

**COLLECTIVE BARGAINING AND NLRA
ISSUES RAISED BY THE AMERICANS WITH DISABILITIES ACT**

I. An Overview of the ADA

Title I of the Americans with Disabilities Act (ADA)¹ prohibits discrimination in employment against “qualified” individuals with disabilities.² The ADA also affirmatively requires employers to provide “reasonable accommodation” to enable qualified employees with disabilities to maintain their employment. The ADA makes it a discriminatory act for an employer to refuse to provide a reasonable accommodation unless the employer can show that the accommodation would present an “undue hardship.” The agency responsible for enforcement of the ADA is the Equal Employment Opportunity Commission (EEOC).³

In the EEOC’s Enforcement Guidance on Reasonable Accommodation, the EEOC explains the rationale for the reasonable accommodation requirement of the ADA.

The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, there are workplace barriers that keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how essential or marginal functions are

¹ 42 U.S.C. §12111 *et seq.* The employment provisions of the ADA were modeled after Section 501, 503 and 504 of the Rehabilitation Act. 29 U.S.C. §§791(g), 793(d) and 794(d), which are applicable to Federal Government Employers, Federal Contractors and recipients of Federal Financial Assistance, respectively.

² The application of the ADA requires a close reading of the statutory language, interpretive guidance and case law interpreting the language of the Act. While a full discussion of the meaning of each term used in the ADA is beyond the scope of this paper, readers unfamiliar with the ADA are cautioned that many of the words used in the Act have acquired a legal meaning that may not be the same as the meaning accorded the same words in other contexts.

³ An employee who believes his/her rights under the ADA have been violated may file a charge of discrimination with the EEOC. The EEOC will investigate the charge. Where cause is found, the EEOC attempts to conciliate the charge and, in some cases, files lawsuits in federal court on behalf of the individual filing the charge or on behalf of a class of individuals. Once the EEOC terminates its proceedings, by dismissing the charge or otherwise deciding not to proceed, the charging party may file a suit in federal court for injunctive relief, damages, attorneys fees and, in appropriate cases, punitive damages.

performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, 3 BNA EEOC Compliance Manual, No. 246, N915.002 (October 17, 2002). In other words, the ADA recognizes that the workplace may need to be adapted physically and operationally in order for qualified employees with disabilities to obtain and maintain employment.

The EEOC lists a number of modifications in the work environment or in workplace practices that an employer may consider in attempting to accommodate an individual with a disability. These include:

- making existing facilities accessible;
- job restructuring;
- part-time or modified work schedules;
- acquiring or modifying equipment;
- changing tests, training materials, or policies;
- providing qualified readers or interpreters;
- reassignment to a vacant position.

EEOC Guidance on Reasonable Accommodation and Undue Hardship, citing 42 U.S.C. § 12111(9).

The ADA and its interpretive guidance make clear that accommodations of this kind need only be provided if they are “reasonable.” The ADA further provides a defense for the employer where the impact of the accommodation is so expensive, burdensome or disruptive to the workplace or the employer’s operations that to grant a request for the accommodation would present an “undue hardship.”⁴ Since the passage of the ADA, courts have further defined the concepts of reasonableness and undue hardship, balancing the needs of the employer and employee, with somewhat more deference to employer concerns than the original EEOC Guidance may have anticipated.⁵

⁴ 42 U.S.C. § 12111 (10). Under this provision, factors to be considered in determining whether an accommodation presents an “undue hardship” include “(i) the nature and cost of the accommodation needed under this Act; (ii) the overall financial resources of the facility or facilities involved ...; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity [as well as its size and structure]; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity [and the physical, administrative and fiscal connection of the facility with the covered entity].”

⁵ See e.g. *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995)(accommodation only reasonable if cost proportionate to benefit); *Hypes v. First Commerce Corp.*, 134 F.3d 721 (5th Cir. 1998)(request for flex time not reasonable).

In its Interpretive Guidance the EEOC states that the ADA anticipates that the process of determining whether an accommodation can be provided in an individual case may involve an “informal, interactive process with the qualified individual with a disability in need of the accommodation.”⁶ The interactive process “should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”

Labor organizations as well as employers are covered entities under the ADA.⁷ As such, unions are prohibited from discriminating against a qualified individual with a disability with respect to internal union administration and representation of employees in collective bargaining and grievance handling. Both an employer and a labor organization commit a discriminatory act under Section 102 (b)(2) of the ADA when they participate in a “contractual or other arrangement ... that has the effect of subjecting a covered... employee with a disability to the discrimination prohibited by [the Act].”

The reasonable accommodation requirement in the ADA makes the ADA different from other federal laws which prohibit discrimination based on race, color, sex, national origin and age, but which do not require that the employer provide any accommodation or other difference in treatment to individual employees. Compare Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*,⁸ and the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* Much of the discussion surrounding the adoption of the ADA concerned the way in which the reasonable accommodation requirement of the ADA would operate in different workplaces. Of particular concern was the impact on unionized workplaces of the reasonable accommodation requirement, with its focus on individualized assessment of needs and individualized adaptations of the workplace.

Contrary to the individualized model of employee accommodation contemplated by the ADA, employees in a unionized plant work under uniform rules set out in a negotiated collective bargaining agreement. Rights and privileges in the workplace, from department selection to job assignment to shift preference to overtime, are largely exercised in order of each employee’s seniority under rules set out in the collective bargaining agreement. In unionized workplaces, the union has authority and responsibility as the exclusive bargaining representative both to represent each individual and to enforce the terms of the collective bargaining agreement for the benefit of all employees. Although the labor movement supported the passage of the ADA, there was much concern as the initial ADA regulations and guidance were being issued that

⁶ 29 C.F.R. § 1630(o)(3).

⁷ 42 U.S.C. §12111 (2). Joint labor-management committees are also covered entities under the ADA.

⁸ Only Title VII’s prohibition against discrimination based on religion includes a requirement that an employer (or union) provide “reasonable accommodation” (absent undue hardship) to employees based on their religion. 42 U.S.C. §701(j). This section was added as an amendment to Title VII in 1972 to address concerns that employees with sincere religious convictions about Sabbath work or other religious issues might be prevented by the neutral work rules of employers from maintaining employment. *See TWA v. Hardison*, 432 U.S. 63 (1977).

seniority systems not be undermined by the ADA or otherwise perceived by the EEOC or the courts as “workplace barriers to individuals with disabilities” which must be overcome.

The language of the ADA itself does not address the relationship between a collective bargaining agreement and an employer’s ability to provide reasonable accommodation to a disabled worker. Nothing in the language of the ADA or its interpretive guidance dictates whether an employer is permitted to limit its efforts to fashion an accommodation to measures that comply with the seniority provisions of a collective bargaining agreement or whether it may be required to deviate from those provisions in order to implement the accommodation. The only suggestions with respect to the role of the collective bargaining agreement in the reasonable accommodation process was contained in the Appendix to the EEOC Guidance, which suggested merely that the “terms of a collective bargaining agreement may be relevant to [the] determination” whether a particular accommodation presented an undue hardship.⁹

II. Potential Conflicts Between Obligations Imposed by the ADA and Those Imposed by the NLRA and Collective Bargaining Agreements

The NLRA regulates not only the selection of the exclusive bargaining representative in unionized workplaces, but also the duty to bargain between the employer and the union. The NLRA also regulates aspects of the relationship between the union and union-represented employees with respect to the union’s duty to represent both individual employees and the bargaining unit as a whole in negotiation of a collective bargaining agreement and enforcement of the agreement through the grievance-arbitration procedure. Employers and unions operating in a union-represented workplace are subject to the requirements and duties of the NLRA and negotiated collective bargaining agreements in addition to the requirements of other federal and state employment discrimination laws, including the ADA.

A. Relevant NLRA Sections

Employers’ duty to bargain under the NLRA is set out in Section 8(a)(5), as follows:

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

⁹ 29 C.F.R. Appendix § 1630(d). The Technical Assistance Manual expanded on this point by providing the following example:

A worker who has a deteriorated disc condition and cannot perform the heavy labor functions of a machinist job, requests reassignment to a vacant clerk’s job as a reasonable accommodation. If the collective bargaining agreement has specific seniority lists and requirements governing each craft, it might be an undue hardship to reassign this person if others had seniority for the clerk’s job.

EEOC Manual, § 3.9(5).

29 U.S.C. §158(a)(5). Labor organizations that serve as exclusive bargaining representatives have a parallel duty to bargain under Section 8(b)(3), 29 U.S.C. §158(b)(3).

The NLRA explains the scope of the duty to bargain in Section 8(d), which provides, in pertinent part:

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

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

29 U.S.C. §158(d). This provision has been interpreted to require both the employer and the union to meet and bargain in good faith over terms and conditions of employment for employees in the workplace, in a sincere attempt to reach agreement. Once the parties enter into a collective bargaining agreement for a fixed term, neither party is required to discuss or agree to any change in the agreement while the agreement is in effect.

The labor organization selected by the majority of employees under procedures set out in the NLRA is the “exclusive representative” of all employees in the bargaining unit, under Section 9(a) of the Act, which provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: Provided, That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. §159(a) (emphasis in original). Under this provision, the employer can “bargain” only with the union designated as the exclusive bargaining representatives and not with individual employees. However, employees retain the statutory right to address their individual grievances with their employer and have those grievances adjusted without the union’s approval, as long as the grievance adjustment does not violate the collective bargaining agreement. Even when adjusting individual grievances under this section, the employer must provide the union an opportunity to be present.

In short, these NLRA provisions prohibit an employer from: (1) changing the working conditions of union-represented employees without first affording the union notice of the proposed changes and an opportunity to bargain; (2) unilaterally altering the provisions of a negotiated collective agreement; and (3) engaging in direct dealing with employees represented by a labor organization.

Section 9(a) has been read by the NLRB and the courts to create an implied duty of fair representation for a union designated under this provision as the exclusive bargaining representative.¹⁰ The NLRB has held that breach of a union’s duty of fair representation is a union unfair labor practice under Section 8(b)(1)(a) and (2) of the Act. 29 U.S.C. §158(b)(1)(a) and (2).¹¹

B. NLRB Response to the ADA

On August 7, 1992, then NLRB General Counsel Jerry Hunter issued Memorandum GC 92-9 (“GC Memorandum”), which addressed areas of potential conflict between the requirements of the NLRA and the ADA. The General Counsel identified two primary areas: (1) potential conflicts between an employer’s duty to bargain under Sections 8(a)(5) and 8(d) of the NLRA and its duties to provide reasonable accommodation under the ADA; and (2) potential conflicts between a union’s duty of fair representation and its obligations under the ADA.¹² The General Counsel’s Memorandum was intended to guide the agency’s investigation of unfair

¹⁰ *Steele v. Louisville & Nashville Railway*, 323 U.S. 192, 202-03, n.3 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Air Line Pilots Ass’n, Intl. v. O’Neill*, 499 U.S. 65 (1991).

¹¹ The Board first recognized a claim for breach of a union’s duty of fair representation under the NLRA in *Miranda Fuel Co.*, 140 NLRB 181 (1962). Although the Second Circuit initially denied enforcement to the Board’s decision, 326 F.2d 172, courts, including the Second Circuit, have since approved the rule announced in *Miranda Fuel*, and the NLRB has since that decision consistently recognized and expanded Board law applicable to a union’s duty of fair representation. See e.g. *NLRB v. Teamsters Local 282*, 740 F.2d 141 (2d Cir. 1984); *California Saw & Knife Works*, 320 NLRB 224 (1995).

¹² The Memorandum also noted that “[e]mployees’ concerted activities regarding disability issues that affect wages, hours, and working conditions are protected by Section 7”, and an employer therefore violates Section 8(a)(1) by retaliating, or threatening retaliation, for such activities. GC Memorandum, pp. 8-9.

labor practice charges where the charges involved claims that implicated employer or union obligations under the ADA as well as obligations under the NLRA.

1. Duty to Bargain Issues

The potential conflicts between the ADA and the NLRA were posed most clearly in the context of an accommodation provided under the ADA inconsistent with the terms of a collective bargaining agreement. The drafters of the ADA acknowledged the possibility of conflict between provisions of a labor agreement and an employer's duty to reasonably accommodate disabled employees, but offered no formula for resolving them as they arose.

The NLRB General Counsel in the 1992 GC Memorandum adopted the view that employers may not use the ADA as an excuse for ignoring collectively bargained rights. GC Memorandum, p. 3. Distinguishing the ADA from other changes in the law that necessarily mandate changes in working conditions,¹³ the GC Memorandum concluded that, given the discretion the ADA affords an employer in terms of compliance, “[i]t seems unlikely that an employer would be privileged [under Section 8(a)(5) of the NLRA] to unilaterally change working conditions to achieve compliance with the ADA without giving a union any notice or opportunity to bargain.”¹⁴ *Id.*

Since the ADA contemplates, and the EEOC regulations recommend, that the employer confer with the disabled employee to determine the appropriate accommodation, the employer should afford the union as the exclusive bargaining representative the opportunity to participate in these discussions in order to comply with Section 9(a) of the NLRA. Otherwise, as the General Counsel concluded, “an employer that arranges a reasonable accommodation with an employee which would change working conditions without negotiating with an affected union may be liable for ‘direct dealing’ with the employee.” GC Memorandum, p.6.¹⁵ In fact, the EEOC agrees that the union should be party to discussions over accommodations; Section 3.9(5) of the EEOC Technical Assistance Manual provides that “the employer should consult with the union and try to work out an acceptable accommodation.” However, the EEOC’s suggestion that

¹³ In such cases, an employer’s unilateral change in working conditions to conform to the law’s mandates does not violate Section 8(a)(5). *Murphy Oil USA, Inc.*, 1987 NLRB LEXIS 133, 286 NLRB 1039, 1042 (1987); *Standard Candy Co.*, 1964 NLRB LEXIS 1252, 147 NLRB 1070, 1073 (1964).

¹⁴ Only those ADA “reasonable accommodations” that effect material, substantial or significant changes in working conditions would violate NLRA Section 8(a)(5) if unilaterally implemented. *LaMousse, Inc.*, 1981 NLRB LEXIS 110, 259 NLRB 37, 48-49 (1981), enf’d (mem.), 703 F.2d 576 (9th Cir. 1983). Thus, General Counsel’s Memorandum notes that accommodations such as putting a desk on blocks or installing a ramp “generally would not be changes in terms and conditions of employment; and an employer would have no Section 8(a)(5) and 8(d) duty to bargain over their implementation. GC Memorandum, pp. 2-3.

¹⁵ The GC Memorandum cites, *inter alia*, *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-84 (1944).

the union be consulted is far less than the NLRA's requirement that the employer and union bargain over changes and the NLRA's proviso in Section 8(d) that neither party is required to bargain over or to modify terms and conditions of employment while a collective bargaining agreement is in effect.

The NLRB General Counsel observed in his Memorandum that, in most cases, unions and employers should be able to devise an accommodation for the employee that is consistent with the provisions of a collective bargaining agreement. According to the EEOC Guidance, the determination of what is an appropriate accommodation is to be made on a case-by-case basis, tailored to match the specific needs of the disabled individual with the essential functions of the given job. At the same time, the Guidance states that the accommodation reached does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. 29 CFR. Appendix § 1630.9. If the employer, employee and union cannot come up with an accommodation which is consistent with the collective bargaining agreement, the General Counsel's Memorandum suggests that a union should be entitled to rely on its Section 8(d) right to refuse the employer's demand for mid-term bargaining over an accommodation that is inconsistent with a collective agreement's facially neutral terms.¹⁶ GC Memorandum, p.5.

The view articulated by the General Counsel has been adopted by the National Labor Relations Board. *Industria Lechera De Puerto Rico, Inc. and Congreso De Uniones Industriales De Puerto Rico*, 344 NLRB No. 133, 177 LRRM 1260 (2005). The employer in that case accommodated an employee who requested assignment to a permanent job on the day shift based on a letter from his doctor stating that the employee was taking medication at night that would interfere with his ability to safely perform his duties on the night shift. The employer acted unilaterally, creating a day shift job and placing the employee in that job. When the union expressed the concerns of other night shift employees, at least one of whom had more seniority, the employer told the union that it had made the accommodation as required by the ADA and declined to bargain with the union over the decision or to provide information justifying its unilateral action. Although no collective bargaining agreement was currently in effect, the Board found that the employer's action was a violation of past practice with respect to assignment of employees from one shift to another by seniority.

An Administrative Law Judge, in a decision adopted by the Board, concluded that the unilateral action of the employer represented a "material, substantial and significant" change with respect to a condition of employment which was a mandatory subject of bargaining under the Act and that the employer violated 8(a)(5) of the Act by implementing the accommodation without first bargaining in good faith with the union. Since the ADA did not require this specific

¹⁶ Neither unions nor employers have the right, under the NLRA or ADA, to insist on contract terms that on their face discriminate against qualified individuals with a disability.

accommodation, the employer was not privileged to ignore its statutory duty to bargain.¹⁷ Consistent with its Opinion, the Board ordered that the employer

before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees ...

2005 NLRB No. 133, at 6. *See also Monterey Newspapers, Inc.*, 2003 NLRB LEXIS 43 (ALJ Decision)(2003)(ALJ decision finding that the employer violated its duty to bargain under Section 8(a)(5) by terminating an employee with medical restrictions based on a unilateral determination that the medical restrictions of the employee could not be accommodated; the Company must bargain with the Union about possible accommodations before terminating the employee).

2. Reasonable Accommodation and Seniority: Judicial Views under the ADA

Consistent with the views of the NLRB General Counsel, the federal courts have held with near unanimity that an accommodation which violates the seniority provisions of a collective bargaining agreement is not a “reasonable accommodation” within the meaning of the ADA.¹⁸ Under these decisions, an employer is not required by the ADA to accommodate an employee and a union is not required to agree to a proposed accommodation which violates the collectively bargained seniority rights of other bargaining unit employees. Thus, courts have rejected ADA claims based on requests by employees with disabilities for reassignment to a vacant position, departmental transfer, program placement, shift preference and relief from mandatory overtime where granting these requests would violate the seniority rights of other employees.¹⁹

¹⁷ In adopting the decision of the ALJ, the Board also relied on *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), which holds that an accommodation which violates an established seniority system is not a “reasonable” accommodation under the ADA. See discussion of *Barnett*, *infra*.

¹⁸ See e.g. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995); *Milton v. Scrivener, Inc.*, 53 F.3d 1118 (10th Cir. 1995); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996); *Kralik v. Durbin*, 130 F.3d 76 (3d Cir. 1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997); *Willis v. Pacific Maritime Ass’n*, 162 F.3d 561 (9th Cir. 1998); *Feliciano v. Rhode Island*, 160 F.3d 780 (1st Cir. 1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629 (6th Cir. 1998); *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001). *But see Emrick v. Libbey-Owens Ford Co.*, 875 F.Supp. 393 (E.D. Tex. 1995).

¹⁹ See e.g. *Davis v. Florida Power and Light Co.*, 205 F.3d 1301 (11th Cir. 2000)(request for relief from mandatory overtime is not reasonable accommodation because mandatory overtime is assigned according to seniority to least senior employees); *Willis v. Pacific Maritime Ass’n*, 244 F.3d 675 (9th Cir. 2001)(request for transfer to light duty classification by employee with insufficient seniority to obtain that classification is not a reasonable accommodation).

The Supreme Court generally approved the majority view of the lower courts on this issue in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), a case addressing reasonable accommodation in the context of a seniority system which was adopted unilaterally by the employer in a non-union setting and was not part of a collective bargaining agreement. The Court held that an employer's showing that a requested accommodation conflicts with the rules of the employer's established seniority system ordinarily requires a finding that the requested accommodation is not a "reasonable" accommodation under the ADA and warrants the grant of summary judgment in favor of the defendant employer. According to the Court this rule applies to the ordinary run of cases, but there could be an exception in "special circumstances." As one example, the Court suggested that an employer might create a seniority system while retaining and exercising such authority to change or modify the system that no reasonable employee expectations are created that would preclude a modification of the seniority system necessary to provide the accommodation requested under the ADA. As another example, the Court stated that an individual might show that the employer's seniority system already contained so many exceptions that another exception, such as the one requested by the employee with a disability, "would not matter." 535 U.S. at 405-406. The Court emphasized that the burden would be on the plaintiff to establish that such "special circumstances" existed.

The Supreme Court's decision in *Barnett* essentially resolves most conflicts between the ADA and collectively bargained seniority rights in favor of the collective bargaining agreement. Although *Barnett* creates a "special circumstances" exception to the preeminence of seniority rights, the circumstances suggested by the Court involved exercise by an employer of a reserved discretion to modify the system and/or the existence of multiple exceptions to the seniority system. These "special circumstances" are more likely to exist in seniority systems unilaterally adopted by an employer in a non-union workplace (like the employer in *Barnett*)²⁰ and are unlikely to be part of a union-negotiated contractual seniority system.²¹

In lower court decisions since *Barnett*, the courts have summarily rejected arguments under the ADA that an employer was required to provide an accommodation in violation of the

²⁰ Cf. *Shapiro v. Township of Lakewood*, 292 F.3d 356 (3d Cir. 2002)(employer cannot rely on seniority system governing transfer rights to excuse refusal to accommodate through transfer where employer failed to follow its own transfer policy). Compare *Medrano v. San Antonio*, 2004 U.S. Dist. LEXIS 22781 (W.D. Tex. 2004)(even absent CBA, no factual analysis of application of seniority system required unless plaintiff meets burden to show "special circumstances" by evidence of "fairly frequent" departures from seniority system).

²¹ See *Turnitsky v. Delphi Automotive Sys.*, 14 ADA 1912 (N.D. Ohio 2003)(employer not required to permit employee to bid into light duty classification as reasonable accommodation where positions are reserved under CBA for employees with work-related injuries). Compare *O'Dell v. Dept of Public Welfare*, 346 F.Supp.2d 774 (W.D.Pa. 2004)(court remands case to permit ADA plaintiff to show "special circumstances" permit transfer without type of approval required by CBA based on evidence, supported by the union, that this requirement was regularly waived).

seniority provisions of a collective bargaining agreement.²² At the same time, while upholding seniority rights, the courts have required defendants relying on seniority provisions to show that a requested accommodation would actually violate another employee's seniority rights. *See e.g. Dilley v. Supervalu, Inc.*, 296 F.3d 958, 963-964 (10th Cir. 2002)(employer must show actual rather than "potential" violation of seniority rights to avoid responsibility for providing the requested accommodation).

3. Duty to Provide Information

The duty to bargain under Section 8(a)(5) includes a requirement that an employer provide information requested by the union which is relevant to the union in fulfilling its responsibilities as the exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The employer may be excused from providing relevant and necessary information to the union if the employer can establish a legitimate and substantial need to protect the confidentiality of the information which outweighs the union's need for it. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). The burden is on the employer to establish its legitimate need to maintain confidentiality, and, even where a legitimate need for confidentiality is shown, the employer is required to bargain with the union in an attempt to reach an accommodation which will meet both the employer's confidentiality concerns and the union's interests in obtaining information relevant to its bargaining obligations. *Exxon Co., USA*, 321 NLRB 896, 898 (1996).

In contrast to the NLRA's broad duty to provide information, the ADA includes specific provisions which require an employer to hold confidential all medical information or medical history regarding an employee's disability. 42 U.S.C. §12112(d)(3) and (4). Under the ADA employers are prohibited from disclosing medical information except to supervisors and managers, health and safety personnel and government investigators. 42 U.S.C. §12112(d)(3)(B). Labor organizations as "covered entities" are subject to the same confidentiality requirements under the ADA. However, there is no express provision in the ADA which permits the exchange of information between the employer and union to enable a union to effectively bargain on behalf of represented employees over accommodation issues. The NLRB General Counsel in his 1992 Memorandum noted but did not attempt to resolve the conflict between the NLRA and the ADA on this issue. (GC Memorandum, at 7)

This conflict was resolved when the EEOC issued an Opinion Letter on November 1, 1996,²³ addressed specifically to the facts before the NLRB in *Roseburg Forest Products Co. and Western Council of Industrial Workers*, 2000 NLRB LEXIS 494, 331 NLRB 999, 164 LRRM 1044 (2000). The facts before the Board were straightforward. The employer operated a plywood plant with approximately 300 employees, represented by the Western Council of

²² *See e.g. Stamos v. Glen Cove School District*, 78 Fed. Appx. 776, 2003 U.S. App. LEXIS 21956 (2d Cir. 2003); *Banks v. Brown-Forman Corp.*, 84 Fed. Appx. 625, 2003 U.S.App. LEXIS 26588 (6th Cir. 2003).

²³ The EEOC Opinion Letter was initially published in Fair Employment Practices Manual (BNA), No. 8, at 405:7527.

Industrial Workers (Union). The employer posted a bid sheet for two job openings in the classification “Hardwood Veneer Sorter (helper)” on day shift. This classification was among the most sought after jobs in the plant because it was not physically demanding and because it was one of the minority of jobs that operated only on the day shift rather than on rotating shifts. Under the collective bargaining agreement, job openings in this classification were open for bid for three working days and then filled based on length of service and capability. Thirty employees bid on the two posted openings, several with more than thirty years of seniority. The employer awarded one job to the most senior bidder (seniority date May 6, 1963). The second opening went to Gary Booze, whose seniority date was July 5, 1973. Approximately 10 unsuccessful bidders had more seniority than Booze.

The union filed a grievance over this violation of the seniority provisions of the collective bargaining agreement. In response to the grievance, the employer informed the union that Booze was placed in the job opening based on his doctor’s recommendation and pursuant to the ADA. The union asked whether other accommodations for Booze had been considered and, in subsequent meetings, proposed alternative accommodations. The employer rejected the union’s suggested alternatives. In addition, the employer denied union requests for information on Booze’s disability (which was not apparent) and for medical records to assist in

- (1) determining what functional limitations exist to warrant an accommodation;
- (2) determining if some other accommodation which does not require a breach of contract is feasible.

331 NLRB at 1001. The employer continued to deny requests for this information through all steps of the grievance procedure in spite of the union’s assertion that it needed the information to assess its own position on the grievance prior to arbitration.²⁴

The union filed an unfair labor practice charge with the NLRB asserting that the employer’s refusal to provide the requested information violated its duty to bargain under Section 8(a)(5) of the NLRA. After a complaint issued, the case was transferred to the Board for hearing. The facts of the case were also considered by the EEOC, which issued an Opinion Letter authored by its legal counsel with approval from the members of the Commission. The EEOC concluded that the union as well as the employer had a duty to provide reasonable accommodation under the ADA and that medical information necessary to meet this obligation may be shared. According to the EEOC Opinion Letter:

In the unique setting of the unionized workplace, when an employer seeks to provide an accommodation that conflicts with collectively bargained seniority rules, the ADA reasonable

²⁴ The employer did offer to produce the medical records if the union obtained a written authorization from the employee. The union obtained the authorization but the employer did not provide the requested information. Six weeks later the employee informed the union and employer that he had decided to rescind the authorization. 331 NLRB at 1000.

accommodation obligation of the employer and of the union, as bargaining representative, are intertwined. The union and employer both participate in making the reasonable accommodation determination regarding a particular individual ...²⁵

Accordingly, ... an employer and a union may share with each other and use medical information necessary to enable them to make reasonable accommodation determinations consistent with the ADA.

EEOC Opinion Letter, at 405:7529. The EEOC cautioned that disclosures between the employer and the union should be limited to individuals on a “need to know” basis, which would typically include upper level grievance representatives and health or safety representatives, who might be useful consultants in the accommodation determination.

Relying on the EEOC Opinion Letter, the Board ruled that Rosenberg Forest Products violated its duty to bargain under Section 8(a)(5) of the NLRA by denying the union’s request for medical information and that the employer’s refusal to provide the information was not justified by the employer’s asserted need to comply with the ADA. As a remedy, the Board did not order the information produced, but rather ordered the employer to bargain in good faith with the union over the scope of production necessary to meet the union’s need for information and the safeguards necessary to protect the employer’s legitimate confidentiality concerns.²⁶ 331 NLRB at 1003.

With the *Rosenburg* decision and the related EEOC Opinion Letter, the EEOC and the NLRB have largely harmonized the standards for exchange of information relevant to the duty to provide reasonable accommodation.

4. Unions’ Duty of Fair Representation

Both the NLRB and the courts have inferred from Section 9(a) of the NLRA, 29 U.S.C. §159(a), that a union’s status as exclusive bargaining representative imposes on the union a “duty of fair representation” which extends to the bargaining unit as a whole and to each

²⁵ The EEOC states in the 1995 Opinion Letter that, in its view, “the employer and union are jointly obligated to negotiate with each other to provide a variance” from the seniority rules if no other accommodation exists, unless the variance would impose an undue hardship. This part of the EEOC’s Opinion Letter is contrary to the Supreme Court’s subsequent decision in *US Airways v. Barnett*, 535 U.S.391 (2002), which holds that accommodations which conflict with seniority provisions are, in the ordinary run of cases, unreasonable and need not be provided.

²⁶ In its decision in *Industria Lechera de Puerto Rico*, 344 NLRB No. 133, at 37-38 (2005), the Board approved an ALJ decision finding that an employer did not breach its duty to bargain by refusing to provide requested information relating to an accommodation made pursuant to the ADA because the union after requesting the information failed to negotiate over conditions for production of the information once the employer raised its confidentiality concern.

individual member of the bargaining unit. *Airline Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991). The duty of fair representation requires a union to represent the bargaining unit employees in good faith in negotiations and in the contractual grievance-arbitration procedure. The courts have recognized that with respect to a union's performance of its role as exclusive bargaining representative,

[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). A union breaches its duty when it engages in intentional conduct which is arbitrary, discriminatory or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967); *United Steelworkers v. Rawson*, 495 U.S. 362 (1990). Union conduct is "arbitrary" only if, "in light of the factual and legal landscape at the time of the union's action, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Air Line Pilots*, 499 U.S. at 67.

With respect to enforcement of Title VII, courts have enforced Title VII's prohibitions against discrimination by a union as a bargaining representative in a manner consistent with the union's duty of fair representation. In other words, a union that complied with its duty of fair representation under the NLRA would not be found to have violated Title VII. In cases arising under Title VII, where no direct evidence of discriminatory intent is present, the courts have adapted the general model for proving a prima facie case of discrimination²⁷ and applied it to unions engaged in representational functions, requiring proof that

- (1) the employer violated its collective bargaining agreement with the union;
- (2) the union breached its own duty of fair representation by letting the breach go unrepaired;
- (3) there is some evidence of animus against plaintiff based on race, sex or some other prohibited characteristic.

See e.g. *Greenslade v. Chicago Sun-Times, Inc.*, 112 F.3d 853 (7th Cir. 1997); *Bugg v. International Union of Allied Industrial Workers*, 674 F.2d 595 (7th Cir. 1982), cert. denied, 459 U.S. 805; *EEOC v. Reynolds Metals Co.*, 212 F.Supp.2d 530 (E.D.Va. 2002); *Vargas v. Hill*, 152 F.Supp.2d 315 (S.D.N.Y. 2001). Even when a plaintiff can prove each of these elements, the union can still prevail by showing that its actions were motivated by a legitimate non-discriminatory reason.

From the perspective of the NLRB General Counsel, the principles governing a union's duty of fair representation continue to apply when issues arise over a union's actions or inactions as a bargaining representative in response to a request for reasonable accommodation under the

²⁷ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

ADA. (GC Memorandum, at 7-8) Similarly, in cases arising under the ADA where it is alleged that a union has violated the ADA in connection with its representative role, courts have applied the same standards as Title VII cases, requiring proof that the union breached its duty of fair representation as an essential element of the ADA claim.²⁸

III. Reasonable Accommodation and Arbitral Remedies for Breaches of Collective Bargaining Agreements

In practice, most disputes between employers and unions that relate to the reasonable accommodation of qualified individuals with disabilities will never come before the NLRB, the EEOC or the federal courts. Collective bargaining agreements almost universally contain grievance and arbitration procedures, which provide for resolution of disputes through negotiations in the grievance process, or if no agreement can be reached, through final and binding arbitration before a neutral arbitrator selected by the parties. The process of arbitration under collective bargaining agreements is accorded great deference by the federal courts.²⁹ Arbitration is a form of alternative dispute resolution which is also favored under the ADA, which provides in Section 513:

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

42 U.S.C. §12212. The NLRB has a long practice of deferring to arbitration under collective bargaining agreements in cases where an unfair labor practice is also arguably a violation of the collective bargaining agreement. *See Collyer Insulated Wire, Gulf & Western Systems Co.*, 1971 NLRB LEXIS 123, 192 NLRB 837 (1971). The NLRB General Counsel's Memorandum on the ADA indicates that, where an unfair labor practice charge turns on contract interpretation, the Board will defer a charge raising ADA issues to arbitration in accordance with *Collyer Insulated Wire*. (GC Memorandum, at 6 n.18) According to the GC Memorandum, only where "there is no claim that the accommodation is even arguably consistent with the contract" will the Board not defer to arbitration. GC Memorandum p.6, n.18.

The remedies under a collective bargaining agreement's arbitration provision are supplemental to the statutory remedies under the ADA, and the presence of an arbitration clause in a collective bargaining agreement does not preclude an employee from filing a lawsuit under

²⁸ See e.g. *Bell v. Glass Molders Pottery Plastics and Allied Workers*, 14 ADA Cases 662 (W.D.Pa. 2002); *Wood v. Crown Redi-Mix, Inc.*, 218 F.Supp.2d 1094 (S.D. Iowa 2002)("in order for a union to be held liable under the ADA, there must be a finding that it breached its duty of fair representation"); *Nweke v. Prudential Ins. Co. of America*, 25 F.Supp.2d 203 (S.D.N.Y. 1998); *Schafer v. Erie County Dept. of Soc. Servs.*, 82 F.Supp.2d 114, 118 (W.D.N.Y. 2000).

²⁹ See *Steelworkers Trilogy of 1960: Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), and cases following.

the ADA over issues which were or could be grieved. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998). In *Wright* the agreement included a broad arbitration clause covering “any dispute concerning or arising out of the terms and/or conditions of this Agreement, or dispute involving the interpretation of the Agreement” and a statement of the parties’ intention that no part of the collective bargaining agreement violate federal or state law. While not expressly ruling on the issue whether a union could ever waive individual rights of employees to vindicate their rights under the ADA in federal court, the Court held that any waiver would at least have to be “clear and unmistakable” and that the language at issue did not meet that test. *See also Alexander v. Gardner-Denver*, 415 U.S. 36 (1974).

If an Arbitrator finds that an employer provided an accommodation which violated the seniority provisions of the collective bargaining agreement, the Union is entitled to enforce that decision in federal court even if the accommodation was provided in settlement of the employee’s legal claim against the employer under a federal employment discrimination law. *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757 (1983). In *W.R. Grace*, which arose under Title VII, the employer had voluntarily entered into a judicially approved Title VII consent agreement with the EEOC that was in conflict with the seniority provisions of its union collective bargaining agreement. The union obtained an arbitration award of back-pay damages against the employer for layoffs pursuant to the conciliation agreements and in violation of the collective agreement. Affirming enforcement of the arbitral award, the Supreme Court stated:

Absent a judicial determination, the commission, not to mention the company, cannot alter the collective bargaining agreement without the Union’s consent ... Permitting such a result would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored. [Citations omitted]

461 U.S. at 771.

ADA issues principally arise in arbitrations in two types of cases: (1) an employee with seniority who seeks transfer or placement in a particular department, job or shift files a grievance when the employer gives the position as a reasonable accommodation to a less senior employee; or (2) an employer refuses to provide a requested accommodation to an employee with a disability, resulting in the employee’s demotion, layoff or termination. Without any attempt to be exhaustive, some examples of arbitrators’ approaches to each type of case follow.

A. Seniority Violations

Seniority provisions generally prevail in arbitrations. An employer who provides an accommodation which violates the seniority provisions of the contract will often rely on a non-discrimination clause in the collective bargaining agreement to justify its action. While arbitrators are divided on whether it is appropriate to look to external law, like the ADA, to interpret the language of a collective bargaining agreement, as experience with the ADA’s requirements increases, arbitrators more frequently look to the ADA, and even related EEOC interpretive guidance, to interpret contractual language.

Contracts, Metals and Welding, Inc., 110 LA 673 (Klein 1998):

The employer assigned a depressed junior employee to the first shift ahead of an employee with greater seniority rights. The Company argued, among other things, that the anti-discrimination clause contained in the contract provided notice to employees that the Company would comply with federal discrimination laws. The arbitrator upheld the grievance of the more senior employee. Reviewing court decisions regarding conflicts between accommodation under the ADA and collective bargaining agreements, the Arbitrator concluded that the law supported the Union's position that the seniority provisions must be honored. In addition, the Arbitrator stated that he would have ruled in favor of the more senior employee because the record showed that the less senior employee had unreasonably rejected another accommodation that would not have clashed with the seniority rights of others.

Alcoa Building Products, 104 LA 364 (Cerone 1995):

The Arbitrator ruled that the Company violated the seniority provisions of the collective bargaining agreement by placing a less senior employee in a job over a more senior incumbent. In ruling in favor of the more senior employee in the job, the Arbitrator rejected the Company's argument that its action was justified by the ADA. The Arbitrator relied on the EEOC's Technical Assistance Manual for the proposition that the employer is not required to bump another employee in order to accommodate an individual with a disability. As is typical in arbitrations, and contrary to the approach in most courts, the Arbitrator made no inquiry into whether the employee's medical condition was severe enough to constitute a "disability" within the meaning of the ADA.

In re Turbine Engine Components Tech. Corp., 120 LA 274 (Fullmer 2004):

In this case, the more senior employee was the employee with a disability. The Company awarded a job to a less senior employee on the grounds that the senior employee was not qualified. The union took his grievance to arbitration claiming that the Company violated the seniority provisions of the collective bargaining agreement. The Arbitrator ruled that the employer did not violate the agreement by awarding a job to a more junior employee because the more senior employee had failed basic skills tests in math and reading which measured legitimate qualifications for the position. The Arbitrator rejected as unreasonable the Union's suggestion that the senior employee could have been accommodated by providing an assistant for the reading and math tasks of the position.

B. Employer Refusals to Accommodate

Collective bargaining agreements rarely contain language requiring reasonable accommodation. Arbitrators have nevertheless read a duty to make reasonable accommodation into collective bargaining agreements and often look to the ADA to determine the meaning and scope of the duty. According to Elkouri and Elkouri's *How Arbitration Works* (6th Ed. 2003),

The right to reasonable accommodation has been found not only where the collective bargaining agreement incorporates the ADA, or includes a nondiscrimination clause covering disability, but also under a general "just cause" provision.

Id., at 816. This approach is not uniformly followed and some arbitrators refuse to read ADA standards into collective bargaining agreements that do not expressly incorporate the ADA.³⁰ Grievances asserting a failure to provide reasonable accommodation are often interposed to prevent an employee from suffering an adverse employment action, often discharge. The following are examples of how arbitrators have addressed the issue of the interrelationship between contractual provisions and the ADA.

Flamingo Hilton-Laughlin, 108 LA 545 (Weckstein 1997):

The Arbitrator upheld the discharge of an employee with degenerative joint disease based on the employer's evidence that it could not find an open position that he could perform with his physical disability. The Union asserted that the employer had failed to provide reasonable accommodation through assignment to light duty or other less demanding positions in the workplace. Although the Arbitrator suggested that the employer "probably did not do everything it could have done to attempt to accommodate the Grievant's disability," the arbitrator ruled in favor of the Company based on the absence of evidence that a position became vacant that the grievant could do and based on evidence that the grievant turned down a proposed accommodation, a job assignment at half his previous pay.

San Francisco Unified School District, 104 LA 215 (Bogue 1995):

The Arbitrator ruled in favor of a teacher who had multiple sclerosis, finding that the School District failed to provide reasonable accommodation to allow her to return to work from sick leave. Specifically, the evidence showed that there were openings in jobs she could perform which were filled after she requested return to work with accommodation. The Arbitrator agreed with the Union that the School district had a duty to provide reasonable accommodation as that duty under the ADA and state law was incorporated into the collective bargaining agreement by language prohibiting discrimination based on a "handicapping condition" and by language under which the School District retained all "duties conferred upon and vested in it by the Laws of the constitutions of the United States and the State of California." Applying standards from the EEOC's Technical Assistance Manual, the Arbitrator found that the School District violated its obligations by failing to ascertain whether it had available positions for the grievant before permitting them to be filled..

In re BWXT PANTEX, LLC (Amarillo Texas) and Metal Traders Council of Amarillo, Texas, 120 LA 385 (Jennings 2004):

The Arbitrator rejected the Union's argument that the ADA should be read into the collective bargaining agreement based on the non-discrimination clause of the agreement which prohibited discrimination based on disability but which otherwise made no reference to the ADA. Instead the Arbitrator ruled based on the language of the collective bargaining agreement

³⁰ See *Jefferson-Smurfit Corp.*, 103 LA 1041 (Canestraight 1994)(declining to imply a duty to provide reasonable accommodation where the collective bargaining agreement does not refer to the duty and does not contain language incorporating the ADA). See also *BWXT PANTEX, infra*.

that the Company did not violate the agreement by demoting an employee whose deteriorating vision, in the employer's view, precluded him from meeting the requirements of his job.

The Institute Sponsors acknowledge and appreciate the contribution to this paper by Patricia McConnell, Vladeck, Waldman, Elias & Engelhard, PC, New York, New York; Yona Rozen and Jim Sanford, Gillespie, Rozen, Watsky, Motley & Jones, P.C., Dallas, Texas; Jules Smith, Blitman and King, Rochester, NY; and Nora Macey, Macey Swanson and Allman, Indianapolis, Indiana.
