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# The Impact of Federal Labor Policy on the Americans with Disabilities Act of 1990: Collective Bargaining Agreements in a New Era of Civil Rights

## I. INTRODUCTION

Nearly thirty years have passed since Dr. Martin Luther King dreamed of an America where people would "not be judged by the color of their skin but by the content of their character."<sup>1</sup> When Dr. King delivered these famous words, Congress had already taken a major step toward making this dream a reality when it enacted Title VII of the Civil Rights Act of 1964, which bars discrimination on the basis of race, color, religion, sex, or national origin.<sup>2</sup> However, because neither Title VII nor subsequent federal civil rights legislation addressed private sector discrimination against the disabled,<sup>3</sup> Americans with disabilities continued to endure unconscionable employment discrimination.<sup>4</sup> The passage of the Americans

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1. *Martin Luther King, Jr., Ennobles the Civil Rights Movement at the Lincoln Memorial*, in LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY 499 (William Safire comp., 1992).

2. 42 U.S.C. §2000e-2 (1988).

3. Prior to the Americans with Disabilities Act (ADA), Congress passed two important laws designed to foster the rights of the disabled, but neither law addressed private sector employment discrimination. The first of these laws, the Rehabilitation Act of 1973, was aimed at discrimination against the disabled within programs funded by the federal government. It provides that "[n]o . . . handicapped individual . . . shall, solely by reason of his handicap, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (1988). Second, the Education of the Handicapped Act, extensively amended by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485 (1988 & Supp. III 1991), was enacted to ensure that "all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(c) (Supp. III 1991).

4. Speaking of the effect that exclusionary attitudes have on disabled Americans, one writer noted:

"At the least you might conclude that there is something queer about you, something ugly or foolish or shameful. In the extreme, you might feel as though you don't exist, in any meaningful social sense at all. Everyone else is 'there,' sucking breath mints and splashing on cologne and swigging wine coolers. You're 'not there.' And if not there, nowhere."

with Disabilities Act (ADA or "the Act")<sup>5</sup> in 1990 signaled the recognition of such discrimination and the beginning of a new era of employment equality for the disabled. Borrowing from Dr. King's language, one individual stated that the "ADA's vision is of an America where persons are judged by their abilities and not on the basis of their disabilities."<sup>6</sup>

Even though the ADA is designed to foster equal employment opportunity for the disabled, it appears to conflict with other federal legislation designed to strengthen the position of employees vis-à-vis their employers through the process of collective bargaining. This comment examines these conflicts and proposes that, in spite of apparent inconsistencies between federal labor laws and the ADA, neither supersedes the other and both are necessary to promote and protect the civil rights

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Rosalie K. Murphy, Note, *Reasonable Accommodation and Employment Discrimination Under Title I of The Americans with Disabilities Act*, 64 S. CAL. L. REV. 1607, 1611-12 (1991) (quoting Nancy Mairs, *Hers*, N.Y. TIMES, July 9, 1987, at C2).

Murphy notes that, if disabled Americans are "not there" in social circles, they are even less "there" in the workforce; statistical evidence indicates that employment opportunities for the disabled are rapidly diminishing. *Id.* at 1612. For example, a recent Census Bureau report found that people with disabilities are less likely to hold jobs now than they were a decade earlier, and those who do work have actually lost earning power. *Id.* (citing *Study on Disabled and Jobs Finds Work and Good Pay Are Scarce*, N.Y. TIMES, Aug. 16, 1989, at A22). In addition, the percentage of disabled men who work full time dropped from 29.8% in 1981 to 23.4% in 1988. *Id.*

Yet even the force of these statistics pales in comparison to the personal life stories of disabled Americans who have suffered employment discrimination. At one of the congressional hearings on the ADA, a blind attorney who had graduated Phi Beta Kappa from the University of Pennsylvania and attended Harvard Law School testified that while applying for a job as corporate counsel, he was rejected over 600 times before a corporation offered him employment. *Id.* (citing *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 26-27 (1989) (statement of Joseph Danowsky, Attorney, Bear Stearns & Company)).

Another attorney, confined to a wheelchair because of multiple sclerosis, experienced similar difficulties. Despite having graduated near the top of her law school class at the University of Washington, and despite her law review experience, moot court success, and clerkships with a federal appellate court and a renowned intellectual property firm, she was rejected over 400 times before she was hired by a firm that "was willing to look at [her] qualifications and not just [her] disability." *Id.* (quoting *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the House Subcomm. on Civil and Constitutional Rights*, 101st Cong., 1st Sess. 152 (1989) (statement of Laura D. Cooper, Attorney, Pettit & Martin)).

5. 42 U.S.C. §§ 12101-12213 (Supp. II 1990).

6. Murphy, *supra* note 4, at 1613 (citing H.R. REP. No. 485(II), 101st Cong., 2d Sess. 48 (1990), reprinted in 1990 U.S.C.C.A.N. 330 (statement of Sandy Parrino)).

of the disabled. Part II provides an overview of Title I of the ADA, focusing on the duty it imposes on employers to make "reasonable accommodations" for disabled employees. Part III discusses the potential conflicts between the ADA and the National Labor Relations Act.<sup>7</sup> Part IV undertakes a similar analysis of the relationship between the ADA and the Railway Labor Act.<sup>8</sup> Finally, Part V reviews the specific issue of reassignment and shows how the federal labor policy promoting collective bargaining interacts with ADA requirements.

This comment concludes by suggesting that both federal labor laws and the ADA have positive roles to play in eliminating employment discrimination against the disabled. The ADA, by recognizing the validity of collective bargaining agreements and their importance in resolving employment disputes, encourages the continued use of the collective bargaining process and arbitration to protect disabled employees from discrimination. Federal labor laws do not contradict the ADA because, while they certainly are capable of addressing the grievances of individual employees, the laws are primarily concerned with protecting the right of employees to speak collectively. The ADA, on the other hand, is civil rights legislation specifically designed to provide individual remedies for employees. While a disabled employee may be able to obtain redress through appropriate arbitration proceedings, he must be able to obtain relief in federal court under the ADA when his rights are not protected under the collective bargaining agreement.

## II. TITLE I OF THE AMERICANS WITH DISABILITIES ACT

A comprehensive and sweeping statute, the ADA is composed of several different sections, each of which was enacted to eradicate a particular form of discrimination against the disabled.<sup>9</sup> All of the sections are significant, but the core of the Act is Title I, which prohibits all forms of employment discrimination.<sup>10</sup> Pervasive discriminatory practices against disabled employees and job applicants are well documented;<sup>11</sup> the pur-

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7. 29 U.S.C. §§ 151-169 (1988).

8. 45 U.S.C. §§ 151-188 (1988).

9. Title I, 42 U.S.C. §§ 12111-12117 (Supp. II 1990), prohibits employment discrimination; Title II, §§ 12131-12165, requires greater accessibility to public transportation; and Title III, §§ 12181-12189, bans discrimination by private entities in places of public accommodation.

10. 42 U.S.C. §§ 12111-12117 (Supp. II 1990).

11. See *supra* note 4; see also Lisa A. Lavelle, Note, *The Duty to Accommodate*:

pose of Title I is to ensure the elimination of such practices by imposing affirmative duties on employers.<sup>12</sup> The ADA requires every employer covered under the Act<sup>13</sup> to engage in a three-step inquiry regarding its treatment of a disabled individual. Each employer must determine (1) whether the applicant or employee is a qualified individual with a disability,<sup>14</sup> (2) whether the applicant or employee is capable of performing the job's essential functions,<sup>15</sup> and (3) whether the employer is required to make a reasonable accommodation.<sup>16</sup>

*A. Is the Applicant or Employee a Qualified Individual with a Disability?*

When making any type of employment decision, the employer must first determine if the particular applicant or employee is a qualified individual with a disability.<sup>17</sup> According to the Act's definitions, "[t]he term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."<sup>18</sup> A disabled individual meets one part of the

*Will Title I of the Americans with Disabilities Act Emancipate Individuals with Disabilities Only to Disable Small Businesses?*, 66 NOTRE DAME L. REV. 1135, 1136 (1991).

12. Lavelle, *supra* note 11, at 1193.

13. As defined by the Act, the term "employer" means

a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

42 U.S.C. § 12111(5)(A) (Supp. II 1990). Excluded from the definition of "employer" are the United States, corporations wholly owned by the United States government, Indian tribes, and bona fide private membership clubs (other than labor organizations) that are exempt from taxation. *Id.* § 12111(5)(B).

14. See 42 U.S.C. §§ 12111(8), 12112(a) (Supp. II 1990); 29 C.F.R. § 1630.2(m) (1992).

15. See 42 U.S.C. § 12111(8) (Supp. II 1990); 29 C.F.R. § 1630.2(m)-(n) (1992).

16. 42 U.S.C. § 12111(9) (Supp. II 1990); 29 C.F.R. § 1630.2(o) (1992).

17. "Disability," with respect to an individual, is defined under the Act's regulations as "(1) [a] physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) [a] record of such impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g) (1992).

18. 42 U.S.C. § 12111(8) (Supp. II 1990).

"qualified" requirement if he "satisfies the requisite skill, experience, education and other job-related requirements of the employment position [he] holds or desires."<sup>19</sup> Yet in order to fully "qualify," a disabled person must also be capable of performing the "essential functions" of the position, with or without reasonable accommodation.<sup>20</sup>

*B. Is the Applicant or Employee Capable of Performing the Job's Essential Functions?*

Employers only have duties to accommodate disabled persons who can perform a job's "essential functions," defined in the Act's regulations as "[t]he fundamental job duties of the employment position the individual with a disability holds or desires."<sup>21</sup> This prerequisite is a key provision of the Act, because it is here that one sees for the first time interaction between federal labor policy and the ADA.

The Act itself does not clearly define what determines whether a certain job function is "essential"; it states only that

[f]or the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.<sup>22</sup>

The regulations promulgated by the Equal Employment Opportunity Commission (EEOC), however, make it clear that evidence of whether a particular job function is essential may include much more than simply the employer's judgment. The evidence may include, among other things, "[t]he terms of a collective bargaining agreement."<sup>23</sup> By including collective bargaining agreements as evidence to be considered, the ADA's provisions concerning essential job functions will be construed not only with the employer's, but also with the employees', judgment in mind.<sup>24</sup>

19. 29 C.F.R. § 1630.2(m) (1992).

20. *Id.* The regulations also offer guidance on interpreting "reasonable accommodation," noting that "[a]n employer or other covered entity is not required to reallocate essential functions." *Id.* app. § 1630.2(o).

21. *Id.* § 1630.2(n).

22. 42 U.S.C. § 12111(8) (Supp. II 1990).

23. 29 C.F.R. § 1630.2(n)(3)(v) (1992).

24. See *infra* notes 66-73 and accompanying text.

*C. Is the Employer Required to Make a  
Reasonable Accommodation?*

Upon making a determination that an applicant or employee is a qualified employee with a disability who can perform the job's essential functions, an employer is generally required under the Act to make "reasonable accommodations" for the disabled person's known disabilities.<sup>25</sup> As defined by the ADA, the term "reasonable accommodation" may include

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.<sup>26</sup>

However, there are exceptions to this general requirement. An employer does not have to make a reasonable accommodation for a disabled applicant or employee if the employer can prove that doing so would cause "undue hardship,"<sup>27</sup> defined by the Act as any "action requiring significant difficulty or expense."<sup>28</sup> Again, the Act itself provides only minimal guidance as to what factors should be considered in determining whether a particular accommodation would impose an undue hardship on an employer. The four factors it lists focus mainly on the relationship between the cost of the proposed accommodation and the financial resources of the employer.<sup>29</sup>

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

26. *Id.* § 12111(9).

27. *Id.* § 12112(b)(5)(A).

28. *Id.* § 12111(10).

29. The Act states that factors to be considered include

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; 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; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity;

On the other hand, EEOC regulations are more illustrative and, as with determinations of "essential functions," are deferential to established federal labor policy. Noting that a demonstration of undue hardship under the ADA requires a stronger showing of difficulty or expense than that required to satisfy the "de minimis" Title VII standard of undue hardship, the interpretive guidance appendix to the regulations stipulates that cost alone may not be determinative.<sup>30</sup>

However, the regulations significantly expand the factors upon which an employer might rely to cogently defend its decision not to make a reasonable accommodation; these factors include the provisions of a collective bargaining agreement.<sup>31</sup> The interpretive guidelines to the regulations state:

Excessive cost is only one of several possible bases upon which an employer could demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination.<sup>32</sup>

This express recognition of the status of collective bargaining agreements suggests that the ADA is meant to dovetail with, rather than undercut, several established federal labor acts designed to strengthen the collective rights of all employees, not only those who are disabled. The following sections address notions of preemption and discuss how federal labor policy and the ADA mutually support the right of all disabled persons to be free from employment discrimination.

### III. POTENTIAL CONFLICTS BETWEEN THE ADA AND THE NATIONAL LABOR RELATIONS ACT

The preeminent federal law governing relationships between employers and employees is the National Labor Relations Act (NLRA).<sup>33</sup> Enacted in 1935, one of the NLRA's pur-

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the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

*Id.*

30. 29 C.F.R. app. § 1630.15(d) (1992).

31. *Id.*

32. *Id.*

33. 29 U.S.C. §§ 151-169 (1988).



poses is to "remov[e] certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions."<sup>34</sup> By promoting the two important practices of collective bargaining<sup>35</sup> and arbitration,<sup>36</sup> the NLRA intends to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."<sup>37</sup> The NLRA and the federal labor policy it embodies must be considered when interpreting the Americans with Disabilities Act.

#### A. *NLRA Collective Bargaining and the ADA*

Concern has been expressed that the ADA may undermine collective bargaining procedures established by the NLRA.<sup>38</sup> Yet the ADA, while it appears to pose several potential conflicts with the NLRA, actually works in tandem with the NLRA's collective bargaining procedures.

##### 1. *The right to exclusive representation*

One of the apparent conflicts between the ADA and the NLRA involves the right of unions to be the exclusive representative of bargaining unit employees.<sup>39</sup> Section 9 of the NLRA states:

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 a group of employees shall have the right at any time to present grievances to

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34. *Id.* § 151.

35. *See infra* notes 66-73 and accompanying text.

36. *See infra* notes 74-77 and accompanying text.

37. 29 U.S.C. § 151 (1988).

38. Jules L. Smith, *Americans with Disabilities Act: The New Regulations and Critical Issues* 35 (paper presented at annual meeting of the American Bar Association Section of Labor & Employment Law, Atlanta, Georgia (Aug. 12-13, 1991)) (unpublished manuscript, available from Jules L. Smith, Blitman & King, Rochester, New York).

39. *Id.* at 36-40.

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.<sup>40</sup>

As one commentator pointed out, this provision appears to be directly contrary to the ADA regulations promulgated by the EEOC, which allow for one-on-one discussions between the disabled person and the employer.<sup>41</sup> These regulations state:

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.<sup>42</sup>

Attempting to comply with both section 9 of the NLRA and the ADA regulations may place both unions and employers in a quandary.<sup>43</sup> If an employer conducts an "informal, interactive process" with a disabled individual to determine a suitable reasonable accommodation, the employer disregards its duty under the NLRA to bargain exclusively with the union representatives of its employees.<sup>44</sup> The employer might try to resolve this conflict by inviting the union representative to be present at the "informal" discussion it conducts with the disabled person pursuant to the ADA. However, the presence of the union representative may in turn violate confidentiality provisions of the ADA.<sup>45</sup> Nonetheless, these apparent conflicts do not undermine either the purposes or the effective enforcement of the two acts.

*a. Exclusivity and the principle of majority rule.* It can certainly be argued that the primary purpose of the NLRA is to strengthen the institutional foundation of unions. Under this view, the NLRA favors unions in order to remedy the inequali-

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40. 29 U.S.C. § 159(a) (1988).

41. Smith, *supra* note 38, at 40.

42. 29 C.F.R. § 1630.2(o)(3) (1992).

43. Smith, *supra* note 38, at 39.

44. *Id.*

45. *Id.* at 40.

ty of bargaining power between employees and employers.<sup>46</sup> As one commentator noted, the NLRA "not only protects the voluntary associations of workers but serves to empower them."<sup>47</sup>

A contrary view is that the NLRA was not designed to favor one side over another but "to foster in a neutral manner" a system that would resolve the conflicting interests of management and labor.<sup>48</sup> In other words, while unionization under the NLRA appears designed to protect workers from the arbitrary and demeaning actions of employers, it is not clear whether the benefits of collective organization were designed to be mandatory or voluntary.<sup>49</sup> Thus, it is reasonable to suggest that the NLRA is concerned at least as much with the interests of individual employees as it is with the institutional power of unions.<sup>50</sup>

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46. See 29 U.S.C. § 151 (1988) (recognizing "the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers"); see also *Alkire v. NLRB*, 716 F.2d 1014, 1017 (4th Cir. 1983) ("A principal purpose of the labor laws is to 'redress the perceived imbalance of economic power between labor and management . . .'" (citation omitted)); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983) ("The Wagner Act was of course intended to promote unionization."); *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716, 717 (2d Cir. 1966) ("The National Labor Relations Act . . . was designed to overcome the inequality of bargaining power between employees and employers.").

One commentator explained that the employer's duty to bargain under NLRA § 8(d), 29 U.S.C. § 158(d) (1988), coupled with the rule forbidding employers from unilaterally instituting changes in mandatory subjects of bargaining without first bargaining with the union, see *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), "is a significant expression of an obligation to regard the union as having some unspecified authority in the premises and thus amounts to a partial transfer to the union of what was once an unrestricted authority." Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1026 (1984).

47. Fried, *supra* note 46, at 1023.

48. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 680-81 (1981).

49. Fried, *supra* note 46, at 1027. See also *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 845 (1992) ("By its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers."); *Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595, 602 (1st Cir. 1979) ("[T]he [NLRA] was not passed to encourage pro-union activity . . .").

50. See, e.g., *NLRB v. Milk Drivers & Dairy Employees, Local 338*, 531 F.2d 1162, 1163 (2d Cir. 1976) ("The Act's provisions were designed to permit workers to exercise freely the right to join unions, to be active or passive members, or to abstain from joining any union at all without imperiling their right to a livelihood."); *NLRB v. Mid-States Metal Prod.*, 403 F.2d 702, 704 (5th Cir. 1968) ("The Act 'was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions . . .'" (citation omitted)).

Indeed, the NLRA protects not only the employees' right to freely associate for purposes of self-organization, but also their right to disassociate.<sup>51</sup> In addition to having the right to refrain from participation in labor organizations and concerted activity,<sup>52</sup> many employees also have the right to refuse union membership under state right-to-work laws permitted by the NLRA.<sup>53</sup>

Consequently, many employees do not desire, nor are they required, to be exclusively represented by a labor organization in their dealings with management.<sup>54</sup> Considering the unique

51. Section 7 of the NLRA provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the *right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).

29 U.S.C. § 157 (1988) (emphasis added).

52. *Id.*

53. "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164 (1988).

Today, 21 states have right-to-work laws that are permissible under the section cited above. ARCHIBALD COX ET AL., *CASES AND MATERIALS ON LABOR LAW* 1117 (11th ed. 1991). These laws basically provide that employees are not required to join a union as a condition of receiving or retaining a job. *Id.* Labor organizations have campaigned heavily to overturn the laws, primarily on the grounds that since unions must represent both members and non-members, those who do not join are "free riders," receiving benefits without cost. *Id.* at 1119.

On the other hand, employers are strongly in favor of right-to-work laws; they emphasize "the basic rights of an individual to get and keep a job without having to pay tribute to any organization in order to make a living." *Id.* at 1120 (citation omitted). Moreover, employers stress that many employees desire to refrain from joining a union or paying dues for valid reasons of conscience. *Id.*

54. Once a union has been certified or has established a majority status, the exclusive representation rule becomes operational and a worker has no choice but to be represented by the union. Fried, *supra* note 46, at 1028 (citing *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944)). While the employee may not be forced to join the union (even though he may be required to pay union dues), he will still be bound by the result of union bargaining. *Id.* However, even in this situation it is conceivable that a disabled employee could meet privately with the employer without a union steward present. Section 9 of the NLRA requires the union to be the exclusive representative of the employees only "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a) (1988). Therefore, as long as the private employer/employee conference over reasonable accommodation does not patently involve "terms and conditions" of employment, such as an employee's request for a

and difficult problems disabled persons face, disabled employees in a unionized setting will often be justified in pursuing the direct contact with their employers that is encouraged under the ADA.

Moreover, it should be noted that union personnel designated under section 9 of the NLRA to be the employees' representatives may not be the actual representative choice of all, or even a majority of, the bargaining unit employees.<sup>55</sup> In the event a union fails to fairly represent an employee, it commits an unfair labor practice and faces possible sanctions.<sup>56</sup> Such sanctions, however, do not effectively protect the individual rights to which a disabled employee is entitled under the ADA. Since disabled employees might not be fairly represented by a union,<sup>57</sup> the ADA is necessary to provide an appropriate method of redress for all disabled individuals who suffer the consequences of arbitrary management decisions.<sup>58</sup>

b. *Confidentiality requirements of the ADA.* A related potential conflict between the NLRA and the ADA concerns issues of privacy. It is well established under the NLRA that an employer need not disclose any or all information that a union asserts is necessary to process a grievance; the privacy rights of employees may override union interests in arguably obtaining relevant information.<sup>59</sup> The issue under the ADA is

wheelchair ramp to enter and exit the building or a wheelchair-accessible bathroom stall, it would not violate the exclusive representation principle of the NLRA. On the other hand, if the private conference involves negotiating a reasonable accommodation that will clearly affect the "terms and conditions" of employment for all union employees in the workplace, *see* discussion *infra* part V, then a union representative would clearly have to be present.

55. As a general rule, a union may be certified in an election if it gets a majority of the votes cast. Thus, since a union may be designated by a majority of valid ballots, the union might in fact only represent a minority of the employees if only a small proportion of eligible voters participate. COX ET AL., *supra* note 53, at 116.

56. Sections 8(b)(2) and 8(b)(3) of the NLRA impose a "duty of fair representation" on the union. 29 U.S.C. § 158(b)(2)-(3) (1988). If a union violates its duty of fair representation by discriminating on the basis of race or sex, the National Labor Relations Board (NLRB) may revoke the union's certification. COX ET AL., *supra* note 53, at 1044.

57. *See infra* notes 134-37 and accompanying text.

58. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 70 (1975) ("When union and employer are not responsive to their legal obligations, the bargain they have struck must yield *pro tanto* to the law, whether by means of conciliation through the offices of the EEOC, or by means of federal-court enforcement at the instance of either that agency or the party claiming to be aggrieved.").

59. Detroit Edison Co. v. NLRB, 440 U.S. 301, 318-19 (1979) (holding that an

whether the sensitive medical and health histories of employees will be accessible to unions. The ADA's "confidentiality" provision states:

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) 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, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations . . . .<sup>60</sup>

Union representatives can participate in "reasonable accommodation conferences" without violating this provision for two reasons. First, it should be emphasized that this provision applies only to the results of employee medical examinations. Many disabled individuals may be entitled to reasonable accommodation and an employer conference regarding such accommodation even though their disability does not involve a medical condition.<sup>61</sup>

Second, an analysis of NLRA definitions leads one to the conclusion that unions should have access to examination records. The ADA provides that, although medical information is to be confidential, supervisors<sup>62</sup> and managers are entitled to

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employer was not required to disclose the results of employee aptitude test scores to the union without employee consent because the testing information was of a "sensitive nature" and the "burden on the Union . . . [was] minimal".

60. 42 U.S.C. § 12112(3) (Supp. II 1990).

61. For example, learning disabilities and other psychological disorders are included in the definition of "disability." 29 C.F.R. § 1630.2(g) (1992). While most laypersons view the ADA as providing "wheelchair ramps and braille stickers on elevators, . . . statistically the largest number of people the ADA will affect will be the learning disabled." Elaine Jarvik, *Learning Disorders Make Life Puzzling and Heartbreaking*, DESERET NEWS, Nov. 6, 1992, at C1 (quoting Michael Herbert, director of the Research Assessment Center, University of Utah).

62. According to the NLRA, the term "supervisor" means

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or

be informed about an employee's medical status.<sup>63</sup> Since supervisors are representatives of upper management, it follows that supervisors will frequently exercise "independent judgment" and participate directly in ADA "conferences" with disabled individuals to determine what reasonable accommodation needs to be made. Thus, it would be inconsistent for the ADA to grant supervisors access to a disabled person's medical records but exclude union representatives from "reasonable accommodation" conferences with supervisors during which such records frequently will be discussed. In addition, it must be noted that supervisors and managers are the ones to whom unionized employees usually bring their grievances.<sup>64</sup> Unions may be entitled to employee medical records in order to properly process a grievance with or against the supervisor.<sup>65</sup>

## 2. *Mandatory subjects of bargaining*

In addition to dovetailing with the NLRA on the issue of

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discipline other employees, or responsibly to direct them, or to *adjust their grievances*, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but *requires the use of independent judgment*.

29 U.S.C. § 152(11) (1988) (emphasis added).

63. 42 U.S.C. § 12112(3)(B)(i) (Supp. II 1990).

64. See David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 743 (1973) ("The grievance procedure normally consists of steps. First, the aggrieved employee, or the union, raises the problem with the immediate supervisor.").

65. It may be difficult for unions to gain access to individual medical examination records of employees on the grounds that the NLRB has recognized that "employers may have a legitimate and substantial interest in protecting the confidentiality of employees' medical records." *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 363 (D.C. Cir. 1983) (citing *Johns-Manville Sales Corp.*, 252 N.L.R.B. 368, 368 (1980)). However, since *Detroit Edison*, 440 U.S. at 318-19, requires the NLRB and courts to weigh the union's interest in relevant information against an employer's legitimate interest in maintaining the confidentiality of such information, it is conceivable that employers will at times be required to divulge medical information otherwise confidential under the ADA. This is particularly true in the case of reassignment, where the union's attempts to enforce seniority provisions of a collective bargaining agreement may be frustrated if an employer suddenly transfers a newly hired disabled employee to "light duty work." See discussion *supra* part V. Without an opportunity to examine and challenge the medical condition of the employee (to verify at a minimum whether he has met the physical criteria for such a transfer), unions may find their efforts to uphold collective bargaining agreement provisions governing "light duty" reassignment to be undermined. In short, the union's interest in preserving intact seniority provisions and other "terms and conditions" of employment present in the collective bargaining agreement may be weighed more heavily than an employer's interest in preserving confidentiality under the ADA.

exclusive representation, the ADA also reinforces the process of collective bargaining itself. A key provision of the NLRA defines collective bargaining as "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."<sup>66</sup> If one views the NLRA's purpose as one of furthering collective employee participation, it is natural to interpret the NLRA's "terms and conditions of employment" language broadly. Thus, virtually every matter which has an impact on the terms and conditions of employment becomes a matter over which the employer must bargain collectively.<sup>67</sup>

The ADA encourages collective bargaining by prohibiting discrimination against a qualified individual with a disability—a disabled person capable of performing a job's essential functions. Since "essential functions" are defined by EEOC regulations as "the fundamental job duties of the employment position the individual with a disability holds or desires,"<sup>68</sup> unions will surely insist on negotiating over what these "fundamental duties" entail.<sup>69</sup> Since a determination of what job functions are essential may have a direct impact on whether a disabled employee has a job at all,<sup>70</sup> the ADA appears to make collective bargaining on this issue a crucial requirement. Moreover, because the ADA lists reassignment as a potential reasonable accommodation for a qualified individual with a disability<sup>71</sup>—an accommodation which may adversely affect other

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66. 29 U.S.C. § 158(d) (1988).

67. *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 221 (1964) (Stewart, J., concurring).

68. 29 C.F.R. § 1630.2(n) (1992). The regulations also state that the term "essential functions" does not include the "marginal functions" of a position. *Id.*

69. See Feller, *supra* note 64, at 738 (stating that collective bargaining agreements may contain "provisions specifying the kind of work which different classes of employees shall perform").

70. *Fibreboard*, 379 U.S. at 222; see also *Davis v. Frank*, 711 F. Supp. 447, 453-54 (N.D. Ill. 1989) (holding that a deaf employee established a prima facie case of discrimination under the Rehabilitation Act in part because the Postal Service's Qualification Standards for Bargaining Unit Positions were overbroad and because the applicable standard requiring that the time and attendance clerk be able "to hear the conversational voice, hearing aid permitted" was not a "business necessity"); *Dexler v. Tisch*, 660 F. Supp. 1418, 1425-26 (D. Conn. 1987) (holding that an employee suffering from achondroplastic dwarfism was not qualified for a distribution clerk position because his short stature and limited reach rendered him unable to do many of the tasks required in the position).

71. 42 U.S.C. § 12112(9) (Supp. II 1990).



unionized employees<sup>72</sup>—the ADA appears to actively promote collective bargaining, since reassignment policies have long been recognized as subjects of compulsory collective bargaining.<sup>73</sup>

### *B. The ADA and the NLRA Policy Favoring Arbitration*

The potential conflicts between the ADA and the NLRA are not limited to questions of exclusive representation and collective bargaining. An apparent inconsistency also exists between the ADA's provision allowing a disabled person to bring a private cause of action against an employer and the NLRA's policy of promoting arbitration.

#### *1. The Steelworkers Trilogy*

Perhaps the most frequently cited cases involving federal labor policy are known as the "Steelworkers Trilogy."<sup>74</sup> The Supreme Court's opinions in the three cases, decided on the same day, elevated arbitration to a preeminent role in the resolution of labor disputes. The Court first held that federal courts should not consider the merits of an employee's claim as long as the employee has some claim that is susceptible to the grievance arbitration procedure.<sup>75</sup> In other words, if any doubts exist as to whether a particular employee grievance is arbitrable under the collective bargaining agreement, those doubts "should be resolved in favor of coverage."<sup>76</sup>

Most importantly, the Court held that federal courts should take a "hands off" approach to the decisions of labor arbitrators; an arbitrator's decision should stand as long as "it draws its essence from the collective bargaining agreement."<sup>77</sup>

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72. See *infra* note 137.

73. *Fibreboard*, 379 U.S. at 224.

74. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

75. *American Mfg.*, 363 U.S. at 568. The Court stated that the courts have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.

*Id.*

76. *Warrior & Gulf*, 363 U.S. at 583.

77. *Enterprise Wheel*, 363 U.S. at 597. "The refusal of courts to review the

Thus, the trilogy heartily endorsed collective bargaining's grievance arbitration process.

## 2. ADA endorsement of arbitration

The Americans with Disabilities Act arguably gives a ringing endorsement of its own to collective bargaining and established policies encouraging arbitration. The fact that the ADA explicitly recognizes the significance of collective bargaining agreements in the workplace indicates that the ADA implicitly recognizes arbitration as the standard procedure that should be used to enforce the agreements. Indeed, the suggestion in a Senate report that future collective bargaining agreements "contain a provision permitting the employer to take all actions necessary" to comply with the ADA<sup>78</sup> indicates a congressional preference for unions and employers to incorporate the ADA's provisions into bargaining agreements and to interpret these provisions by means of grievance arbitration.

Moreover, "where appropriate and to the extent authorized by law" the ADA explicitly encourages the use of alternative means of dispute resolution "including settlement negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration."<sup>79</sup> Such a stance is consistent with federal labor policy stating that the grievance procedure is an integral part of the continuing collective bargaining process.<sup>80</sup>

However, since the ADA is civil rights legislation, it could fail to endorse arbitration and still not undermine established principles of grievance resolution that have arisen under the NLRA scheme.<sup>81</sup> When considering the roots of arbitration, it

merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Id.* at 596.

78. Murphy, *supra* note 4, at 1618 n.75 (citing S. REP. NO. 116, 101st Cong., 1st Sess. 32 (1989)).

79. 42 U.S.C. § 12212 (Supp. II 1990).

80. *Warrior & Gulf*, 363 U.S. at 578 ("Arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.")

81. Provisions governing grievance procedure, while not mandated by the NLRA, now appear in collective bargaining agreements as a matter of course. One study conducted by the Bureau of Labor Statistics in 1961-62 examined all collective agreements covering 1000 or more workers in effect at the time, excepting railroad, airline, and government agreements. Of these, only 20 agreements, covering some 50,000 workers, or slightly more than one-half of one percent, contained no grievance procedure. Feller, *supra* note 64, at 742 n.350.

is important to remember that arbitration clauses (requiring grievance arbitration) in collective bargaining agreements are not the result of management's good will. While arbitration clauses may provide labor and management with a mechanism for resolving employee disputes, they typically are agreed upon because labor and management make a deal, not out of pure concern for employees. It is often stated that the arbitration clause is the quid pro quo for a no-strike clause.<sup>82</sup> Therefore, arbitration might be viewed as a means of reducing the costs to employers through strike avoidance rather than a means of addressing the rights of individual employees.<sup>83</sup>

Furthermore, the mere inclusion of an "ADA compliance"<sup>84</sup> clause or other nondiscrimination clause in a collective bargaining agreement will not foreclose a disabled employee from bringing suit under the ADA as the following section demonstrates.

### 3. *Alexander v. Gardner-Denver Co.*

In a landmark labor case, *Alexander v. Gardner-Denver Co.*,<sup>85</sup> Alexander, a black employee, filed a grievance under the collective bargaining agreement governing his workplace after he was discharged by the company. In addition to a broad arbitration clause, the agreement contained two important provisions: one provided that the employer retained the right to discharge employees for cause, and the other broadly prohibited discrimination.<sup>86</sup>

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82. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55 (1974) (citing *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 248 (1970)).

83. *Id.* at 54-55. The *Alexander* Court noted:

The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike . . . . It is not unreasonable to assume that most employers will regard the benefits derived from a no-strike pledge as outweighing whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII. Indeed, the severe consequences of a strike may make an arbitration clause almost essential from both the employees' and the employer's perspective.

*Id.*

84. See *supra* note 78 and accompanying text.

85. 415 U.S. 36 (1974).

86. *Id.* at 39. The anti-discrimination clause stated that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." *Id.*

After the company rejected Alexander's claims that he was discharged because of racial discrimination, the grievance was submitted to arbitration.<sup>87</sup> However, before an arbitration hearing took place, Alexander "filed a charge of racial discrimination with the Colorado Civil Rights Commission, which [subsequently] referred the complaint to the Equal Employment Opportunity Commission."<sup>88</sup> Soon thereafter, Alexander raised his discrimination claim before an arbitrator. However, the arbitrator ruled adversely, finding that Alexander had been "discharged for just cause."<sup>89</sup> The EEOC also issued an unfavorable ruling, finding that "there was not reasonable cause to believe that a violation of Title VII of the Civil Rights Act of 1964 . . . had occurred."<sup>90</sup>

Alexander then filed suit in federal court, claiming anew that he had been the victim of a racially discriminatory employment practice in violation of section 703(a)(1) of the Civil Rights Act.<sup>91</sup> Both the district court and the Tenth Circuit held that since he had chosen to pursue his grievance to final arbitration under the nondiscrimination clause of the collective bargaining agreement, Alexander was bound by the arbitrator's decision and was therefore barred from suing his employer under Title VII.<sup>92</sup> However, the Supreme Court reversed, holding that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully *both* his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."<sup>93</sup>

*a. Civil rights suits address the collective needs of employees.* The Court's reasoning sheds much light on the ADA and its relationship with federal labor policy. First, the Court noted that the private right of action available to an employee under Title VII is essential because a private person's suit "not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment

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87. *Id.* at 42.

88. *Id.*

89. *Id.* In ruling against the employee, the arbitrator did not comment on the employee's claim of racial discrimination.

90. *Id.* at 43.

91. *Id.*

92. *Id.*

93. *Id.* at 59-60 (emphasis added).

practices."<sup>94</sup> By providing for a private cause of action, both Title VII and the ADA serve as mechanisms by which individual employees can improve the lot of their co-workers. Thus, civil rights legislation, including such acts as Title VII and the ADA, actually promotes the collective voice of employees in a manner similar to the NLRA.

*b. Contractual rights are different from statutory rights.* The *Alexander* Court also distinguished grievance arbitration, which employees use to vindicate contractual rights under a collective bargaining agreement, from a lawsuit filed under Title VII, which employees use to assert independent statutory rights.<sup>95</sup> Reasoning that contractual and statutory rights remain separate even though an employee alleges that both were violated as the result of one factual occurrence, the Court stated that "no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums."<sup>96</sup> In fact, "the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each."<sup>97</sup>

The same reasoning is applicable to the ADA.<sup>98</sup> The ADA's statement of findings makes it evident that Congress passed the Act because existing laws did not adequately protect the rights of disabled Americans.<sup>99</sup> While the ADA targets discrimination against the disabled in all sectors of the community, not just in the unionized workplace, it is arguable that part

94. *Id.* at 45 (citations omitted).

95. *Id.* at 49-50.

96. *Id.* at 50.

97. *Id.* at 50-51.

98. It has been noted that the ADA contains the same broad coverage of Title VII and refers to Title VII in its enforcement provisions. Renée L. Cyr, Note, *The Americans with Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 BROOK. L. REV. 1237, 1258 (1992); see also Smith, *supra* note 38, at 12 (pointing out that the ADA, like § 504 of the Rehabilitation Act, adopts all of the remedies available under Title VII). The relevant provision of the ADA states:

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C. § 12117(a) (Supp. II 1990).

99. 42 U.S.C. § 12101(a) (Supp. II 1990).

of the reason Congress found it necessary "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities"<sup>100</sup> was that the grievances of disabled employees were not being properly addressed through arbitration procedures.<sup>101</sup>

*c. Civil rights statutes do not preempt federal labor law.* While it was intended to provide additional remedies for the disabled, the ADA does not preempt the NLRA.<sup>102</sup> The ADA, like Title VII, was not designed to prohibit arbitration as an effective avenue of redress for employees who suffer discrimination.<sup>103</sup> Both the NLRA policy favoring arbitration and the

100. *Id.* § 12101(b)(2). The Act's findings also indicate congressional recognition that the collective voice of disabled Americans was not being heard:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

*Id.* § 12101(a)(7). If unions as the collective voice for labor had been advocating appropriately for disabled employees, the "political powerlessness" of the disabled might have been mitigated.

101. See Fried, *supra* note 46, at 1028 (noting that by enacting FLSA, OSHA, ERISA, and Title VII, "[w]e have indeed moved toward a system that recognizes individual workers' rights independent of labor-union bargaining").

102. As one author commented, the argument that the ADA preempts the NLRA focuses on § 501 of the ADA, *see* 42 U.S.C. § 12201(a)-(b) (Supp. II 1990), which preempts federal laws that provide lesser protection to disabled individuals than the ADA. Smith, *supra* note 38, at 45. Smith relies on language in a House Report on the ADA to support his conclusion that the preemption argument fails. "This section (501) explains the relationship between section 504 of the Rehabilitation Act of 1973 and this Act and the relationship between this Act and State laws that provide greater protection for the rights of individuals with disabilities . . ." H.R. REP. NO. 485(I), 101st Cong., 2d Sess. 44-45 (1990), *reprinted in* 1990 U.S.C.C.A.N. 288-89. Because the NLRA does not provide *any* specific protection to the disabled as a class, it was not one of the acts Congress intended the ADA to preempt as providing *lesser* protections than the ADA. Smith, *supra* note 38, at 45-46.

103. Employers concerned about the possibility of "dual remedies" should be directed to the opinion in *Alexander*, where the Court addressed the issue in the context of a Title VII dispute. Concluding that an employee is entitled to pursue both a Title VII suit and arbitration, the Court reasoned:

Nor can it be maintained that election of remedies is required by the possibility of unjust enrichment through duplicative recoveries. Where, as here, the employer has prevailed at arbitration, there, of course, can be no duplicative recovery. But even in cases where the employee has first prevailed, judicial relief can be structured to avoid such windfall gains. Furthermore, if the relief obtained by the employee at arbitration were fully equivalent to that obtainable under Title VII, there would be no further relief for the court to grant and hence no need for the employee

ADA's provisions for civil suit are fundamental components of an overall strategy aimed at eliminating discrimination against the disabled.

*d. Limitations on arbitrators necessitate private causes of action under the ADA.* Finally, while the *Alexander* Court recognized that arbitration may be an appropriate and effective avenue for resolving discrimination claims,<sup>104</sup> it also noted that arbitration is in many respects inferior to federal courts as a forum for adjudicating Title VII rights.<sup>105</sup> Arbitration may be an inappropriate forum because the arbitrator's primary role is to enforce the contractual rights of the parties, not to enforce the requirements of civil rights legislation.<sup>106</sup> In addition, arbitrators are typically conversant with the "law of the shop, not the law of the land,"<sup>107</sup> while federal courts are designated to resolve constitutional and statutory issues.<sup>108</sup>

This same reasoning explains why disabled employees covered by a collective bargaining agreement must be able to bring civil suits under the ADA. Under the best scenario, unions and management will incorporate the ADA's nondiscrimination provisions into collective bargaining agreements and use the grievance arbitration process to provide appropriate redress for complaints arising under the agreements. However, since the possibility remains that disabled employees will occasionally be denied appropriate relief in arbitration,<sup>109</sup> they must be

to institute suit.

*Alexander*, 415 U.S. at 51 n.14 (citations omitted).

104. The Court reasoned:

[T]he grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee.

*Id.* at 55.

105. *Id.* at 56.

106. *Id.* at 56-57.

107. *Id.* at 57 (citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-83 (1960)).

108. *Id.*

109. Discussing the potential inadequacies of the arbitration process in resolving Title VII claims, the *Alexander* Court stated:

A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the

allowed to seek judicial remedies.

#### IV. THE ADA AND THE RAILWAY LABOR ACT

Another act embodying important federal labor policy is the Railway Labor Act (RLA).<sup>110</sup> The RLA, enacted to address the rights of individuals employed by carriers, is similar to the NLRA in that it gives employees the right to organize and bargain collectively; in addition, the RLA establishes procedures for grievance arbitration.<sup>111</sup> However, the arbitration procedure under the RLA raises some perplexing preemption issues when it is examined together with the ADA. This section explores potential conflicts between the ADA and the RLA and suggests that the RLA, like the NLRA, can coexist harmoniously with the ADA.

##### A. *Grievance Arbitration Under the RLA*

The primary purpose of the RLA is to provide an orderly, peaceful method by which labor and management can resolve labor disputes.<sup>112</sup> This process requires "minor disputes" to be initially submitted to grievance procedures that are contractually agreed upon by the parties.<sup>113</sup> Courts have interpreted "minor dispute" to mean any dispute between employees and carriers arising out of "the interpretation or application of [a] collective bargaining agreement."<sup>114</sup>

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bargaining unit. Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. And a breach of the union's duty of fair representation may prove difficult to establish.

*Id.* at 58 n.19 (citations omitted).

110. 45 U.S.C. §§ 151-188 (1988).

111. *Id.* §§ 152-153.

112. Part of the RLA's purpose is to

provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; [and] . . . to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

*Id.* § 151(a)(4)-(5).

113. *Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1096 n.4 (9th Cir. 1991) ("Disputes 'growing out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions' must be resolved through grievance procedures provided for in collective-bargaining agreement[s].") (quoting 45 U.S.C. § 184 (1988)).

114. *Id.*; see also *Stephens v. Norfolk & W. Ry.*, 792 F.2d 576, 580 (6th Cir. 1986) (quoting *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902, 904 (6th Cir.



If a minor dispute remains unresolved following grievance procedures, the RLA requires the parties to submit to binding arbitration before the National Railway Adjustment Board (NRAB)<sup>115</sup> or a privately established arbitration panel.<sup>116</sup> Courts have been strict in requiring adherence to this process. Failure to submit to grievance procedures or the NRAB results in the dismissal of an employee's or carrier's suit brought directly in federal court.<sup>117</sup> Thus, the RLA arguably encourages arbitration even more vigorously than the NLRA. The potential conflict this RLA policy poses with the ADA (and other civil rights statutes) is significant; nevertheless, the potential conflict is capable of resolution because the Supreme Court has clearly marked the path.

#### B. *Atchison, Topeka & Santa Fe Railway v. Buell*

The Supreme Court addressed the issue of RLA preemption in the landmark case of *Atchison, Topeka & Santa Fe Railway v. Buell*.<sup>118</sup> In *Buell*, Buell filed a complaint in federal court under the Federal Employers' Liability Act (FELA), which enables railroad workers to sue their employers for personal injuries received from employers or co-workers.<sup>119</sup> The complaint alleged that as a direct and proximate result of the railroad's failure to protect Buell from malicious and oppressive harassment from his fellow employees, Buell suffered an emotional breakdown.<sup>120</sup>

Not surprisingly, the railroad asserted that Buell's sole remedy was binding arbitration before the National Railroad Adjustment Board as required by the RLA.<sup>121</sup> The Court rejected this argument, holding that regardless of the strong RLA policy favoring arbitration, Buell was not barred from bringing an FELA action for damages.<sup>122</sup> The *Buell* Court's reasoning

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1983)), *amended*, 811 F.2d 286 (1987).

115. The Adjustment Board consists of 34 members, 17 selected by carriers and 17 selected by recognized labor organizations of employees. 45 U.S.C. § 153 First (1988).

116. *Stephens*, 792 F.2d at 580 (citation omitted); see also *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989) (holding that an adjustment board created under the RLA has exclusive jurisdiction over minor disputes).

117. *Stephens*, 792 F.2d at 580 n.6.

118. 480 U.S. 557 (1987).

119. *Id.* at 559.

120. *Id.*

121. *Id.*

122. *Id.* at 564. The Court reasoned:

is relevant in two aspects to the relationship between the ADA and the RLA.

1. *The ADA created federal statutory rights for individuals*

Most important is the Court's statement that the federal labor policy promoting arbitration cannot preempt an employee's private cause of action brought under a federal statute enacted to create substantive rights for individuals.<sup>123</sup> This reasoning tends to support the argument that the RLA and other federal labor acts do not preempt the ADA. Clearly, the ADA is a federal statute designed to "provide minimum substantive guarantees to individual workers."<sup>124</sup>

Yet this reasoning can also be problematic, for preemption arguably does not depend on whether the employee's suit is brought under a federal or state statute,<sup>125</sup> but on whether the

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The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages. Presumably a host of personal injuries suffered by railroad employees are caused by negligent practices and conditions that might have been cured or avoided by the timely invocation of the grievance machinery. But we have never considered that possibility a bar to an employee's bringing an FELA claim for personal injuries, and the Railroad has not persuaded us to do so now.

*Id.* (citation omitted).

123. The opinion's key language reads:

This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. *See, e.g., McDonald v. West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine, supra*, at 737.

*Buell*, 480 U.S. at 564-65.

124. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 737 (1981).

125. Interestingly, the Sixth Circuit has held that the RLA preempts state civil rights acts, thus barring an employee from bypassing RLA arbitration procedures and bringing suit directly against the employer. In *McCall v. Chesapeake & Ohio Ry.*, 844 F.2d 294 (6th Cir.), *cert. denied*, 488 U.S. 879 (1988), the court held that the Michigan Handicappers' Civil Rights Act was preempted by the RLA. Distinguishing *Buell*, the court stated:

Although *Buell* stands for the proposition that claims under substantive statutory rights may be decided outside of the labor arbitration machinery, it should not be read . . . to dictate a holding in this case that

the dispute can be resolved independently of the collective bargaining agreement. Several courts have held that state civil rights statutes barring employment discrimination are preempted by the RLA, reasoning that when an RLA arbitration board "is required by the collective bargaining agreement to make the same factual inquiry regarding physical ability to perform a job as would be made under the state act, the federal dispute resolution process is the sole remedy."<sup>126</sup>

Because the ADA is a federal law, federal case law like *Buell* will likely control interpretation of the ADA. Yet these state cases still portend cloudy horizons for the ADA. Since the ADA's regulations stipulate that the terms of a collective bargaining agreement may be considered in determining whether an employer is required to make a particular accommodation,<sup>127</sup> employers conceivably will often insist that the agreement is determinative and therefore that arbitration is the exclusive forum for resolving claims arising under the ADA. In other words, employers may attempt to avoid suit under the ADA by arguing that a determination of the validity of an employee's claims requires analysis of the terms of a collective bargaining agreement.<sup>128</sup> If courts accept these arguments, the entire purpose of the ADA will be undermined.

Nevertheless, courts will hopefully be persuaded by the reasoning in *Buell* and similar cases arising under the Labor Management Relations Act (LMRA)<sup>129</sup> and recognize that the

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the state act is preempted. FELA, the statute involved in *Buell*, is a federal statute . . . . In the instant case, we are concerned with a state statute. The issue is not the relationship between two federal statutes passed by Congress; it is the relationship between a federal statute and a state statute.

*Id.* at 298.

126. *Id.* at 303. See also *Stephens v. Norfolk & W. Ry.*, 792 F.2d 576, 580 (6th Cir. 1986) ("If the [state] 'action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A.,' exclusive jurisdiction of the NRAB preempts the action." (citation omitted)); *Underwood v. Trans World Airlines, Inc.*, 710 F. Supp. 78, 83 (S.D.N.Y. 1989) ("Although the existence of a relationship between rights regulated by the state and the collective bargaining agreement is not in itself enough to mandate preemption, the strong similarity between the inquiry that an Adjustment Board would have to make and that made by a jury in a state cause of action requires that the claim under the [New York Human Rights Law] be preempted in this case.").

127. See *supra* note 31 and accompanying text.

128. See *supra* note 126.

129. While cases arising under the LMRA do not control cases arising under the RLA because RLA preemption is broader, *Hubbard v. United Airlines, Inc.*, 927

ADA creates independent rights that deserve protection in federal court. By recognizing that collective bargaining agreements may be relevant when one interprets its various provisions, the ADA validates the policies of collective bargaining

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F.2d 1094, 1097 (9th Cir. 1991), cases arising under the LMRA are helpful in determining when statutory rights are independent enough to arise separately from collective bargaining agreements.

The most important case discussing preemption in the context of the LMRA is *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). In *Lingle*, an employee was discharged for allegedly filing a false worker's compensation claim. Although the employee pursued arbitration and was eventually reinstated with full backpay, he also brought a state law tort claim in federal court, alleging that he had been discharged in retaliation for exercising his rights under the state worker's compensation laws.

In holding that the employee's state law claim for retaliatory discharge was not preempted by § 301 of the LMRA (because the claim did not require interpretation of a collective bargaining agreement), the Court reasoned:

[E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.

*Id.* at 409-10. The Court also relied on its prior reasoning in *Buell*, stating that "there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements." *Id.* at 411.

Following *Lingle*, at least two courts have held that an employee's state law claim of handicap discrimination is not preempted by the LMRA. See *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir.) (holding that an employee's claim was not preempted by LMRA § 301 because resolution of a handicap discrimination claim would not require interpretation of a collective bargaining agreement), *cert. denied*, 493 U.S. 992 (1989); *Ackerman v. Western Elec. Co.*, 860 F.2d 1514, 1517 (9th Cir. 1988) (holding that an employee's discrimination claim under the California Fair Employment and Housing Act was not preempted by LMRA § 301 because the right is "defined and enforced under state law without reference to the terms of any collective bargaining agreement").

See also *Miller v. AT&T Network Sys.*, 850 F.2d 543, 550 (9th Cir. 1988) (holding that an Oregon statute prohibiting discrimination based on physical handicap created a "mandatory and independent state right that is not preempted by section 301"); *Elstner v. Southwestern Bell Tel. Co.*, 659 F. Supp. 1328 (S.D. Tex. 1987) (holding that employee's claim of handicap discrimination under the Texas Commission on Human Rights Act was not preempted by the LMRA), *aff'd*, 863 F.2d 881 (5th Cir. 1988); *Austin v. New England Tel. & Tel. Co.*, 644 F. Supp. 763, 767 (D. Mass. 1986) (holding that employee's claim of handicap discrimination and wrongful discharge was not preempted by LMRA § 301 because the duty not to discharge employees on the basis of handicap arose from state common law, "independent of any right established by contract").

*Cf. Hubbard v. United Airlines, Inc.*, 927 F.2d 1094, 1098 (9th Cir. 1991) (holding that an employee's claim that her employer violated RICO by paying her disability benefits in an amount less than that provided for in the collective bargaining agreement was preempted by the RLA; employee based her RICO claim "on predicate acts that involve[d] violation of a right created by the CBA").

and arbitration under the RLA just as it does under the NLRA. Yet binding arbitration cannot be an exclusive forum for the disabled under the RLA any more than it is under the NLRA.

2. *The ADA provides disabled employees with individualized remedies*

The other significant point made by the *Buell* Court is that some federal statutes, like FELA, not only provide workers with "substantive protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also afford[] injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board."<sup>130</sup> Certainly Title I of the ADA accomplishes the same goal; its entire thrust is to eliminate employment discrimination against the disabled by requiring employers to make reasonable accommodations suited to the individual needs of each disabled employee.<sup>131</sup> Thus, when called upon to adjudicate conflicts arising between the RLA and the ADA, courts should hold that arbitration cannot be the last stop for disabled employees.

## V. REASSIGNMENT AND REASONABLE ACCOMMODATION

Perhaps the best way to understand how the federal labor policies discussed will impact the ADA is to examine the issue of reassignment,<sup>132</sup> an issue of substantial concern among employers facing compliance with the Act.<sup>133</sup> This issue is of critical importance to employers with a unionized workforce because reassignment policies, which are often tied to seniority,<sup>134</sup> are usually an integral part of the collective bargaining

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130. *Buell*, 480 U.S. at 565 (emphasis added).

131. See *supra* note 42 and accompanying text.

132. The term "reassignment" is generally understood to mean "any transfer of an employee from one position to another position, including demotions." Kathryn W. Tate, *The Federal Employer's Duties Under the Rehabilitation Act: Does Reasonable Accommodation or Affirmative Action Include Reassignment?*, 67 TEX. L. REV. 781, 820 n.209 (1989).

133. See, e.g., Michael J. Lotito & Michael J. Soltis, *Prepare for ADA Now*, INDUS. WEEK, Oct. 7, 1991, at 64; Michael A. Verespej, *Here Comes a New Legal Quagmire*, INDUS. WEEK, Nov. 4, 1991, at 85.

134. See, e.g., *Shea v. Tisch*, 870 F.2d 786, 789 (1st Cir. 1989) (reassignment of disabled Postal Service employee was not required when such action would violate the seniority provisions of the collective bargaining agreement requiring that assignments must be bid for and then awarded on the basis of seniority); *Carter v. Tisch*, 822 F.2d 465, 466 (4th Cir. 1987) (disabled employee denied reassignment

agreement. Unfortunately, this issue is clouded with confusion because of the ADA's failure to address it squarely.<sup>135</sup> This section examines how the ADA's provision for reassignment, as a possible reasonable accommodation, interacts with federal labor policies that favor collective bargaining and arbitration.

#### A. *Reassignment under the Rehabilitation Act of 1973*

Several courts have found that reassignment is not a reasonable accommodation required by the Rehabilitation Act because an employee may be fired if she can no longer perform the essential functions of the job for which she was hired.<sup>136</sup> More importantly, the majority of courts that have considered the issue in a union setting have found that reassignment cannot be a required accommodation if it "usurp[s] the legitimate rights of other employees in a collective bargaining agreement."<sup>137</sup>

This precedent has the potential to exert strong influence over interpretation of the ADA; even though the ADA specifically includes reassignment as a possible accommodation,<sup>138</sup> Title I of the ADA is modeled after the regulations that implement section 504 of the Rehabilitation Act.<sup>139</sup> Therefore, if

because collective bargaining agreement required that an employee serve five years before becoming eligible for a permanent light duty assignment).

135. One author commented that while the EEOC provides that "employers may refer to a collective-bargaining agreement to clarify whether a particular job function is essential[,] . . . it left unanswered whether filling job vacancies according to collective-bargaining rules violates ADA provisions if those rules would discriminate against someone with a disability." Verespej, *supra* note 133, at 85.

136. See, e.g., *Black v. Frank*, 730 F. Supp. 1087, 1091 (S.D. Ala. 1990); *Wimbley v. Bolger*, 642 F. Supp. 481, 486 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987); *Alderson v. Postmaster Gen.*, 598 F. Supp. 49, 55 (W.D. Okla. 1984).

137. *Florence v. Frank*, 774 F. Supp. 1054, 1062 (N.D. Tex. 1991); see also *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989); *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987); *Daubert v. United States Postal Serv.*, 733 F.2d 1367, 1370 (10th Cir. 1984); *Davis v. United States Postal Serv.*, 675 F. Supp. 225, 235 (M.D. Pa. 1987); *Dexler v. Tisch*, 660 F. Supp. 1418, 1424 (D. Conn. 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); *Jasany v. United States Postal Serv.*, 33 Fair Empl. Prac. Cas. (BNA) 1115 (N.D. Ohio 1983), *aff'd*, 755 F.2d 1244, 1252 (6th Cir. 1985); *Bey v. Bolger*, 540 F. Supp. 910, 928 (E.D. Pa. 1982).

138. 42 U.S.C. § 12111(9) (Supp. II 1990).

139. 29 C.F.R. app. § 1630 (1992). The overview of the regulations states:

The format of part 1630 reflects congressional intent, as expressed in the legislative history, that the regulations implementing the employment provisions of the ADA be modeled on the regulations implementing section 504 of the Rehabilitation Act of 1973, as amended, 34 CFR part 104.

courts interpret the ADA's requirement of reasonable accommodation against a backdrop of Rehabilitation Act litigation, they might continue to bar reassignment when the terms of a collective bargaining agreement prohibit such action. Indeed, when one considers the Supreme Court's opinion in *Ford Motor Co. v. EEOC*,<sup>140</sup> the validity of reassignment as a reasonable accommodation seems marginal at best.

### B. *Ford Motor Co. v. EEOC*

In this case, Judy Gaddis applied for a job in 1971 as a "picker-packer" at the Ford warehouse in Charlotte, North Carolina. At the time she applied, no woman had ever worked as a "picker-packer" in the warehouse.<sup>141</sup> Even though she was qualified for the position, Ford hired a man, prompting Gaddis to file a charge of sexual discrimination with the EEOC.<sup>142</sup>

In July 1973, another position opened and Ford offered the job to Gaddis, but without seniority retroactive to her 1971 application.<sup>143</sup> Gaddis rejected this offer, partly because she did not want to lose the seniority she had accrued working at General Motors in the interim.<sup>144</sup> In July 1975, the EEOC sued Ford in federal district court, "alleging that Ford had violated Title VII of the Civil Rights Act of 1964 by refusing to hire women at the Charlotte warehouse."<sup>145</sup>

The district court held, and the court of appeals affirmed, that Ford had discriminated against Gaddis on the basis of her sex and that Gaddis was therefore entitled to backpay dating from July 1973, when she rejected Ford's unconditional job offer.<sup>146</sup> However, the court of appeals suggested that "had Ford promised retroactive seniority with its job offer, the offer would have cut off Ford's backpay liability."<sup>147</sup> Without such

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Accordingly, in developing part 1630, the Commission has been guided by the section 504 regulations and the case law interpreting those regulations.

*Id.*

140. 458 U.S. 219 (1982).

141. *Id.* at 221.

142. *Id.* at 222.

143. *Id.*

144. *Id.*

145. *Id.* at 223 (citation omitted).

146. *Id.*

147. *Id.* at 223-24.

an offer, Ford's 1973 offer was "incomplete and unacceptable."<sup>148</sup>

Overturning the decision of the court of appeals, the Supreme Court held that "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability."<sup>149</sup> In reaching this conclusion, the Court reasoned that Title VII permits courts to consider the rights of "innocent third parties."<sup>150</sup> The Court then stated:

The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proved, and may never prove, unlawful discrimination. As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees. In light of the "overriding importance" of these rights, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76 (1982) (quoting *Humphrey v. Moore*, 375 U.S. 335, 346 (1964)), we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proved, unlawful discrimination.<sup>151</sup>

Thus, the Court was unwilling to give Title VII rights superpriority over the contractual rights of seniority to which employees were entitled under a collective bargaining agreement.<sup>152</sup>

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148. *Id.* at 224.

149. *Id.* at 241.

150. *Id.* at 239 (citing *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 723 (1978)).

151. *Id.* at 239-40. In a footnote, the Court commented:

Seniority may govern, "not only promotion and layoff, but also *transfer*, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, 'bumping' possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and [even] a preferred place in the punch-out line."

*Id.* at 239 n.28 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 766-67 (1976)) (emphasis added).

152. Emphasizing that costs to an employer would be high were retroactive seniority to be granted, the Court stated:

The rule adopted by the court below . . . makes hiring the Title VII claimant more costly than hiring one of the other applicants for the same job. To give the claimant retroactive seniority before an adjudication of



Because reassignment policies usually are tied to seniority,<sup>153</sup> and because seniority provisions are "universally included"<sup>154</sup> in collective bargaining agreements, *Ford* casts substantial doubt on the legality of requiring reassignment as a reasonable accommodation under the ADA when reassignment impacts seniority. Nevertheless, reassignment should be, and is, a legitimate form of reasonable accommodation for disabled employees.

### 1. *A few courts permit reassignment*

First, some courts have held that the Rehabilitation Act requires an employer to consider reassignment when a disabled employee becomes unable to perform the essential functions of the job for which he was hired.<sup>155</sup> While the employees in

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liability, the employer must be willing to pay the additional costs of the fringe benefits that come with the seniority that newly hired workers usually do not receive. More important, the employer must also be prepared to cope with the deterioration in morale, labor unrest, and reduced productivity that may be engendered by inserting the claimant into the seniority ladder over the heads of the incumbents who have earned their places through their work on the job. In many cases, moreover, disruption of the existing seniority system will violate a collective-bargaining agreement, with all that such a violation entails for the employer's labor relations. Under the rule adopted by the court below, the employer must be willing to accept all these additional costs if he hopes to toll his backpay liability by offering the job to the claimant. As a result, the employer will be less, rather than more, likely to hire the claimant.

*Id.* at 229.

153. See *supra* note 134.

154. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977); see also *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 613 (1st Cir. 1987) (holding that the question of how to order seniority in a new bargaining unit created by the consolidation of two preexisting units was a matter for the bargaining table); *Schick v. NLRB*, 409 F.2d 395, 398 (7th Cir. 1969) (stating that seniority is "valid subject matter for the collective bargaining process"); *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385, 388 (4th Cir. 1967) (stating that because seniority has a vital impact on "terms and conditions of employment" it is a mandatory subject of bargaining); *NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 979-80 (8th Cir. 1967) ("Seniority rights and layoff practices have been recognized by the courts as falling within the broad definition of 'terms and conditions of employment.'" (citation omitted)).

155. *Guice-Mills v. Derwinski*, 967 F.2d 794 (2d Cir. 1992) (holding that the offer of a staff nurse position to a disabled former head nurse was a permissible reasonable accommodation); *Coley v. Secretary of Army*, 689 F. Supp. 519 (D. Md. 1987) (holding that the Army had a duty to attempt reassignment of handicapped persons prior to termination, which entailed consideration of the variety of positions for which the employee was allegedly qualified); *Rhone v. United States Dept't of Army*, 665 F. Supp. 734, 744 (E.D. Mo. 1987) ("While agencies cannot be expected to search ad infinitum for a position that will correlate with a handicapped

these cases were not covered by collective bargaining agreements, that fact should not bar courts from requiring reassignment under the ADA; several of the cases rejecting reassignment in the collective bargaining context have done so because the Rehabilitation Act did not explicitly require reassignment.<sup>156</sup> Therefore, the door is open for future courts to interpret the ADA as requiring more than the Rehabilitation Act.

*2. Seniority and reassignment policies are mandatory subjects of bargaining*

Second, seniority provisions and reassignment policies are considered mandatory subjects of bargaining because they affect the "terms and conditions of employment."<sup>157</sup> Therefore, these provisions and policies will probably be modified in collective bargaining negotiations to reflect ADA policies. It should be noted that the ADA explicitly prohibits a covered entity from using collective bargaining agreements as an excuse to discriminate.<sup>158</sup>

*3. Reassignment is not mandatory*

Third, reassignment is not mandatory under the ADA; it is only one of several alternatives to be considered by an employer in determining the appropriate accommodation for a disabled employee. Not only did Congress place limitations on the scope of reassignment,<sup>159</sup> but it also recognized that reas-

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employee's remaining abilities and qualifications, . . . federal employers are bound to undertake a reasonable and competent attempt to retain such employees in a capacity in which they are qualified and capable of serving.").

156. Tate, *supra* note 132, at 833.

157. See *supra* notes 153-54 and accompanying text.

158. According to the Act, the term "discriminate" includes

participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of a covered entity, or an organization providing training and apprenticeship programs).

42 U.S.C. § 12112(b)(2) (Supp. II 1990) (emphasis added).

159. The House Education and Labor Report on the ADA stated:

Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee

signment should be considered only as a last resort.<sup>160</sup> As one author has noted, "when it would be possible to accommodate an employee by job restructuring or modifying the employee's work schedule, such avenues must be pursued before reassigning the employee to another position."<sup>161</sup>

#### 4. *The ADA recognizes federal labor policy*

Finally, the ADA's recognition of collective bargaining agreements as a factor to consider in determining what accommodations the ADA requires implies that substantial limits must be placed on reassignment. While employers cannot simply ignore the ADA and claim that they are absolutely barred from considering reassignment under the collective bargaining agreement, individuals suing under the ADA cannot hold to the other extreme and claim that reassignment is *always* mandatory where available. Nevertheless, reassignment should at least be considered. Both federal labor laws and the ADA have important roles to play in assuring that reassignment becomes a fair and reasonable option among accommodations that may be offered to disabled employees.

### VI. CONCLUSION

The passage of the Americans with Disabilities Act marks the dawning of a new era of civil rights. No longer forced to suffer in silence the harsh discrimination to which they have been subjected for decades, disabled Americans are now assured a permanent and important place in society, particularly in the workforce.

Yet exuberance over the ADA's passage should not be blind to the circumstances under which it will operate. Primarily a law to end a specific facet of employment discrimination, the ADA will necessarily interact with several other laws governing employment relationships in the United States. Specifically, the ADA will become an integral piece of established federal

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from being out of work and employer from losing a valuable worker . . . . The Committee . . . wishes to make clear the reassignment need only be to a vacant position—"bumping" another employee out of a position to create a vacancy is not required.

H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 345.

160. Cyr, *supra* note 98, at 1255.

161. *Id.* (citation omitted).

labor policy promoting collective bargaining and arbitration. Consequently, courts must interpret the ADA so as to not trample the legitimate rights of employees and employers working under valid collective bargaining agreements. Labor has come too far to be casually brushed aside in the interest of providing "reasonable accommodations"; the ADA might never have succeeded if labor had not laid the groundwork for learning how to restrain management from arbitrary decisions.<sup>162</sup>

At the same time, courts should recognize that the ADA is a law intended to grant disabled persons the maximum protection possible. While it does not override federal labor policy, at the same time it should not take a back seat. Discrimination against the disabled is a problem in the union setting just as it is elsewhere.

This comment suggests that the ADA and federal labor laws are in reality two sides of the same coin. Both are designed to promote the collective voice of employees; both provide mechanisms whereby individual employees can petition for redress. Finally, both have the capacity to be forceful tools in the fight to end discrimination against the disabled. As the ADA, the NLRA, and the RLA interact and work together to create a better employment atmosphere for the disabled, all Americans with disabilities can look to the future with hope and anticipation.

*David S. Doty*

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162. As John L. Lewis, founder of the Committee for Industrial Organization (CIO) said in a famous speech:

No tin hat brigade of goose-stepping vigilantes or bibble-babbling mob of blackguarding and corporation-paid scoundrels will prevent the onward march of labor, or divert its purpose to play its natural and rational part in the development of the economic, political, and social life of our nation.

Unionization, as opposed to communism, presupposes the relation of employment; it is based upon the wage system, and it recognizes fully and unreservedly the institution of private property and the right to investment profits. It is upon the fuller development of collective bargaining, the wider expansion of the labor movement, the increased influence of labor in our national councils, that the perpetuity of our democratic institutions must largely depend.

*Labor's John L. Lewis Defends His Union's Right to Strike*, in LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY, *supra* note 1, at 585.