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ARBITRATION, LABOR CONTRACTS, AND THE ADA: THE BENEFITS OF PRE-DISPUTE ARBITRATION AGREEMENTS AND AN UPDATE ON THE CONFLICT BETWEEN THE DUTY TO ACCOMMODATE AND SENIORITY RIGHTS

*Jan William Sturner**

I. INTRODUCTION

President Bush signed the Americans with Disabilities Act¹ (the ADA or the Act) into law on July 26, 1990, and the Act became effective two years later on July 26, 1992. Title I of the ADA, which is enforced by the Equal Employment Opportunity Commission (the EEOC), protects individuals with disabilities from employment discrimination.² To further the goal of eradicating disability bias in the workplace, the United States Congress (Congress) intended that alternative dispute resolution processes would be utilized, at least in part, to resolve employees' ADA claims. The monetary costs, time consumption, negative publicity, and procedural complexities and rigidity often associated with the court system suggest that more practical and flexible alternatives to traditional litigation, such as arbitration,³ are attractive

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1. See Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (1994)).

2. See 42 U.S.C. §§ 12111-12117 (1994).

3. See HENRY H. PERRITT, JR., AMERICANS WITH DISABILITIES ACT HANDBOOK § 9.22, at 404 (3d ed. 1997), for a definition of "arbitration" in a labor/employment context.

Arbitration is a private adjudicatory process that produces a binding decision. The power of an arbitrator derives from an arbitration agreement, which may be entered into for a class of potential disputes before they arise, as in a typical collective bargaining agreement, or in a postdispute agreement that, in effect, provides for settlement of the claim through arbitration. Arbitration awards are enforceable under the Uniform Arbitration Act, which has been enacted by 35 states, and under the United States Arbitration Act. Both acts require courts to defer to arbitration decisions and allow overturning (impeaching) an arbitration award only on limited grounds.

Id. Labor arbitration awards, which arise out of collective bargaining agreements, can be enforced and challenged under section 301 of the Labor Management Relations Act of 1947. See 29 U.S.C. § 185 (1994). In addition to arbitration's role in a labor (i.e., unionized) context, arbitration processes are also used extensively for resolving disputes arising out of commercial contracts and individual agreements.

possibilities for potential disputants.⁴

Moreover, in the union/employer grievance-arbitration context,⁵ where external laws are often a secondary consideration, or simply not contemplated at all within the terms of a collective bargaining agreement, the Act has begun to reshape the landscape. The mandates of the ADA have compelled labor arbitrators to scrutinize closely how and when the external law of the Act should interact with, supplement, or perhaps even supersede the "law of the shop" in the resolution of contractual disputes arising out of collective bargaining agreements.

Considering Congress's approval of voluntary alternative dispute resolution mechanisms as a means for enforcing the ADA's provisions, the legal community should continue to support the facilitation of mandatory and binding arbitral processes that are procedurally sound and achieve fair and just results in both unionized and non-unionized workplaces. Whether an ADA claim is brought in a unionized or non-unionized setting, pre-dispute arbitration agreements can conserve valuable public and private resources while also preserving working relationships that might otherwise deteriorate in the face of protracted litigation.

As a corollary to the virtues of pre-dispute arbitration agreements, private and public benefits can also be realized where, in a unionized context, labor arbitrators take it upon themselves to consider the external law of the ADA, if indicated, in analyzing contractual grievances. Of course, references to external law need only occur where a dispute implicates the ADA. However, even grievances involving purely contractual matters may raise issues related to employee disabilities. In this regard, arbitrators are at times presented with grievances that do not specifically reference the ADA, but indirectly involve disability discrimination issues nonetheless. For example, a grievance might require the interpretation of language in a labor contract which could ultimately adversely affect the conditions of employment for an employee or group of employees who have disabilities. The parties may pursue such a dispute purely as a contractual matter, without ever recognizing the ADA's provisions. On the other hand, the parties could be fully aware of the ADA's relevance to their dispute, yet the arbitration clause in their collective bargaining agreement may not cover such statutory matters. Or perhaps, the

4. See generally FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 7-9 (Martin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (discussing the advantages of arbitration as opposed to the court system).

5. Grievance arbitration is one of the two types of labor arbitration; it is the process by which an arbitrator resolves a dispute by interpreting or applying the provisions of a negotiated collective bargaining agreement between an employer and a union. See *id.* at 5-6. The other kind of labor arbitration is interest arbitration where the arbitrator considers the parties' individual positions and writes an actual agreement for them. See *id.* at 128.

parties may not even be interested in pursuing the claim on a statutory basis. In these situations, arbitrators must squarely confront not only their contractual duty to interpret the language of the labor agreement, but also their legal duty to follow congressional mandates under the ADA—even if the relevant ADA issues are not properly presented for review. Accordingly, arbitrators should attempt to apply the external law of the Act consistently and uniformly where it is relevant to contractual labor disputes, even where the Act's applicability may be peripheral.

Labor arbitrators should maintain a holistic view of their adjudicatory roles. Admittedly, they act as private umpires for parties to collective bargaining agreements, but they are also quasi-public gatekeepers not only for national labor relations policy, but also, at times, for state and federal employment laws. They must assume such roles notwithstanding the fact that, technically, they are most often called upon by employers and unions to construe the more narrow rights and obligations arising out of only the specific language of individual labor agreements. Where a dispute arising out of a collective bargaining agreement implicates statutes such as the ADA, an arbitrator's private contractual duties quickly evolve into a public responsibility to fashion an award that satisfies not only the law of the shop but, more importantly, the law of the land. A judicial policy of ensuring that arbitral awards comport with federal anti-discrimination statutes such as the ADA seems necessary and appropriate, particularly considering Supreme Court precedent that appears to have authorized arbitrators to incorporate outside laws into the analyses of their awards.⁶

In terms of recognizing the provisions of the ADA, arbitrators reviewing union grievances must be especially aware of an employer's duty under the Act to provide reasonable accommodations to disabled employees. Such cognizance by an arbitrator is particularly relevant where the duty to accommodate under the ADA may potentially conflict with a term in a collective bargaining agreement, such as a seniority clause. To ensure compliance with the Act, and to foster sound public policy, reviewing courts

6. See generally *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (ruling that an arbitrator's consideration of external law is appropriate and observing that an arbitrator "may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement"). Cf. *Alexander v. Gardner-Denver Co.* 415 U.S. 36, 53 (1974) ("The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the partie[s]."). Many subsequent cases have cited *Enterprise Wheel* for the proposition that an arbitrator is entitled to apply external sources of law, at least in part, when interpreting the terms of a collective bargaining agreement. See, e.g., *National Gypsum Co. v. Oil, Chemical and Atomic Workers Int'l Union*, 147 F.3d 399, 404 (5th Cir. 1998) ("The arbitrator's decision in this case drew its essence from the agreement, and the arbitrator properly 'looked to the law for help in determining the sense of the agreement.'").

should not hesitate to overturn arbitration awards that are repugnant to the mandates of the ADA. In fact, where the ADA is clearly implicated, and when petitioned to do so, courts should consider vacating or remanding any award that results in a violation of the ADA, demonstrates a manifest disregard for the ADA's provisions, or otherwise jeopardizes the important social policies espoused under the ADA.⁷

ADA claims are ripe for arbitral decisionmaking because they are often factually dense, communication/negotiation-intensive, and all parties involved are usually best served by an expedient resolution. This is particularly true where the ADA's duty to accommodate is the focus of the dispute. A thorough and streamlined private arbitration process, as opposed to litigation, is an ideal method for resolving disability disputes in either union or non-union workplaces. This proposition is supported by the text of the ADA and other federal laws, the legislative history of the ADA and the Civil Rights Act of 1991,⁸ and the prevalence of disability bias in employment, as demonstrated by the increasing number of claims brought under the Act.

II. THE ADA AND ARBITRATION

A. The Text of the ADA and Other Federal Laws

Section 513 of the ADA,⁹ entitled "Alternative Means of Dispute Resolution," clearly sets forth Congress's view of the role of arbitration in resolving disputes under the Act. Section 513 provides: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act."¹⁰ The Civil Rights Act of 1991, which, in part, amended the ADA,¹¹ contains an almost identical provision in Section 118 encouraging the use of alternative dispute resolution: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute

7. See *infra* notes 213-14 and accompanying text which explain that federal courts can overturn arbitration awards in instances where an award is contrary to "some explicit public policy" or where an award is in "manifest disregard of the law."

8. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in various sections of U.S.C.).

9. See 42 U.S.C. § 12212 (1994).

10. *Id.*

11. See Pub. L. No. 102-166, §§ 102, 109, 105 Stat. 1071, 1072, 1077-78 (1991) (amending the ADA by allowing for the recovery of compensatory and punitive damages for acts of intentional disability discrimination, and by applying the Act's requirements to domestic employers with employees working in foreign countries).

resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by [this Act]."¹²

Several other federal laws also tend to support a national policy of utilizing arbitral processes to resolve civil rights and labor issues. These are: (1) the Federal Arbitration Act¹³ (the FAA), which was originally passed in 1925; (2) section 203(d) of the Taft-Hartley Act (the Labor Management Relations Act),¹⁴ which states: "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement[;]"¹⁵ (3) Executive Order 11246, OFCCP Revised Order Number 4,¹⁶ (when coupled with the foregoing language from the Taft-Hartley Act) which requires federal contractors to "[i]nclude nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory;"¹⁷ (4) the Judicial Improvements and Access to Justice Act,¹⁸ which implements experimental court-annexed arbitration and provides for mandatory arbitration of civil claims where the damages sought are less than \$100,000;¹⁹ and (5) the Administrative Dispute Resolution Act,²⁰ which directs agencies to encourage the use of alternative dispute resolution in administrative programs.²¹

12. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991).

13. 9 U.S.C. §§ 1-16 (1994).

14. 29 U.S.C. §§ 141-187 (1994).

15. 29 U.S.C. § 173(d) (1994).

16. 4 C.F.R. § 60-2.21(7) (1996).

17. *Id.* This Executive Order applying to federal contractors, when considered in concert with section 203(d) of the Taft-Hartley Act, implies the existence of a federal policy favoring and perhaps requiring arbitration of discrimination claims arising in a unionized context. See generally Stephen W. Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age and ADA Claims*, 37 ST. LOUIS U. L.J. 985, 985-87 & n.1 (1993).

18. 28 U.S.C. §§ 651-658 (1994).

19. See *id.* This provision allows any of the ten judicial districts covered by the program to adopt a local rule for submission of cases worth \$100,000 or less to non-binding arbitration. The districts involved are: Northern District of California; Middle District of Florida; Western District of Michigan; Western District of Missouri; District of New Jersey; Eastern District of New York; Middle District of North Carolina; Western District of Oklahoma; Eastern District of Pennsylvania; and Western District of Texas. See generally Skrainka, *supra* note 17, at 985-87 & nn.1 & 5, for a discussion of how the various laws noted above reflect the federal government's positive view of arbitration as it relates to resolving civil rights claims.

20. 5 U.S.C. § 571 *et seq.* (1994).

21. See *id.*

B. Legislative History of the ADA and the Civil Rights Act of 1991

Statements from members of Congress concerning the enactment of the ADA and the use of arbitration are further illustrative of a policy of supplementing traditional litigation with alternative measures for resolving disputes. United States Representative Dan Glickman (D-Kan), the author of Section 513 of the ADA, explained: "This provision should serve as a reminder that rights and litigation are not one in the same. There are better ways to achieve the goals of the ADA than litigation and we should encourage cooperation in achieving those goals, not confrontation."²²

The Conference Report on the ADA, however, also reflects an intent on the part of Congress to restrict the impact of Section 513. The report states: "It is the intent of the conferees that the use of alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA."²³ The conferees also adopted, by reference, a statement from the House Judiciary Committee explaining its position on alternative dispute resolution and the ADA:

This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law. . . . The Conferees emphasize that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by [this Act]. Thus, for example, the Conferees believe that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act.²⁴

Indeed, the above language does propose limitations on agreements to arbitrate. Yet, notwithstanding these limitations, other congressional statements clearly frame the ADA and the Civil Rights Act of 1991 as a body of law encouraging conservation of judicial resources.²⁵ For instance, United States Senator Robert Dole (R-Kan) and Representative Henry Hyde (R-Ill) advocated a more hands-off approach for private agreements to arbitrate

22. 136 Cong. Rec. H2421 (daily ed. May 17, 1990).

23. H.R. REP. NO. 101-596 (1990), *reprinted in* 136 Cong. Rec. H4582, 4606 (daily ed. July 12, 1990) (Joint Explanatory Statement of The Committee of Conference).

24. H.R. REP. NO. 101-485, pt. 3, at 76-77 (1990).

25. *See generally* 136 Cong. Rec. H2599 (1990) (remarks of Rep. Glickman) (explaining that the ADA "establishes an important principle that we ought to try to avoid litigation . . . if possible, and that encouraging dispute resolution between the parties is a positive ide[a]").

employment disputes, as is reflected in an interpretive statement placed on the legislative record for the Civil Rights Act of 1991:²⁶

This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods. In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums.²⁷

Strengthening the sentiment of Senator Dole and Representative Hyde were the comments of President Bush, who, at the signing ceremony for the Civil Rights Act of 1991, adopted the above statement and noted that it would be treated as authoritative interpretive guidance.²⁸ President Bush explained:

[S]ection 118 of the Act encourages voluntary agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration. This provision is among the most valuable in the Act because of the important contribution that voluntary private arrangements can make in the effort to conserve the scarce resources of the Federal judiciary for those matters as to which no alternative forum would be possible or appropriate.²⁹

Thus, although Congress may not have intended that all arbitration agreements would necessarily preclude ADA claims, the legislative history of the ADA and the Civil Rights Act of 1991, at a minimum, encourages the use of mutual efforts to engage in binding arbitration. Congressional intent appears to reflect at least the potential for sanctioning the preclusive effect of voluntary binding arbitration on subsequent court actions. In this regard, precluding court claims is a particularly viable prospect where plaintiffs have expressly and voluntarily waived their right to assert a cause of action in a traditional judicial forum.³⁰

26. See generally *supra* note 11. As has been noted, the Civil Rights Act of 1991, in part, amended the ADA.

27. 137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole); *id.* at H9548 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde).

28. See E. PATRICK MCDERMOTT AND ARTHUR ELIOT BERKELEY, *ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE* 13-14 (1996).

29. Statement of President George Bush upon signing S. 1745, *reprinted in* 1991 U.S.C.C.A.N. 768, 769.

30. See, e.g., *Block v. Art Iron, Inc.*, 866 F. Supp. 380, 386 (N.D. Ind. 1994) (holding that the plaintiff's ADA claim is not subject to a collective bargaining agreement's arbitration clause, and plaintiff is not prohibited from pursuing the claim in court because "the ADA's legislative history very strongly suggests that ADA claims may not be arbitrated in the absence of an express, voluntary waiver of the right to assert the claim in the courts.").

The text and legislative history of the ADA, coupled with the existence of other supporting federal laws, have laid the foundation for employers and employees to enter into agreements to resolve ADA claims through a mandatory, exclusive and binding arbitral process. The increasing number of disability-related claims suggests that such agreements can not only help to relieve crowded court dockets, but also serve the needs of disputants by simplifying the resolution procedure and hastening an ultimate determination on the merits. A faster, less expensive, and more flexible and confidential process can provide adversaries, who often must maintain ongoing employment relationships, with a more effective means to achieve a fair and final outcome.

III. THE INCREASE IN DISABILITY CLAIMS AND THE BENEFITS OF ARBITRATING DISPUTES BROUGHT UNDER THE ADA

A. ADA Claims on the Rise

As President Bush inferred in his Presidential Statement, upon signing the Civil Rights Act of 1991 into law, the process of arbitrating ADA claims is undoubtedly an "important contribution . . . in the effort to conserve the scarce resources of the Federal judiciary."³¹ Clearly, if the judiciary's resources were scarce in the early 1990s, the increase in employment-related litigation over the past decade has only exacerbated an already difficult situation. Growing numbers of lawsuits threaten not only public resources, but also private industry where employers are increasingly bombarded with both meritorious and, unfortunately, oftentimes frivolous claims.³²

31. See *supra* note 29.

32. See *Witnesses Debate Effects of ADA At Civil Rights Commission Hearing*, 67 U.S.L.W., *Legal News*, (BNA), No.19 at 2294 (November 24, 1998). On November 12, 1998, witnesses testified before the U.S. Commission on Civil Rights and explained that "[t]he multiple complexities of the Americans with Disabilities Act have resulted in scores of spurious lawsuits whose costs are ultimately borne by employers . . ." *Id.* Further testimony also revealed that "while employers win most lawsuits that charge ADA violations, it costs them about \$150,000 to win each case[.]" *Id.* Moreover, Anne Reesman, general counsel for the Equal Employment Advisory Council noted that "the ADA differs from other civil rights laws in that 'there is no cookie-cutter approach' for determining who is protected under the statute. As a result, the ADA becomes a 'shield' for nonproductive employees to sue their employe[r]." *Id.* (stating further that the "reasonable accommodation" prong of the ADA is a "floating target" for lawsuits); see also Stephanie Armour, *Disabilities Act Abused? Law's Use Sparks Debate*, USA TODAY, September 25, 1998, at B1 ("Passed in 1990 to widespread praise, the Americans with Disabilities Act (ADA) now is being targeted by critics who say it has led to too many spurious claims."). "What has happened is that many, many employees believe—sometimes wrongly—that they're covered [by the Act]. It's being misused. It's used as a club against employers." *Id.* (citing Jefferey Sheldon, a Washington, D.C. lawyer specializing in labor).

Public opinion polls reflect our society's growing litigiousness, especially in the employment context. In a 1990 survey by the *National Law Journal*, sixty-two percent of respondents indicated that they would be more willing to bring legal action on account of employment discrimination than they would have five years previously.³³ In addition, one-quarter of the respondents stated they had personally experienced job bias.³⁴ The same poll revealed that seventy-eight percent of American adults believe some, most, or all employers discriminate to some degree when hiring or promoting employees.³⁵

Further statistical evidence also supports the conclusion that employment litigation continues to rise. Approximately one year following the ADA's effective date of July 26, 1992, a survey of activity among federal district courts revealed that civil filings had increased to 228,162 with a twenty-five percent increase from the previous year in employment-related claims.³⁶ These figures have continued to soar as more federal and state anti-discrimination legislation has been enacted, and courts have continued to develop, redefine and broaden existing legislation. In fact, employment-related claims commenced in federal district courts have risen from an annual total of 13,650 in 1993, to 24,174 in 1997.³⁷ Moreover, the number of ADA claims filed with the EEOC has reportedly risen from an annual total of 15,099 in all of 1993, to 18,045 as of only September 30, of the 1997 calendar year.³⁸ In addition, according to these partial annual statistics for 1997, disability claims accounted for 22.4% of all charges filed with the EEOC, which include claims based on race, sex, national origin, religion, retaliation, age and the Equal Pay Act.³⁹

33. See Randall Samborn, *Many Americans Find Bias at Work*, NAT'L L.J., July 16, 1990 at 1.

34. See *id.*

35. See *id.*

36. See *Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics 2-3* (1993).

37. See *Statistical Tables for the Federal Judiciary, Table C-2A, U.S. District Courts Civil Cases Commenced, by Nature of Suit During the 12 Month Periods Ended Dec. 31, 1993 through 1997* (Jan. 30, 1998) (provided by Gwendolyn W. Coleman, on March 18, 1998, from the Administrative Office of the United States Courts, Statistics Division, Washington D.C.).

38. See *Equal Employment Opportunity Commission, Americans with Disabilities Act of 1990 - Statistics, FY 1992 - through - FY 1997* (1998) (provided by David Grinberg, on March 18, 1998, from the Office of Communications and Legislative Affairs at the EEOC headquarters in Washington, D.C.); see also Armour, *supra* note 32, at 2B. "More than 90,800 charges under the ADA were filed between July 1992 and September 1997 with the EEOC. The claim most often cited was back impairment, followed by emotional/psychiatric impairments. Nearly 3,000 cases were for substance abuse; more than half the charges involved claims of wrongful discharge." Armour, *supra* note 32, at 2B.

39. See *Charge Statistics from the U.S. Equal Employment Opportunity Commission, FY*

Observers point to a number of factors as possible causes for the litigation boom. These include: (1) increasing unemployment;⁴⁰ (2) the demographic expansion in the legally protected applicant pool and work force (e.g., greater numbers of females entering the work force, an older work force, and increasing minority participation);⁴¹ (3) “a possible cohort effect wherein younger females and minorities refuse to tolerate discriminatory treatment experienced by their predecessors and have a readily accessible white male coworker against whom they can compare their treatment in the labor market;”⁴² (4) more aggressive enforcement of federal anti-discrimination laws by government agencies;⁴³ (5) modern legislation broadening the scope of protected classes of workers and increasing the economic rewards for prevailing plaintiffs;⁴⁴ (6) more aggressive pursuit of litigation by lawyers;⁴⁵ (7) greater litigiousness on the part of employees on account of declining employee loyalty as well as lesser employer loyalty toward workers;⁴⁶ (8) nuances in legal theories facilitating more meritorious causes of action (e.g., reverse discrimination under Title VII of the Civil Rights Act of 1964 and the extension of 42 U.S.C. § 1981 [of the Civil Rights Act of 1866] to employment contracts);⁴⁷ and (9) “clumsy downsizing by many employers with resultant exposure to employment law litigation, compounded by the decline of promotional opportunities and economic security among those employees remaining after the downsizing.”⁴⁸

More voluntary agreements to submit ADA suits to binding arbitration would greatly assist in curbing the flood of disability-related claims brought to the EEOC and to the court system. Private arbitration clearly benefits not only the overwhelmed governmental entities charged with the ADA’s enforcement but also offers participants a variety of benefits not available to the traditional court litigant.

1991 through FY 1997, (provided by David Grinberg on March 18, 1998 from the Office of Communications and Legislative Affairs at the Equal Employment Opportunity Commission Headquarters in Washington, D.C.).

40. See MCDERMOTT & BERKELEY, *supra* note 28, at 24.

41. See MCDERMOTT & BERKELEY, *supra* note 28, at 24.

42. See MCDERMOTT & BERKELEY, *supra* note 28, at 24 (citing Peter Kuhn, *Sex Discrimination in Labor Markets: The Role of Statistical Evidence*, 77 AM. ECON. REV. 567, 579 (1987)).

43. See MCDERMOTT & BERKELEY, *supra* note 28, at 24.

44. See MCDERMOTT & BERKELEY, *supra* note 28, at 24.

45. See MCDERMOTT & BERKELEY, *supra* note 28, at 24.

46. See MCDERMOTT & BERKELEY, *supra* note 28, at 24.

47. See MCDERMOTT & BERKELEY, *supra* note 28, at 24.

48. MCDERMOTT & BERKELEY, *supra* note 28, at 24.

B. The Benefits of Using Arbitration as an Alternative

As a preliminary matter, arbitration is designed to be less expensive than the courtroom process, primarily because discovery is often significantly limited.⁴⁹ Arbitration is also less time-consuming than a formal lawsuit and yields a more rapid outcome.⁵⁰ The brevity of the process allows the parties to consider more settlement options as well, since reinstatement and outplacement may still be possibilities in the early stages of a dispute.⁵¹ Furthermore, considering arbitration is a private adjudicatory scheme, the flexibility of the process is a primary advantage over the more rigid court system both in terms of procedure and remedies. The vagaries and unpredictability of jury verdicts are also avoided where arbitration is utilized, and a skilled arbitrator or panel of arbitrators is called upon to render a decision. Indeed, arbitrators trained in the field of employment laws and labor relations are far better equipped to make sound determinations of fact and law than a juror who has little or no equivalent training.⁵² In this regard, comprehending the detailed and factually-dependent provisions of the ADA can be especially difficult for jurors. Jury decisions in ADA claims are arguably more susceptible to legal error than the analysis of a qualified arbitrator. As one observer has indicated: "The ADA is a complex piece of legislation and it can be considered advisable under the appropriate fact pattern that it be interpreted by those familiar with the field of labor relations. Juries, by contrast, tend not to appreciate the legal principles involved."⁵³ A further benefit of arbitration is that it "offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts."⁵⁴ Finally, the arbitration process can be confidential,

49. See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 7 (5th ed. 1997).

50. See *id.* at 13.

51. See *id.*; Loren K. Allison & Eric H.J. Stahlhut, *Arbitration and the ADA: Do the Two Make Strange Bedfellows?*, 37 RES GESTAE 168, 171 (1993) (explaining the benefits and drawbacks of arbitration and noting that in 1977, the Federal Mediation and Conciliation Service reported that it had resolved hundreds of cases between employers and individual employees through arbitration in an average per-case time of 268 days).

52. See ELKOURI & ELKOURI, *supra* note 49, at 8; Allison & Stahlhut, *supra* note 51, at 171 & n.28 (noting that because of their experience, arbitrators "are better able to understand the dynamics of the workplace and what behavior does and does not constitute 'discrimination'" (citing *United States Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 580 (1960) for the proposition that "the Supreme Court has admitted that arbitrators are better decision-makers in the area of labor disputes.").

53. Allison & Stahlhut, *supra* note 51, at 171.

54. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997).

unlike a trial that can expose an employer to negative publicity as well as place an employee in an undesirable spotlight. Arbitration allows resolution and perhaps settlement in a private, internal setting which may foster more cooperative attitudes. This can be immensely beneficial where the employer and employee contemplate the possibility of an ongoing working relationship during and following the arbitration process.

Although private arbitration processes can be criticized as contrary to the traditional legal tenet of *stare decisis* and the need for public awareness of judicial decisions and interpretations of the ADA,⁵⁵ such arguments appear to have limited validity. Arguably, every case brought under the ADA, particularly "reasonable accommodation" claims,⁵⁶ must be decided on their own merits because of the individual nature of an employee's disability and the specific circumstances of each employer's workplace conditions. The facts of each case are often so unique, especially where a reasonable accommodation is sought, that a decision in one instance would likely never suffice as the sole precedent to determine the outcome of another. In this sense, proper application of the Act's interpretive guidelines to the facts in question can be equally if not more important than reliance upon previous decisional law.⁵⁷

Moreover, although arbitration may not yield a judicial opinion for public review, the confidential arbitral process may in fact produce a more practical and beneficial result for a disabled employee whose most immediate concern is often that of returning to work without being subjected to hostility or other animosity from his or her employer or coworkers. Indeed, Congress enacted the ADA "to establish a clear and comprehensive prohibition of discrimination on the basis of disability," and to assimilate qualified individuals with disabilities into the social and economic mainstream of American life.⁵⁸ It

55. See, e.g., *id.*, at 1476-77 (stating that "[t]he fundamental distinction between contractual rights, which are created, defined, and subject to modification by the same private parties participating in the arbitration, and statutory rights, which are created, defined, and subject to modification only by Congress and the courts, suggests the need for a public, rather than private, mechanism of enforcement for statutory rights[.]" and also explaining that "[j]udicial decisions create binding precedent that prevents a recurrence of statutory violations; it is not clear that arbitral decisions have any such preventive effect").

56. See *infra* notes 60-68 and accompanying text for an explanation of an employer's duty of "reasonable accommodation" under the ADA.

57. See generally *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997) ("Most employment discrimination claims are entirely factual in nature and involve well-settled legal principles In fact, one study done in the 1980s found that discrimination cases involve factual claims approximately 84% of the time.").

58. See H.R. REP. NO. 101-485(I), (1990), *reprinted in* 1990 U.S.C.C.A.N. 303. Notably, "[i]nitial signs suggest that the [ADA] has made some difference. The most recent data from the U.S. Census Bureau show there were an additional 800,000 severely disabled people working in 1994 than in 1991, a 27% jump." Armour, *supra* note 32, at B1. Although the

follows that the privacy of arbitration, although seemingly counterintuitive to the concept of public awareness and *stare decisis*, may do more to foster the intended purposes of the Act than would the publicity of the traditional judicial process. Simply put, arbitration, as opposed to a trial, can offer employees with disabilities an opportunity to return to work more often, more quickly, and more amicably.⁵⁹

numbers are improving, the changes are occurring slowly as evidenced by the Census study's further finding that "[j]ust more than half of the roughly 29 million working-age people with disabilities were employed in 1994[.]" Armour, *supra* note 32, at B1.

However, observers have recognized that sociological issues create difficulties in attempting to gauge how effective the Act has been in assimilating the disabled community into the workforce. For example, at a recent hearing before the U.S. Commission on Civil Rights, held November 12, 1998, the commission received testimony explaining that:

. . . [T]hrough the mid-1990s, the employment rate for disabled people decreased while the number of people receiving Social Security disability benefits increased.

But the correlation has "nothing to do with the ADA," Rather, the employment rate for people with disabilities is most closely related to the economy. Today's Social Security disability benefits rolls reflect the recession earlier in the decade

. . . [C]hanges in Social Security regulations and a weak economy in the early 1990s caused an increase in the number of people applying for benefits. Because there are no partial or time-limited benefits from SSA, people who get on those rolls "stay there for some time,"

The monetary aspects of Social Security rarely act as incentives for people to seek benefits Rather, the eligibility for Medicare and Medicaid that comes with becoming a Social Security benefit recipient is the major factor that drives people to apply for benefits.

Witnesses Debate Effects of ADA at Civil Rights Commission Hearing, 67 U.S.L.W. 2294, 2294-95 (1998) (quoting John Bound, of the Population Studies Center, and Ken Nibali, associate commissioner for programs and policy in the Social Security Administration's Office of Disability).

59. See generally LABOR AND EMPLOYMENT ARBITRATION § 23.03[9][a], at 23-29 (Tim Bornstein et al. eds., 1997). As the following passage indicates, the prospect of reemployment is crucial to workers with disabilities:

Some arbitrators requiring accommodation have been moved by the serious difficulties that the physically or mentally disabled worker would confront in seeking employment. They have been concerned that a worker dismissed for a disability will face the prospect of long-term, if not permanent, unemployment. This concern is very real. One study has shown that two-thirds of all disabled employees who are not reemployed by their employers could not achieve gainful employment in the succeeding five years. Conversely, if rehired by the original firm, the employee was found to be "assured of relative success in future labor market [sic]."

Id. (internal footnotes omitted) (citing, for one, a study contained in A.J. Jaffee et al., *Disabled Workers in the Labor Market*, 73, 75-76 (1964)).

A recent newspaper article reported on the current state of affairs for disabled employees and job applicants in the workforce. See *Employees with Disabilities More Visible in Workforce*, DALLAS MORNING NEWS, Sept. 7, 1998, at 2D. The article explained: "While at least two-thirds of the 15 million Americans with severe disabilities remain idle – even while surveys show most want to work – those with jobs are proving their versatility and becoming

Thus, the argument that the arbitral process is flawed because of minimal public disclosure appears to overestimate the possible negative impact of arbitration on future ADA claims. It also underestimates the ability of present and future plaintiffs to attain justice through private arbitration regardless of whether the parties fail to establish binding legal precedent in the process. Furthermore, the element of privacy is unquestionably a fundamental benefit of using the arbitration system if for no other reason than the presence of a confidential environment where plaintiffs with legitimate claims can come forward where they otherwise might not due to a fear of reprisals. In sum, the private arbitral process provides employers and employees with a chance to resolve their differences in a setting that will not expose either of them to an unwanted public eye. This benefit does not differ greatly from the advantages of a confidential settlement agreement in a traditional litigation context.

The benefits of arbitration are perhaps even more pronounced when considered in the light of an employer's duty to provide a reasonable accommodation to employees with disabilities. The efficiency of arbitration allows both the employer and employee to reach a quick and relatively painless solution to the oftentimes complex and amorphous accommodation issue. The brevity and intimacy of the process can effectively put the employee back to work and the employer's business back in motion before substantial damage is done to the working relationship.

C. Resolving the Reasonable Accommodation Issue Through Arbitration

The ADA is a unique piece of civil rights legislation. Its provisions not only prohibit disability discrimination but also require active participation on the part of an employer in assimilating individuals with disabilities into the workforce. In this regard, an employer is required to make "reasonable

more visible than ever in the nation's workplaces." However, "[p]eople who are learning-impaired just like those who are blind or use wheelchairs, lag far down the disability ranks in their ability to find jobs" primarily because of "misinformation, fear and ignorance." The article also reported that Frank Bowe, a professor of special education at Hofstra University, who is deaf himself, asserted that other hurdles, aside from discrimination, also exist: "Many people with disabilities have low levels of education, cannot find jobs that pay better than welfare or cannot afford to live near jobs they're offered." Professor Bowe nonetheless noted that "[g]reat things are happening which are very encouraging to break down stereotypes, but for the large number of people with a disability, it's slow slogging, slower that [sic] anyone would like it to be." Referencing the Civil Rights Act of 1964's "uphill drive against racial discrimination" Professor Bowe surmised that "another decade or two might slip by before the far reaching Americans with Disabilities Act of 1990 can make a real difference." The article concluded by citing more positive statistics: "There are heartening trends. Education rates are rising: 75 percent of people with disabilities finished high school in 1994, up from 60 percent in 1986, and college enrollment jumped from 29 percent to 44 percent." *Id.*

accommodations to the known physical or mental limitations” of otherwise qualified applicants or employees to enable such individuals to perform their jobs.⁶⁰

The reasonable accommodation prong of the ADA represents the basis for a large percentage of all claims brought under the Act. In fact, from July 26, 1992, the effective date of the ADA, until September 30, 1997, the EEOC received a total of 26,302 charges from claimants alleging failures by employers to provide a reasonable accommodation.⁶¹ This number represents 29.0% of the 90,803 total ADA charges received during the reporting period, which included categories of disability claims involving discharge (52.3%), harassment (12.6%), hiring (9.4%), discipline (8.0%), layoff (4.5%), promotion (3.9%), benefits (3.8%), wages (3.5%), rehire (3.3%), and suspension (2.3%).⁶² As these statistics indicate, the only more frequently cited violation was “discharge,” which accounted for 47,510 charges or 52.3% of the total number of violations.⁶³

The ADA’s mandate to provide a reasonable accommodation to qualified individuals with disabilities, in a sense, places an affirmative duty upon employers to engage in “non-discrimination.”⁶⁴ Reasonable accommodations may involve changes in both the work site and general working conditions. Examples are physical alterations to improve accessibility, restructuring or reassigning of tasks, or modifications of work schedules.⁶⁵ An employer is not required to provide an accommodation, however, if an employee fails to inform the employer of his or her need,⁶⁶ or if the proposed accommodation would impose an “undue hardship” on the employer’s business.⁶⁷

60. See 42 U.S.C. § 12112(b)(5)(A) (1994); see also 29 C.F.R. §§ 1630.2(o), 1630.9, and Appendices (1996); see generally James W. Bucking, *Beyond the ADA: Protection of Employees with Drug and Alcohol Problems in Arbitration*, 11 LAB. LAW. 1, 3 (1995) (“One of the things that sets the ADA apart from other civil rights legislation is the specific statutory requirement, not only forbidding discrimination against disabled employees, but also requiring employers to make reasonable accommodations to allow an otherwise qualified individual with a disability to perform the job.”).

61. See *Equal Employment Opportunity Commission, Cumulative ADA Charge Data for the July 26, 1992 – September 30, 1997 Reporting Period*, (1998) (provided by David Grinberg, on March 18, 1998, from the Office of Communications and Legislative Affairs at the EEOC headquarters in Washington, D.C.).

62. See *id.* The percentages of all types of claims add up to more than 100% because individual charges often alleged multiple violations. See *id.*

63. See *id.*

64. See 29 C.F.R. § 1630.9 (1996) (“The obligation to make reasonable accommodation is a form of non-discrimination.”).

65. See 42 U.S.C. § 12111(9) (1994).

66. See 29 C.F.R. § 1630.9 (1996) (“[I]t is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.”).

67. See 42 U.S.C. § 12111(9) (1994); 29 C.F.R. § 1630.2(p) (1996). Factors which are to be considered in the determination of an undue hardship are: (1) The cost and nature of the

The ADA's provisions prescribe a fact-intensive, "interactive process"⁶⁸ between the employer and employee to determine the exact nature of the accommodation required and whether the employer can actually provide what may be needed. This interactive process is best accomplished when an expedient result can be reached and the working relationship between the employer and employee can persevere notwithstanding the potential for conflict. Thus, claims asserting a failure by an employer to provide a reasonable accommodation appear to be particularly well-suited for resolution through a private arbitration process. As has been surmised by Garylee Cox, the Vice President for Governmental Relations of the American Arbitration Association since October 1994:

[Alternative Dispute Resolution] is very suitable for the Americans With Disabilities Act ("ADA") because of the "undue hardship" [and reasonable accommodation] clause. There are a number of factors that may impact the ADA. One example is biotechnology. Presently, we are on the threshold of some amazing breakthroughs, such as helping the blind by implanting an optic nerve and enabling them to see, light-weight prostheses that enable people who are almost crippled to participate in strenuous athletics, and cochlear implants that may make deafness a thing of the past. The same thing is happening in the workplace. Technological advancements such as voice-activated computers and employees connected to the Internet to interface with headquarters offices may enable more people to work at home. This is not just going to be a boon to the disabled, it will be a boon for people with small children or others in the work force who have special needs.

The delays in administrative remedies and litigation may cause a court decision to be obsolete by the time it is rendered. It is possible that in the five years it takes to litigate a reasonable accommodation claim or some other issue, technology will overtake it and make the final decision moot. . . .

We have to find . . . a quicker way for those protected to assert claims and get a remedy. If you are looking for employment, you cannot afford to wait in the wings for years. While awaiting litigation, the targets of discrimination continue to suffer, to lose promotional opportunities, and to experience escalating hostility in the workplace if the claim is found to be without merit. It is a very uncomfortable situation. Every time the litigant walks through the office, and I have seen it in my own office, people say,

accommodation sought; (2) the financial resources of the facility in question; (3) the financial resources of the entire entity; and (4) the type of operations involved. See 42 U.S.C. § 12111(10) (1994).

68. See 29 C.F.R. § 1603.3(o)(3) (1996).

“there’s the person asserting this silly claim.” For all parties, it’s better to resolve it quickly.⁶⁹

Scholars have also indicated that ADA claims could be dealt with most appropriately by using alternative dispute resolution to resolve difficult factual issues that lie at the heart of employer compliance:

As many observers have noted, this new law explores uncharted waters and will likely lead to many controversies and disputes as it becomes more clear over the next few years. For example, in considering an employee with a disability for a job or promotion, it is crucial that the candidate be able to perform the “essential functions” of the job. A job candidate must be “otherwise qualified” with or without accommodation of the disability by the employer. A job candidate is entitled to “reasonable accommodation” by an employer, as long as it does not cause an “undue hardship” on that employer. Certainly for both the employee and the employer, ADR procedures would appear to be necessary to avoid protracted and costly legal or administrative proceedings which will inevitably emanate from a new and somewhat vague law with society-wide coverage.⁷⁰

The arbitral process is suitable for many causes of action arising out of the ADA.⁷¹ The simplicity and privacy of arbitration can allow an employer

69. Garylee Cox, *The Appropriate Arena for ADA Disputes: Arbitration or Mediation?*, 10 ST. JOHN’S J. LEGAL COMMENT. 591, 591-93 (1995).

70. E. PATRICK McDERMOTT & ARTHUR ELIOT BERKELEY, *ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE* 14 (1996).

71. Although other alternative dispute resolution processes are beyond the scope of this paper, mediation could also serve as an effective mechanism for resolving ADA claims. Mediation has been defined by the American Arbitration Association as “intervention by an impartial third person with the purpose of helping the parties reach their own solution.” AMERICAN ARBITRATION ASSOCIATION, *A MODEL SEXUAL HARASSMENT CLAIM RESOLUTION PROCESS* 6 (1994). Thus, mediation differs from arbitration in that the latter usually involves a final and binding decision by a neutral third party, whereas a mediation process usually requires the third party to act only as a facilitator, and to allow the parties themselves to reach an agreement. A mediation agreement is enforceable under state contract law, whereas an arbitration award can be enforced either under federal labor laws, see 29 U.S.C. § 186 (1994) (section 301 of the National Labor Relations Act), if the award results from a labor arbitration process under a collective bargaining agreement, or under state or federal arbitration acts which provide for labor and commercial arbitration enforcement.

Notably, the American Arbitration Association has developed a model claim resolution process for sexual harassment in employment, whereby parties to a dispute first engage in mediation and, if unsuccessful, they can then submit the claim to binding arbitration. See AMERICAN ARBITRATION ASSOCIATION, *A MODEL SEXUAL HARASSMENT CLAIM RESOLUTION PROCESS* 6 (1994). This combination of mediation and arbitration (also known as “med/arb”) involves intensive investigation by a “Factfinding Team” which delivers a “Factfinding Report” to the respective parties. See *id.* Such a process could be successfully utilized for disability claims as well. To date, the American Arbitration Association has not issued a model “med/arb”

to conform its conduct to the mandates of the Act without the prospect of a long and grueling court battle and the potential for negative publicity. Arbitration can also protect the working relationship and provide the parties with an opportunity to fashion remedies that would not otherwise be available through the court system. Most important, however, is the fact that arbitration can be a far more efficient and effective means of uncovering the essential interests of both parties, and exploring the specific and detailed facts underlying those interests.

Yet, although the arbitration process can surely benefit parties to an ADA claim, the legal effect of pre-dispute arbitration agreements can be problematic. The enforceability of agreements to submit statutory claims to a mandatory and binding arbitration process, as an exclusive substitute for the traditional judicial forum, (i.e., having the effect of precluding any prior, simultaneous, or subsequent court claim raising the same statutory issues) has been a matter of considerable debate. The Supreme Court has considered this issue both in a collective bargaining context and in an individual contractual situation, and its decisions have at times led to contradictory results in lower courts.

On the whole, courts have upheld the enforceability of *individual* agreements to arbitrate statutory employment claims. In doing so, courts have generally required a showing of specific indicia of a clear, knowing, and

process for ADA claims as it has for disputes involving sexual harassment. Telephone Interview with Jocelyn Learned, Office of D. Breckenridge Grover, Regional Vice-President for the American Arbitration Association in Denver, Colorado (Mar. 9, 1998). However, draft standards for mediating ADA disputes have been developed by the ADA Mediation Standards Work Group, formed by members of the Society of Professionals in Dispute Resolution. The draft standards were released in September and are available on the Internet at <<http://www.mediate.com/articles/adaltr.cfm>> on the Mediation Information and Resource Center's Web site. The deadline for submission of comments on the draft was December 1, 1998.

Presumably, the use of mediation in lieu of, or in combination with arbitration, may provide parties to an ADA claim (particularly one involving a reasonable accommodation) with a greater chance for reconciliation and a continuing working relationship once relevant facts and respective interests are revealed in a less adversarial atmosphere. *See generally, Lawyers Offer Strategies for Mediating ADA Disputes, Proposing Accommodation*, 67 U.S.L.W. 2255, 2255-56 (1998). "Mediation can be conducted in a 'judicial format,' in which the mediator - often a retired judge - evaluates the case and the likely outcome in court based on previous experience In another format, known as 'process centered,' the mediator identifies the parties' interests and crafts an agreement with their involvement." *Id.* at 2256. "An advocate's goal in mediation is not to persuade the neutral party about the merits of the claim, but 'to help clients articulate their interests.'" *Id.* at 2255. In terms of the usefulness of mediation in resolving reasonable accommodation claims under the ADA, one observer noted that "[b]ecause some clients may have spurred their employer to 'unnecessary hostility' when they previously tried asking for an accommodation on their own, advocates [in the mediation process] can play a helpful role in smoothing things over." *Id.* at 2256.

voluntary waiver of statutory rights on the part of the employee. Of importance as well has been the existence of an arbitral forum that can provide a claimant with a full and fair opportunity to vindicate his or her statutory rights. However, where parties have sought to enforce analogous arbitration agreements in union-negotiated labor contracts, courts have not been similarly receptive.

Almost all federal courts that have considered this issue have recognized a substantial legal distinction between an individual employee's agreement to arbitrate statutory claims, and thereby waive his or her statutory right to a federal forum, and an arbitration clause in a collective bargaining agreement which similarly purports to waive individual statutory rights. As is evident, the effect of both types of agreements is the waiver of the right of individual employees to bring court claims for employment discrimination. Yet, the substantive difference between such agreements is that in the "individual" context, one employee is voluntarily waiving his or her rights; whereas in the "collective" context, a labor organization is waiving the rights of each employee, ostensibly for the good of the union as a whole in the collective bargaining process. Along these lines, most courts have recognized that equal employment opportunity rights are uniquely individual in nature and cannot be diluted by waivers arising out of majoritarian processes such as collective bargaining. Thus, federal courts of appeals, except for the Fourth Circuit, have ruled that a union cannot collectively waive the statutory rights of individual employees to bring employment discrimination suits in a federal court forum.

The leading decisions, which have specifically addressed whether a union's agreement to arbitrate ADA claims can effectively waive the right to a judicial forum for individual employees, have been handed down by the Fourth and Eleventh Circuits. Recently, the Supreme Court granted a petition for writ of certiorari to the Fourth Circuit in a case that presented the Court with the question of whether an agreement to arbitrate ADA claims, as contained in a collective bargaining agreement, is enforceable. Unfortunately, the Court did not provide substantial additional guidance on the issue of enforceability, but rather took the opportunity only to clarify the standard for waiving individual statutory rights in the collective bargaining process. Thus, the law of whether union agreements to arbitrate individual statutory claims are *enforceable* remains in a state of flux.

IV. THE ENFORCEABILITY OF ARBITRATION AGREEMENTS: CASE LAW

A. The Fourth Circuit: Union Agreements to Arbitrate ADA Claims Can Be Enforced

In *Austin v. Owens-Brockway Glass Container, Inc.*,⁷² the United States Court of Appeals for the Fourth Circuit held that a plaintiff who, through a collective bargaining agreement, voluntarily agreed to submit statutory disability claims to arbitration, was precluded from having her ADA claim against her employer heard in federal court because she had failed to utilize the internal grievance-arbitration process.⁷³ In developing its ruling, the *Austin* court relied heavily on legislative intent and the Supreme Court's landmark opinion in *Gilmer v. Interstate/Johnson Lane Corp.*⁷⁴ The *Gilmer* opinion held that a securities firm could enforce individual voluntary agreements with its brokers to arbitrate claims under the Age Discrimination in Employment Act (the ADEA), and thereby preclude the submission and resolution of such claims in a judicial forum.⁷⁵ The Fourth Circuit also bolstered its decision with policy considerations as set forth in several other Supreme Court opinions espousing the "well-recognized policy of federal labor law favoring arbitration of labor disputes."⁷⁶

72. 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996).

73. *See id.* at 885-86; *see also* *Brown v. ABF Freight Sys., Inc.*, 997 F. Supp. 714 (E.D. Va. 1998) (following *Austin* in holding that a plaintiff was required to arbitrate his ADA and analogous state disability claim where the collective bargaining agreement at issue contained a clear agreement to submit statutory discrimination claims to the arbitral forum). The Fourth Circuit, in *Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997), reaffirmed its adherence to *Austin*, yet found that the collective bargaining agreement in that case did not require submission of Title VII and Family and Medical Leave Act statutory claims to an arbitral forum. *See id.* at 342. The *Trans World Airlines* court clarified its position on agreements to arbitrate in a collective bargaining context by explaining that "[t]he question of whether a collective bargaining agreement submits statutory disputes to arbitration is a matter of contract law, and 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.* at 340 (citing *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986) (internal citation omitted)). Consequently, the Fourth Circuit appeared to establish a general rule in *Trans World Airlines*, incorporating the holding in *Austin*, to the effect that in order to compel mandatory arbitration of statutory claims, parties to a collective bargaining agreement "would not need to mention in their agreement that a statute was the source of a dispute committed to arbitration as long as it were made clear that their agreement is sufficiently broad to include the arbitration of such disputes." *Id.* at 341-42. The Fourth Circuit explained that the disputed arbitration clause in the instant collective bargaining agreement was much narrower in scope than the clause at issue in *Austin* and, as a result, did not evidence the requisite clarity in its language to require arbitral resolution of the statutory claims involved. *See id.* at 341.

74. 500 U.S. 20 (1991).

75. *See id.* at 26.

76. *Austin*, 78 F.3d at 879 (quoting *Adkins v. Times-World Corp.*, 771 F.2d 829, 831 (4th

The *Austin* decision strongly endorsed the *Gilmer* Court's recognition of the arbitration process as a means of resolving employment disputes that has come of age. In fact, the Fourth Circuit adopted several applicable portions of the *Gilmer* opinion to support its position regarding the legitimacy and effectiveness of the arbitral process:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. . . . [A]ttacks on the adequacy of arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes" [H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." . . . If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."⁷⁷

The Fourth Circuit, in *Austin*, also noted with approval that the *Gilmer* Court had dismissed various arguments that attempted to cast a negative light on the arbitral process. The arguments rejected by the Court included potential bias by arbitration panels, problems associated with limited discovery, lack of a written opinion leading to decreased public awareness of discriminatory conduct, ineffective appellate review and disproportionate bargaining power between employers and employees.⁷⁸ The Fourth Circuit explained that the *Gilmer* Court "refused to presume that arbitrators would be biased [and] explained that choosing arbitration means 'trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."⁷⁹ The *Austin* opinion also

Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986), and citing the "Steelworkers Trilogy": *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960)).

77. *Austin*, 78 F.3d at 880-82 (citing *Gilmer*, 500 U.S. at 26, 28, 30 (alterations in original) (internal citations omitted) and quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 637 (1985) and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).

78. *See id.* at 880.

79. *See id.* (citing *Gilmer*, 500 U.S. at 30-31 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628)).

surmised that although the *Gilmer* Court recognized that the appellate review process for arbitration awards was indeed limited, the Court asserted that it was nevertheless adequate to preserve compliance with statutory mandates.⁸⁰ Finally, the Fourth Circuit also favorably referenced the Supreme Court's determination that a "lack of class actions should [not] bar arbitration, because individual conciliation should not be barred; and . . . the claim of unequal bargaining power is one that should be decided in individual cases"⁸¹

The Fourth Circuit based much of its decision in *Austin* on the contractual language of the collective bargaining agreement at issue.⁸² The court found the language of the labor contract's terms to be sufficiently broad to demonstrate a clear intent by the parties to provide for mandatory, final, and binding arbitration as to each complaint involved in the case.⁸³ In summarizing its position, the *Austin* court opined:

Whether the dispute arises under a contract of employment growing out of [sic] securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of the opinion it should be enforced.⁸⁴

The language of the labor agreement, the text and legislative history of the ADA, and the Supreme Court's pronounced favor for the arbitration all provided the Fourth Circuit with the bases for its conclusion. Yet, the reasoning of the *Austin* decision did not survive long without challenge. Critics of the *Austin* opinion were quick to point out that the Fourth Circuit's reliance on *Gilmer* was indeed somewhat tenuous. *Gilmer* involved an employee who had voluntarily waived his right to a federal forum through an individual arbitration agreement. The *Austin* court, in contrast, involved a situation where a union, rather than an individual, had purported to waive the rights of its employee-members through a mandatory arbitration clause in a collective bargaining agreement.

Although the *Austin* court recognized the "individual" versus "collective" distinction, it accorded minimal significance to this apparent conflict. The Fourth Circuit neatly disposed of this problem by explaining that in the collective bargaining process, unions had always been allowed to bargain for and waive certain rights of their constituents, where such rights represented

80. See *id.* (citing *Gilmer*, 500 U.S. at 32 n.4).

81. *Id.* (citing *Gilmer*, 500 U.S. at 32-33).

82. See *id.*

83. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996).

84. *Id.* at 885.

terms and conditions of employment.⁸⁵ The *Austin* opinion went on to explain that “[t]here is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate.”⁸⁶ Instead, the bulk of the Fourth Circuit’s analysis focused on the seemingly unfaltering manner in which Congress and the Supreme Court had appeared to embrace the role of arbitration in labor relations in recent years. Federal courts of appeals outside of the Fourth Circuit, however, have assigned much greater legal significance to the distinction between individual and collective/union waivers of statutory rights.

B. The Eleventh Circuit: Union Agreements to Arbitrate ADA Claims Cannot Be Enforced Without Procedural Safeguards

In *Brisentine v. Stone & Webster Engineering Corp.*,⁸⁷ the Eleventh Circuit reached a different conclusion than did the Fourth Circuit in *Austin*. The Eleventh Circuit ruled that an employee covered by a collective bargaining agreement containing a mandatory arbitration clause, which arguably applied to statutory claims, nevertheless retained the right to bring an ADA suit in federal court.⁸⁸ The *Brisentine* court explained that in order for an agreement to arbitrate statutory claims to be enforceable, it must meet three requirements: (1) the individual employee, not the union, must agree to the clause at issue; (2) the agreement must authorize the arbitrator to resolve federal statutory claims; and (3) the employee must be given the option of pursuing arbitration of a federal statutory claim if the grievance process proves to be unsatisfactory.⁸⁹

The *Brisentine* decision relied on the Supreme Court’s opinion in *Alexander v. Gardner-Denver Co.*,⁹⁰ to support its outcome. In *Alexander*, a case decided seventeen years prior to *Gilmer*, the Supreme Court ruled that a mandatory arbitration clause in a collective bargaining agreement did not foreclose a plaintiff’s right to bring a Title VII race discrimination lawsuit.⁹¹ The *Alexander* Court explained that when Congress enacted Title VII, it

85. *See id.*

86. *Id.*

87. 117 F.3d 519 (11th Cir. 1997).

88. *See id.* at 526-27.

89. *See id.*

90. 415 U.S. 36 (1974).

91. *See id.* at 59-60. It should be noted that the Supreme Court has been quite clear in pointing out that the *Alexander* case did not present the Court with the issue of the enforceability of an agreement to submit statutory claims to arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991). Instead, *Alexander* addressed the distinct issue of whether arbitrating a contractual claim under a labor agreement precludes the judicial resolution of an analogous statutory claim. *See id.*

sought to provide individuals with a right to equal employment opportunities, and the judicial enforcement of the same, which could not be waived through the collective bargaining process.⁹² The Supreme Court opined:

In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.⁹³

The Court further asserted:

We are also unable to accept the proposition that petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.⁹⁴

Notably, unlike the *Brisentine* court, the Fourth Circuit in *Austin* expressly disavowed the notion that the *Alexander* opinion retained any current precedential value. It did so by highlighting the recent shift in federal policy toward favoring the arbitral process as a means of resolving workplace disputes. The Fourth Circuit illustrated its point by citing the more recent *Gilmer*⁹⁵ case in tandem with the legislative history of the ADA and the Civil Rights Act of 1991. The *Austin* court appeared to surmise that the aged and outdated analysis of *Alexander* had perhaps been implicitly overruled in

92. See *Alexander*, 415 U.S. at 51-52 (1974).

93. *Id.* at 49-50.

94. *Id.* at 51-52.

95. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Gilmer, and that Congress and the judiciary had provided a blanket approval of sorts for all voluntary arbitration agreements, whether individual or collective in nature. However, the *Gilmer* opinion never specifically overruled *Alexander*, nor purported to modify the *Alexander* analysis.⁹⁶ Critics nevertheless agree that *Gilmer* clearly weakened the rationale supporting the result in *Alexander*.

As indicated, the *Brisentine* court assigned great significance to the *Alexander* case, notwithstanding the jurisprudential conflict raised by the later *Gilmer* opinion. The Eleventh Circuit explained its dependence on the *Alexander* opinion on account of the two cases' factual similarities, as opposed to the *Gilmer* decision which was unlike *Brisentine* and *Alexander* in several respects.⁹⁷ The court first noted that the arbitrator in the instant case, as in *Alexander*, did not have the authority to resolve statutory claims under the collective bargaining agreement.⁹⁸ In contrast, the agreement in *Gilmer* did cover the arbitration of statutory as well as contractual claims.⁹⁹ Moreover, the court rationalized that, as in *Alexander*, the disparity in interests between the union and the individual employee weighed against enforcement of the arbitration clause as the exclusive means for resolving individual statutory claims.¹⁰⁰ In *Gilmer*, on the other hand, the Supreme Court was confronted not with a collective bargaining agreement, but with an individual contractual agreement to submit claims to arbitration.¹⁰¹ Finally, the Eleventh

96. The Supreme Court, in *Gilmer*, concluded that the *Alexander* case was in fact inapposite to its analysis. See *Gilmer*, 500 U.S. at 35 (1991). The Court explained:

There are several important distinctions between [*Alexander*] and the case before us. First [*Alexander*] did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, [it] involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employee[] there had not agreed to arbitrate [his or her] statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in [*Alexander*] understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in [*Alexander*] occurred in the context of a collective-bargaining agreement, the [employee was] represented by [his or her] union[] in the arbitration proceeding[]. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, [*Alexander was*] not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." *Mitsubishi*, 473 U.S. at 625. Therefore [*Alexander*] provide[s] no basis for refusing to enforce *Gilmer's* agreement to arbitrate his ADEA claim.

Id.

97. See *Brisentine*, 117 F.3d at 523-25.

98. See *id.* at 524.

99. See *id.*

100. See *id.* at 525.

101. See *id.*

Circuit noted that the claim in *Gilmer* implicated the Federal Arbitration Act (the FAA) whereas neither the *Alexander* case nor the case at bar were subject to the FAA because the arbitration clauses in the latter cases arose out of union/employer labor contracts.¹⁰²

The essence of the *Brisentine* decision is that a labor union, as a collective entity, cannot waive individual employees' rights to enforce statutory claims in federal court. However, the Eleventh Circuit did explain that it would likely enforce an individual employee's voluntary agreement to arbitrate statutory claims against his or her employer. In fact, the *Brisentine* opinion referred, with approval, to the *Gilmer* case in this regard which "explained that the concern about the conflict between collective representation and individual statutory rights that was present in *Alexander* is not present in the context of individual employment contracts."¹⁰³ It is quite clear,

102. See *id.* (noting that "[n]either this Court nor the Supreme Court has decided whether collective bargaining agreements are subject to the FAA" and explaining that other circuit courts have reached conflicting results—comparing *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 355 (7th Cir. 1997) (holding that the FAA is generally applicable to collective bargaining agreements, provided that workers covered by agreement are not engaged in transportation) with *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996) (noting that "in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements.")). The Fifth Circuit has also determined that a collective bargaining agreement is a contract of employment excluded from the application of the FAA. See *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81, 86 (5th Cir. 1956) *rev'd*, 353 U.S. 488 (1957) (holding that the FAA "does not authorize the judicial enforcement of a contractual undertaking to submit to arbitration grievances arising under a collective bargaining agreement"). The Ninth Circuit has held that the FAA is not applicable to labor or employment contracts of any kind. See *Craft v. Campbell Soup Co.*, 161 F.3d 1199, 1206 (9th Cir. 1998) (basing this conclusion on the language of the FAA, its legislative history, and applicable Supreme Court precedent).

Although the issue is beyond the scope of this paper, the reader should recognize that section 1 of the FAA excludes from the FAA's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). Some courts, as demonstrated above, have viewed this exclusion as including *all* employment contracts, whether individual or collective in nature, and whether or not they apply to the specific class of workers listed in the statute. Other courts have interpreted the FAA's language more literally and have applied the exclusion only to "workers actually involved in the 'flow' of commerce, *i.e.*, those workers responsible for the transportation and distribution of goods." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997). The *Cole* court explained: "[O]ur research indicates that every circuit to consider this issue squarely has found that section 1 of the FAA exempts only the employment contracts of workers actually engaged in the movement of goods in interstate commerce." *Id.* at 1471 (citations omitted).

103. *Brisentine*, 117 F.3d at 525 (citing *Gilmer*, 500 U.S. at 35). The Fifth Circuit, following *Gilmer*, has also upheld the enforceability and preclusive effect of individual arbitration agreements in securities registration applications in the context of ADEA and Title VII claims. See *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995). The Fifth Circuit has also extended the *Gilmer* analysis to arbitration clauses contained in individual employment contracts. See *Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 218 (5th

therefore, that under *Gilmer* and its progeny, individual voluntary agreements to arbitrate statutory claims can be enforced and can preclude a *de novo* judicial determination assuming the arbitral process affords employees an adequate opportunity to vindicate the full range of their federally-protected rights.¹⁰⁴

Cir. 1997); *Rojas v. Communications, Inc.*, 87 F.3d 745, 749 (5th Cir. 1996). In *Miller and Rojas*, the Fifth Circuit rejected the plaintiffs' arguments that their employment contracts were not covered by the FAA, and ruled that, under the FAA, the arbitration clauses at issue compelled the employees to submit their ADA and sexual harassment claims to the binding arbitral process. See *Miller*, 121 F.3d at 218; *Rojas*, 87 F.3d at 748-49.

Notably, the Ninth Circuit recently rejected the application of the *Gilmer* analysis in the context of a Title VII claim brought by an employee who had signed a Form U-4 securities representative's registration application (as had been done in the *Gilmer* case as well) containing a mandatory arbitration clause. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1189-90 (9th Cir. 1998) (explaining that although *Gilmer* held that an employee's ADEA claim was subject to an arbitration clause contained in the Form U-4, the legislative history of the Civil Rights Act of 1991, developed prior to the *Gilmer* decision, evidenced an intent by Congress to preclude compulsory arbitration of Title VII disputes); see also *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998), *aff'd* 163 F.3d 53 (1st Cir. 1998) (noting that the *Gilmer* analysis is inapplicable to Title VII cases, even where the Form U-4 has been signed, and is further inapplicable where the adequacy of the arbitral forum is in question—in this case the court found "structural biases" in the arbitration process used by the New York Stock Exchange). But see *Sues v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998), *cert. denied* 67 U.S.L.W. 3524 (1999) (rejecting the Ninth Circuit's rationale in *Duffield* regarding the legislative history of the Civil Rights Act of 1991, and holding that a former brokerage employee's race and age discrimination claims were subject to arbitration under the Form U-4 agreement since Congress had in fact evinced a clear intent to encourage private arbitral processes for resolving such disputes).

On January 1, 1999, the National Association of Securities Dealers (NASD) changed its rule which had historically required employees registered with NASD to submit all statutory employment claims to arbitration. The change specifically excludes statutory discrimination and harassment claims from the former requirement of mandatory arbitration for all employment disputes:

The SEC-approved NASD rule change does not require securities firms to drop their mandatory arbitration programs. Rather, the rule change merely takes NASD out of the business of dictating that there must be mandatory arbitration clauses in securities industry employees' contracts. Brokerage firms are not prevented from including such arbitration requirements in individual contracts.

Paine Webber Allows Bias Claims in Court; Other Brokerages Still Mandate Arbitration, 67 U.S.L.W. 24, 2374 (U.S. Jan. 5, 1999). Thus, for those individuals associated with NASD member brokerages, beginning January 1, 1999, the enforceability of arbitration clauses in securities industry agreements will arise only in the context of *individual* employment contracts rather than as part of an industry-wide "registration" process for employees.

104. See *Brisentine*, 117 F.3d at 525; see also *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837-38 (8th Cir. 1997) ("[W]e agree with those post-*Gilmer* decisions which have ruled that Title VII claims, like ADEA claims, are subject to individual consensual agreements to arbitrate."); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (holding that an employee's individual contractual agreement with an employer to arbitrate statutory claims is enforceable if "the arbitration arrangement (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types

Admittedly, the *Brisentine* analysis finds support in a number of other circuits that have considered the enforceability of union arbitration clauses for statutory discrimination claims, other than those brought exclusively under the ADA. For example, the Sixth Circuit, in *Penny v. United Parcel Service*,¹⁰⁵ the Tenth Circuit, in *Harrison v. Eddy Potash, Inc.*,¹⁰⁶ the Seventh Circuit, in *Pryner v. Tractor Supply Co.*,¹⁰⁷ the Third Circuit, in *Martin v. Dana Corp.*,¹⁰⁸ the Eighth Circuit, in *Varner v. National Super Markets*,¹⁰⁹ and the Second Circuit, in *Tran v. Tran*,¹¹⁰ have all found that employees covered by collective bargaining agreements containing mandatory arbitration clauses are entitled to pursue their statutory claims individually in federal court without first exhausting the contractual grievance-arbitration machinery. The clear split between the Fourth Circuit and other circuits, in combination with the general confusion surrounding the *Alexander* and subsequent *Gilmer* opinions,¹¹¹ has prompted many observers to look to the Supreme Court for guidance.

of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.") (emphasis in original).

105. 128 F.3d 408, 413-14 (6th Cir. 1997) (following *Alexander*).

106. 112 F.3d 1437, 1453-54 (10th Cir. 1997), *vacated*, 118 S. Ct. 2364 (1997) (adopting "the majority view . . . that *Alexander* and its progeny remain good law and that statutory employment claims are independent of a collective bargaining agreement's grievance and arbitration procedures" (citations and internal quotation marks omitted)).

107. 109 F.3d 354, 363-65 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 294 (1997) (applying *Alexander* in holding that "the union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement.").

108. 114 F.3d 421 (3d Cir. 1997), *vacated*, 114 F.3d 428 (upholding the exclusivity of the arbitration process in a collective bargaining agreement only where the employee could pursue arbitration without the approval of the union, and where the arbitration clause in question explicitly provides for arbitration of statutory employment discrimination claims).

109. 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 946 (1997) (applying *Alexander* in ruling that that an employee need not exhaust the grievance and arbitration remedies under a collective bargaining in order to bring a Title VII claim in federal court).

110. 54 F.3d 115, 117-18 (2d Cir. 1995), (construing claim under the Fair Labor Standards Act).

111. See 12 Lab. Rel. Wk., (BNA) No. 39, at 1092 (Oct. 7, 1998). "Courts have repeatedly expressed confusion about whether *Gilmer* effectively overruled [*Alexander*] as the Fourth Circuit decided in *Austin*, or whether *Gilmer* only applies in cases involving individual arbitration agreements." *Id.*

C. "Only the Supreme Court can answer th[is] question . . ." ¹¹² The *Wright* Case

Although the *Brisentine* court placed great emphasis on the *Alexander* opinion, it also recognized that "[t]he Supreme Court's attitude toward arbitration warmed considerably from *Alexander* to *Gilmer*, and may become warmer still."¹¹³ With this premonition in tow, the Supreme Court recently granted certiorari in the Fourth Circuit case of *Wright v. Universal Maritime Service Corp.*,¹¹⁴ a case which appeared to present squarely to the Court the important and contentious issues raised by union agreements to submit individual statutory claims to mandatory and binding arbitration. The *Wright* case also appeared to provide the Court with an ideal opportunity to finally resolve its seemingly conflicting opinions in *Alexander* and *Gilmer*. However, the Supreme Court in *Wright* effectively left these issues in limbo.

In *Wright*, the Fourth Circuit, following its own analysis in *Austin*, held that an employee was required to arbitrate his ADA claims pursuant to an arbitration clause in a collective bargaining agreement.¹¹⁵ The plaintiff had claimed that the rule espoused in *Austin* was inapplicable because the collective bargaining agreement at issue did not specifically address actions under the ADA.¹¹⁶ However, the Fourth Circuit explained that "an arbitration agreement need not list every possible dispute between the parties in order to be binding."¹¹⁷ The court further instructed:

112. *Pryner*, 109 F.3d 354, 365 (7th Cir. 1997) (Chief Judge Posner noting that the Supreme Court should reconcile its past opinions in *Alexander* and *Gilmer*, to settle the issue of the enforceability of a labor contract's mandatory and binding arbitration process for statutory employment discrimination claims).

113. *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d at 526.

114. 121 F.3d 702 (4th Cir. 1997) (unpublished), *vacated*, 119 S. Ct. 391 (1998).

The following groups signed on to amicus briefs in support of the plaintiff in *Wright*: The National Academy of Arbitrators, the AFL-CIO, the International Longshoremen's Association, the Lawyers' Committee for Civil Rights Under Law, the American Association of Retired Persons, the National Employment Lawyers Association, the NOW Legal Defense and Education Fund, the Association of Trial Lawyers of America, the Disability Rights Education & Defense Fund, Inc., the National Partnership for Women and Families, the American Civil Liberties Union, the ACLU of South Carolina, and the attorneys general of thirteen states. See 12 Lab. Rel. Week, (BNA) No. 39, at 1093 (Oct. 7, 1998) ("The large number of amicus briefs filed in *Wright* reflects the importance of the issues raised."). The following groups participated in the filing of amicus briefs on behalf of the employer in *Wright*: The U.S. Chamber of Commerce, the Securities Industry Association, the National Association of Manufacturers, the Equal Employment Advisory Council, and the Labor Policy Association of Waterfront Employers. See *id.*

115. See *Wright*, No. 96-2850, 1997 U.S. App. LEXIS 1466, at *5.

116. See *id.* at *1.

117. *Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

An employer need not provide a laundry list of potential disputes in order for them to be covered by an arbitration clause. For example, in *Gilmer v. Interstate/Johnson Lane Corp.* . . . the Supreme Court held that a plaintiff was required to submit his [Age Discrimination in Employment Act] claim to arbitration where the arbitration agreement covered "any dispute, claim or controversy." The language of the [collective bargaining agreement] at issue in this case is equally broad, covering "all matters" regarding "terms and conditions of employment." This language easily encompasses Wright's ADA claim. A narrower interpretation of the agreement would fly directly in the face of the ADA's statutory preference for arbitration, and the strong federal policy favoring alternative dispute resolution.¹¹⁸

Upon review, a unanimous Supreme Court vacated and remanded the Fourth Circuit's decision.¹¹⁹ In an opinion written by Justice Antonin Scalia, the Court found that the "very general" arbitration clause at issue did not cover statutory claims brought under the ADA.¹²⁰ The Court announced that a presumption of arbitrability, such as that which exists under section 301 of the Labor Management Relations Act¹²¹ and the FAA,¹²² does not similarly apply to clauses which are not particularly clear in their coverage of statutory claims such as the ADA.¹²³ Accordingly, Justice Scalia noted that the presumption of arbitrability in labor disputes "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a [collective bargaining agreement]."¹²⁴ Or, stated differently, where disputants have not otherwise agreed to arbitrate through specific and unequivocal contractual language, courts should presume that they are generally better equipped than arbitrators to resolve statutory discrimination claims. However, it is critical to recognize

118. *Id.* (citations omitted) (alterations supplied).

119. See *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391 (1998). See generally *Arguments Before the Court: Americans with Disabilities Act Claim; Effect of Arbitration Clause in Collective Bargaining Agreement*, 67 U.S.L.W. 3249 (Oct. 13, 1998), for a thorough discussion of oral arguments presented to the Court on October 7, 1998, by the plaintiff's attorney (Ray P. McClain from Charleston, South Carolina), the defendant's attorney (Charles A. Edwards from Raleigh, North Carolina), and the Department of Justice and the EEOC ((both of these agencies were represented by Deputy Solicitor General Barbara D. Underwood).

120. See *Wright*, 119 S. Ct. at 397.

121. 29 U.S.C. § 185 (1994). See generally *Wright*, 119 S. Ct. at 395 (citing the *Steelworkers Trilogy* to demonstrate the concept of a presumption of arbitrability under § 301 of the Labor Management Relation Act).

122. 9 U.S.C. §§ 1-16 (1994). See *Wright*, 119 S. Ct. at 395 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), where the Court "also discerned a presumption of arbitrability under the FAA").

123. See *Wright*, 119 S. Ct. at 395.

124. *Id.* (citing *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986) and *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82 (1960)) (emphasis in original).

that the Supreme Court in *Wright* never went so far as to conclude that even a "very specific" arbitration clause would be valid in the context of the resolution of statutory claims.

Applying analogous Supreme Court precedent from *Metropolitan Edison Co. v. NLRB*,¹²⁵ Justice Scalia's opinion posited that a union-negotiated waiver of an employee's statutory right to a judicial forum for employment discrimination claims must, at a minimum, be "clear and unmistakable."¹²⁶ Yet, the Court implied that this minimum standard would not end the inquiry. A finding of "clear and unmistakable" contractual language would apparently be only an initial step toward determining whether such a waiver was indeed valid and enforceable. The Court did not address potential additional steps, or kinds of proof, that might be required to prompt a finding of validity or enforceability, if indeed a method of validating or enforcing such a waiver even exists in this context. Although the Court did not opine in this respect, such additional proof could include evidence of a "knowing and voluntary" waiver,¹²⁷ and/or evidence of the legitimacy and sufficiency of the arbitral

125. 460 U.S. 693 (1983). The *Metropolitan Edison* Court considered the issue of whether a union could waive the statutory rights of its officers under the National Labor Relations Act. In explaining its position, the Court in *Wright* favorably quoted the following passage from *Metropolitan Edison*: "[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." *Wright*, 119 S. Ct. at 396 (quoting *Metropolitan Edison, Co.*, 460 U.S. at 708).

126. See *Wright*, 119 S. Ct. at 396.

127. See, e.g., *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 163 F.3d 53, 70-73 (1st Cir. 1998) (construing the "analytical rubric" of a "knowing and voluntary" waiver and quoting *Alexander* for the proposition that: "in determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent . . . was voluntary and knowing"; and also citing the *Wright* case as a basis for the conclusion that "there be some minimal level of notice to the employee [whether in a union or non-union contest] that statutory claims are subject to arbitration"); *Doyle v. Raley's, Inc.*, 158 F.3d 1012, 1015 (9th Cir. 1998) (holding that an employee's waiver of judicial forum rights for discrimination claims must be "knowing") (citing *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997), cert. denied, 118 S. Ct. 1511 (1998) for the proposition that agreements to arbitrate disputes arising under the ADA and equivalent state laws must at least be knowing, and 29 U.S.C. § 626 (1994) which amended the ADEA by requiring that waivers of rights under the ADEA be "knowing and voluntary"); see also *Hooters of America, Inc. v. Phillips*, No. 4:96-3360-22, 1998 U.S. Dist. LEXIS 3962, at *76-83 (D.S.C. Mar. 12, 1998). The *Hooters* court considered the characteristics of a valid agreement for an individual employee to waive his/her right to a federal forum. See *id.* The court highlighted the fact that the Supreme Court had not yet had the opportunity to develop a complete standard for judging the validity of such individual waivers:

The Supreme Court has indicated that an employee could not forfeit substantive rights under Title VII absent a voluntary and knowing waiver. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 n.15 (1974). [However,] [t]he Court has not reached the issue of the standard applicable to the waiver of the right to litigate one's Title VII claims in federal court. *Gibson v. Neighborhood Health Clinics*, 121

process at issue, particularly in terms of allowances and safeguards for vindicating the entire spectrum of substantive rights under employment discrimination statutes. However, the *Wright* case also presents the possibility that perhaps a union can never enter into a valid and enforceable waiver of this sort for its employees, regardless of whether "clear and unmistakable" language is included in the agreement and irrespective of whether the agreement is entered into knowingly and voluntarily. The Court's holding appeared to be deliberately limited so as not to preclude this eventuality.

In any event, the Court did find that the disputed clause in *Wright* was indeed too broad to encompass statutory disability claims in a "clear and

F.3d 1126, 1129 (7th Cir. 1997). In *Gilmer*, the Court (in dicta) stated that in agreeing to arbitrate a federal claim, a party "does not forgo the substantive rights afforded, by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (internal quotations omitted)).

Id. at *79-80. The *Hooters* court continued by explaining that the Fourth Circuit had "not addressed the question whether a knowing and voluntary waiver is required for an agreement to arbitrate a Title VII claim." *Id.* at *80. However, the Ninth Circuit, in *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995), had ruled that there must "be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes." *Hooters*, at *78-79 (quoting *Lai*, 42 F.3d at 1304). Moreover, the Seventh Circuit, in *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126 (7th Cir. 1997), explained that, "obviously, the strongest case for a court's finding that an employer and employee agreed to submit claims to arbitration will arise when the record indicates the employee has knowingly agreed to do so." *Hooters*, at *80-81 (quoting *Gibson*, 121 F.3d at 1129). Alternatively, the *Hooters* court recognized that the Eighth Circuit, in *Patterson v. Tenet Healthcare, Inc.* 113 F.3d 832, 834 (8th Cir. 1997), "applied ordinary contract principles in determining whether an employee had agreed to submit Title VII claims to arbitration." *Hooters*, at *80.

The rationale of the cases cited in *Hooters*, although arising in an individual, non-union context, may be applicable to a case such as *Wright*. The *Wright* case has firmly announced the "clear and unmistakable" threshold as the first step for determining whether a collective waiver of statutory forum rights in a union-negotiated arbitration agreement will be valid. However, the *Wright* opinion did not address whether a proposed waiver that is "clear and unmistakable" in form and language must also be "knowing and voluntary" in its genesis and ultimate acceptance by the parties. A further issue to consider in a collective bargaining context, is whether a "knowing and voluntary" standard includes the intent of only the employer and union officials who negotiate the labor contract (i.e., the contractual parties) or, in addition, each employee who may vote on and/or be subjected to the contract's terms and conditions (i.e., the third-party beneficiaries). Perhaps, however, the Supreme Court, following the Eighth Circuit in *Patterson*, will rule that a valid arbitration agreement in a union context requires only adherence to the common law principles of contract law (offer, acceptance, meeting of the minds, etc.), in addition to "clear and unmistakable" waiver language. In any event, the "clear and unmistakable" standard in *Wright* appears to be only one factor, albeit a crucial factor, in assessing the validity and enforceability of a union's collective agreement to submit individual employment discrimination claims to an arbitral forum.

unmistakable” fashion.¹²⁸ The Court pointed specifically to the fact that the language of the collective bargaining agreement, as well as that of a relevant contractual seniority plan, did not even contain a specific anti-discrimination provision.¹²⁹ As Justice Scalia asserted: “It may well be that ordinary textual analysis of a [collective bargaining agreement] will show that matters which go beyond the interpretation and application of contract terms are subject to arbitration; but they will not be *presumed* to be so.”¹³⁰ Thus, the arbitration agreement in *Wright* could not even pass the initial litmus test for a valid union waiver. The Court therefore found that any additional legal analysis regarding the validity and enforceability of the clause, in light of *Alexander* and *Gilmer*, was unnecessary.¹³¹

In essence, the Court’s decision in *Wright* was quite narrow. It revealed only what is legally required, at a minimum, to be included in the language of a collective bargaining agreement that attempts to waive the individual statutory rights of employees. However, the Court never determined whether a waiver satisfying the “clear and unmistakable,” minimum “linguistic” standard would in fact be valid and enforceable where the statutory right to be waived is the right to a judicial forum for ADA claims. The Court only decided that, if all other things were equal, a waiver satisfying the “clear and unmistakable” standard could at least survive some degree of *initial* scrutiny—which in this case, the waiver could not. The basic ruling in *Wright* appeared to be that, whether or not such a waiver is ultimately valid and enforceable, the language of any such waiver must *at least* contain specific indicia of intent which would likely require the parties to incorporate an explicit reference to the statute in question.¹³²

128. See *Wright*, 119 S. Ct. at 397.

129. See *id.* The Court recognized that, unlike the instant claim, the *Austin* case and the *Alexander* case both involved labor contracts with specific anti-discrimination language. See *id.* at 396-97.

130. *Id.* at 396 (emphasis in original).

131. See *id.* at 397.

132. Interestingly, the Court briefly referred to, but refused to opine fully on, an argument by Respondent and various amici that because the ADA’s statutory language specifically encourages alternative dispute resolution, an arbitration agreement such as the one at issue should be enforced. See *id.* at 397 n.2. In response, the opinion stated:

Respondents and some of their *amici* rely upon the provision in the ADA which states that “[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter.” 42 U.S.C. § 12212. They rely upon it principally in connection with the question whether, under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 [] (1991), a predispute agreement in a [collective bargaining agreement] to arbitrate employment-discrimination claims is enforceable—a question we do not reach. Our conclusion that a union waiver of employee rights to a federal judicial forum for employment discrimination claims

As a consequence of its narrow holding, the Court did not, and in fact refused to, rule on whether *Alexander* remains good law following *Gilmer*. Justice Scalia's opinion was quite clear in recognizing that the Court did not need to "reach the question whether such a waiver would be enforceable."¹³³ The Court explained: "[W]e find it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred."¹³⁴ Thus, the Court determined to leave for another day the question to which most eager observers greatly anticipated an answer.

Although, admittedly, the Court's opinion did not provide the revelations many had hoped for, it did nevertheless explore in a cursory manner the inherent conflict between *Alexander* and *Gilmer*.¹³⁵ In this regard, Justice Scalia wrote:

There is obviously some tension between these two lines of cases. Whereas [*Alexander*] stated that "an employee's rights under Title VII are not susceptible of prospective waiver," [*Gilmer*] held that the right to a federal judicial forum for an ADEA claim could be waived. Petitioner and the United States as *amicus* would have us reconcile the lines of authority by maintaining that federal forum rights cannot be waived in union-negotiated [collective bargaining agreements] even if they can be waived in individually executed contracts—a distinction that assuredly finds support in the text of [*Gilmer*]. Respondents and their *amici*, on the other hand, contend that the real difference between [*Alexander*] and [*Gilmer*] is the radical change, over two decades, in the Court's receptivity to arbitration, leading *Gilmer* to affirm that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," [*Gilmer*], they argue, has sufficiently undermined [*Alexander*] that a union *can* waive employees' rights to a judicial forum.¹³⁶

Indeed, the above passage neatly framed for resolution the quandary with which courts and practitioners have wrestled since *Gilmer* was decided. Yet, as noted, the Court determined that a full reconciliation of the two cases was not required in *Wright* since no legitimate waiver of forum rights had taken

must be clear and unmistakable means that, absent a clear waiver, it is not "appropriate," within the meaning of this provision of the ADA, to find an agreement to arbitrate. We take no position, however, on the effect of this provision in cases where a [collective bargaining agreement] clearly encompasses employment discrimination claims, or in areas outside collective bargaining.

Wright, 119 S. Ct. at 397 n.2.

133. *Id.* at 397.

134. *Id.* at 395.

135. *See Wright*, 67 U.S.L.W. at 4015.

136. *See id.*

place in any event.¹³⁷ Later in the opinion, Justice Scalia again verified the troubling aspects of the conflicting cases when he explained that “whether or not [*Alexander*’s] seemingly absolute prohibition of union waiver of employees’ federal forum rights survives *Gilmer*, [*Alexander*] at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a [collective bargaining agreement].”¹³⁸ And in one final reference to the *Alexander-Gilmer* dichotomy, the opinion also concluded that the “clear and unmistakable” standard, applicable to union waivers, would not apply where individual employees voluntarily waived their own rights, such as occurred in *Gilmer*.¹³⁹ Thus, by comparing its analysis in the instant case with the facts in *Gilmer*, the Court appeared to suggest implicitly that individual agreements to arbitrate statutory claims could be enforced with broader waiver language (i.e., something less than “clear and unmistakable”) than would be required in analogous union agreements. Perhaps, in this comparison, the Court foreshadowed the potential application of the pro-arbitration *Gilmer* analysis to an *Alexander* or *Wright*-type case where the language of a union arbitration clause actually comports with the heightened “clear and unmistakable” standard.

D. Considerations Following *Wright*

The *Wright* case clearly did not generate an instructive opinion for determining when union agreements to arbitrate employees’ statutory claims will be enforceable. However, it did provide insight into the Court’s view on issues of legitimately waiving statutory rights, which can be part and parcel of the individual and collective negotiation process in drafting a mutually beneficial employment contract. One issue worth considering following the *Wright* case is the options that remain if in fact the Court eventually determines that *Alexander* remains good law, and a union, as a collective entity, can never enter into a valid waiver of this kind, despite “clear and unmistakable” language in its labor contract. Perhaps, in such a case, employees, apart from the union, could each individually “agree to” an arbitration clause in a collective bargaining agreement. In this way, the employees could enter into valid and enforceable individual agreements to submit statutory claims to arbitration, and maintain their union representation

137. See *id.*

138. *Id.* at 396.

139. See *id.* at 397. (“[G]ilmer involved an individual’s waiver of his own rights, rather than a union’s waiver of the rights of represented employees and hence the ‘clear and unmistakable’ standard was not applicable.”).

in all other respects. The case law to date suggests that this alternative is a legal possibility but will encounter judicial resistance.¹⁴⁰ Although this process would undoubtedly be construed as an unfair labor practice under the National Labor Relations Act,¹⁴¹ since the employer would be dealing directly with employees regarding mandatory subjects of bargaining, a representative union could cure the potential violation by consenting to the individual dealings and agreements.

In support of upholding the *Alexander* analysis, it is not difficult to see the potential problems associated with an employee, who would rather not waive his or her statutory rights under a mandatory arbitration clause, but must nevertheless vote on the ratification of a collective bargaining agreement as a whole.¹⁴² One might argue that, irrespective of a contract's specific language, a court could never accurately determine whether an employee knowingly or voluntarily approved of, or "accepted" in a common-law contractual sense, a collective bargaining agreement containing a waiver of certain statutory rights. Accordingly, an employee could be aware of an arbitration clause and not agree with its terms, yet may nevertheless be bound by its language if the collective bargaining agreement is ratified by union officials (i.e., where rank-and-file employees are not entitled to vote on the

140. See *Doyle*, 158 F.3d 1012 (9th Cir. 1998). In *Doyle*, an employee individually agreed to waive her right to a federal forum for discrimination claims although her employment was covered by a collective bargaining agreement. See *id.* at 1013. The Ninth Circuit found, as did the Supreme Court in *Wright*, that the waiver language and the terms of the collective bargaining agreement's arbitration clause were too broad to be fairly read as encompassing the resolution of statutory claims. See *id.* at 1014-15. The court further noted that any legitimate waiver of this kind must be a knowing waiver, which would require that the language of the waiver and arbitration clause clearly state that an employee is foregoing the right to pursue a statutory claim in a judicial forum. See *id.* at 1015. Yet, the Ninth Circuit further implied that had the waiver and arbitration clause been legitimate, it still would have applied the rule in *Alexander* that a union could not waive this right for individual employees. See *id.* at 1014. This result does not consider that the individual employee, and not the union, entered into the waiver agreement in this case. The collective bargaining agreement only contained language describing the scope of disputes that the arbitration clause would or would not cover. Considering the posture of the Ninth Circuit, however, employers who seek individual agreements from union employees should perhaps consider having employees sign a waiver and fully detailed arbitration clause as an integrated document, despite any additional language that may be contained in a more expansive labor agreement. As such, the individual agreement will at least be considered a "knowing" waiver. Whether the rule in *Alexander* would prevent a unionized employer from enforcing such a "knowing" waiver, notwithstanding its "individual" character, remains untested.

141. See 29 U.S.C. § 158(a)(1), (5) (1994).

142. Depending on a particular union's constitution and by-laws, rank and file union members may not even have the right to vote for ratification of a collective bargaining agreement. In addition, employees who are not union members, but are otherwise part of the relevant bargaining unit, are generally not entitled to vote on collective bargaining agreements, yet are subject to the terms and conditions therein including the grievance-arbitration process.

contract) or by the vote of other employees (i.e., where the employee voted not to approve the contract but was in the minority).¹⁴³ In sum, the application of arbitration clauses in the unionized context is indeed troubling because of the inherent democratic theory of labor organizations that can often bind dissenting individual employees to a majority rule. However, particularly in the case of ADA claims, an employer and union should vigorously pursue opportunities to explain the benefits that can be realized by individual employees where disability issues are resolved through arbitration. With such knowledge in hand, few employees will likely disapprove of a system that offers speed, simplicity, flexibility, confidentiality, and a chance to be heard no matter how significant the issue may be.

As is evident, the submission of a statutory claim to binding arbitration can arise out of an agreement either between an employer and an individual employee or between an employer and a labor organization representing a group of employees covered by a collective bargaining agreement. However, the ADA can also influence the union/employer grievance-arbitration setting where no specific ADA statutory claim is being brought or resolved, but rather, where the terms of a collective bargaining agreement are at issue and the interpretation of the contract may directly or indirectly implicate the Act's provisions. The following section will examine the existing and potential impact of the ADA on the manner in which arbitrators and courts interpret the contractual language of labor agreements.

V. THE ADA AS IT APPLIES TO GRIEVANCE ARBITRATION

A. The Application of External Law to the Collective Bargaining Agreement

Arbitrators who interpret collective bargaining agreements have historically differed in their opinions on whether to apply external law, such as the ADA, to the contractual grievance process.¹⁴⁴ There are essentially three positions that have evolved. The first school of thought is that an arbitrator has an absolute duty to consider external law when interpreting a labor contract, even where the agreement does not reference the particular law at issue.¹⁴⁵ The second view is that external law should only be considered

143. See generally *id.*

144. See LABOR AND EMPLOYMENT ARBITRATION § 23.02, at 23-14 (Tim Bornstein et al. eds., 1997)

145. See *id.* at 23-14.2 (citing Howlett, *The Arbitrator, the NLRB and the Courts*, 20 ANN. MEETING NAT'L ACAD. ARB. 67 (1967); *Thermo King Corp.*, 102 Lab. Arb. (BNA) 612 (1993) (Dworkin, Arb.) (reasonable accommodation—fundamental employer obligation under the

where an arbitrator finds a contract's language ambiguous and one of the reasonable interpretations would violate the law.¹⁴⁶ The remaining position holds that although an arbitrator's decision may allow conduct that is otherwise unlawful, an award may not require conduct prohibited by law.¹⁴⁷

At the Twentieth Annual Proceedings of the National Academy of Arbitrators, two distinguished members, Bernard D. Meltzer,¹⁴⁸ and Robert G. Howlett,¹⁴⁹ debated this very issue.¹⁵⁰ Meltzer's argument was summarized as follows:

Bernard Meltzer argued that where there is an "irrepressible conflict" between the collective bargaining agreement and external law, the arbitrator should ignore the law and rely upon three points. First, that the Supreme Court, in defining the narrow scope of the award's review, specifically pointed out that where the arbitrator based the award solely upon his or her view of the legislation, as opposed to the language of the agreement, the arbitrator has exceeded the scope of his or her authority. Second, Meltzer emphasized that parties call upon arbitrators to construe and not to destroy their agreement. Moreover, because the Court relied upon the specialized competence of arbitrators in contractual matters, arbitrators would become involved in areas in which the courts had specialized competence were the arbitrators to apply external law. Finally, Meltzer noted that in matters of law, the courts had plenary authority and therefore, unlike arbitrators, exercised the "coercive power of the state." Thus, Meltzer cautioned that limited judicial review of awards applying external law would be "wholly inappropriate."¹⁵¹

Howlett's conclusions contrasted with those of Meltzer:

Americans with Disabilities Act—has long been recognized as element of just cause by arbitrators); cf. *Municipality of Anchorage*, 101 Lab. Arb. (BNA) 1127 (1994) (Carr, Arb.) (ADA actively encourages alternative dispute resolution)). See generally *supra* note 6 (explaining that the Supreme Court, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), opined that an arbitrator is entitled to look to external laws sources for guidance).

146. See LABOR AND EMPLOYMENT ARBITRATION § 23.02, at 23-14.2 to 15 (Tim Bornstein et al. eds., 1997) (citing Meltzer, *Ruminations about Ideology, Law, and Arbitration*, 20 ANN. MEETING NAT'L ACAD. ARB. 1, 15-16 (1967)).

147. See *id.* at 23-15 (citing Mittenthal, *The Role of Law in Arbitration*, 21 ANN. MEETING NAT'L ACAD. ARB. 42, 50 (1968)).

148. Bernard D. Meltzer was a Professor of Law at the University of Chicago.

149. Robert G. Howlett was the Chairperson of the Michigan Labor Mediation Board.

150. See Robert Perkovich, *Does Gilmer v. Interstate/Johnson Lane Corp. Compel the Consideration of External Law in Labor Arbitration?: An Analysis of the Influence of the Americans with Disabilities Act on Arbitral Decisionmaking*, 25 STETSON L. REV. 53, 58 (1995) (citations omitted).

151. *Id.*

[T]he separation of contractual claims and statutory claims is "impossible in many arbitrations." Therefore, an award that did not consider external law might result in error, would ignore the fact that the law governs all contracts, and would require the laws to be incorporated explicitly. As a result, collective bargaining will be longer and more complex. [Howlett] also argued that the public policy of the land was that parties should resolve their disputes privately.¹⁵²

According to studies, the general consensus among arbitrators is that their role is to construe only the language of the contract and limit the scope of their consideration to the agreement itself.¹⁵³ Yet, other sources suggest that where arbitrators have been confronted with grievances involving Title VII of the Civil Rights Act of 1964,¹⁵⁴ they have been consistent in recognizing and applying the law.¹⁵⁵ The ADA's "reasonable accommodation" requirement has presented arbitrators with perhaps their most significant challenge regarding the application of external law to the terms of a collective bargaining agreement.¹⁵⁶ In particular, arbitrators will inevitably encounter difficulties in reconciling an employer's duty to provide a reasonable accommodation where that duty conflicts with the seniority provision of a labor contract.¹⁵⁷

B. The Clash Between Contractual Seniority Rights and the Duty to Provide Reasonable Accommodations Under the ADA.

The ADA contains specific language which prohibits participation "in a contractual or other . . . 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

152. *Id.* at 58-59 (citations omitted) (alterations supplied).

153. *See id.* (citing George, *Legislation, Discrimination and Benefits*, 46 ANN. MEETING NAT'L ACAD. ARB. 130, 136 (1994), which references Greenfield, *How Do Arbitrators Treat External Law*, 45 INDUS. & LAB. REL. REV. 683, 685-86 (1992)).

154. Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e - e(17) (1994)).

155. *See* Robert Perkovich, *Does Gilmer v. Interstate/Johnson Lane Corp. Compel the Consideration of External Law in Labor Arbitration?: An Analysis of the Influence of the Americans with Disabilities Act on Arbitral Decisionmaking*, 25 STETSON L. REV. 53, 58-59 (1995) (citing George, *Legislation, Discrimination and Benefits*, 46 ANN. MEETING NAT'L ACAD. ARB. 130, 136 (BNA 1994), which references Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared*, Proceedings of the 39th Annual Meeting of the National Academy of Arbitrators 101 (1987)).

156. *See id.*

157. *See id.*

[a] . . . labor union).¹⁵⁸ This provision has been construed as preventing an employer from using a collective bargaining agreement as a vehicle to circumvent the ADA's requirements either explicitly or implicitly.¹⁵⁹ One of the Act's requirements that often is inextricably linked to the terms of a collective bargaining agreement is the employer's duty to provide a reasonable accommodation to qualified applicants or employees with disabilities.¹⁶⁰ In this regard, a perplexing question that can arise in the grievance-arbitration context is whether an employer breaches a seniority provision in a labor contract by restructuring a job or reassigning an employee to a vacant job as a means of accommodating a disabled individual, who is otherwise not entitled to seniority privileges.¹⁶¹ In addition, an arbitrator may also confront

158. 42 U.S.C. § 12112(b)(2) (1994).

159. See LABOR AND EMPLOYMENT ARBITRATION § 23.03[8][a], at 23-23 (Tim Bornstein et al. eds., 1997)

160. See 42 U.S.C. § 12112(b)(5)(A) (1994).

161. Congress first applied a duty of "reasonable accommodation", in an employment context, to the religious practices and observances of workers. This requirement was codified in 1972 into Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e(j) (1994). Title VII, in part, requires that employers reasonably accommodate an employee's religious practices and observances up to the point of "undue hardship on the conduct of the employer's business." *Id.* The Supreme Court has noted that to require an employer "to bear more than a de minimus cost in order to [accommodate the religion of an employee] is an undue hardship." *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977). Senate and House Reports concerning the ADA explained that the "de minimus" cost rule set forth by the Supreme Court for an undue hardship under Title VII did not apply to the duty to accommodate under the ADA. See *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1049 (7th Cir. 1996), cert. denied, 117 S. Ct. 1318 (1997) (citing S. REP. at 36; H.R. REP. at 68, 1990 U.S.C.C.A.N. 303, 350).

The Supreme Court, in *Trans World Airlines, Inc. v. Hardison*, considered a conflict between a requested religious accommodation (relief from Saturday work duties) and the collectively bargained-for seniority rights of other employees (more senior employees would be required to work on Saturdays). See *Hardison*, 432 U.S. at 66-69. The Court held that the duty to accommodate could not supersede the collective seniority rights of other employees. See *id.* at 79. The Court explained:

We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with [the plaintiff] that an agreed-upon seniority system must give way when necessary to accommodate religious observances.

Id. at 79 (internal footnote omitted). Since the *Hardison* decision, courts have differed in applying its rationale to the ADA's duty to accommodate. For instance, the Seventh Circuit has noted that "[t]he language of the ADA, like that of Title VII, falls far short of providing a 'clear and express indication from Congress' that it intended 'reasonable accommodation' to include infringing upon the seniority rights of other employees." *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1048 (7th Cir. 1996), cert. denied, 117 S. Ct. 1318 (1997). Conversely, the D.C. Circuit has explained:

a precisely converse situation where an employer may violate the ADA by refusing to accommodate a disabled worker with a job transfer because the employee lacks the required seniority under a labor contract.¹⁶² Indeed, such scenarios can present an arbitrator with a Catch-22.

One could proffer an argument that an employee seeking such an accommodation is not covered by the Act because he or she is not an "otherwise qualified" individual with a disability¹⁶³ (i.e., he or she does not have the requisite seniority under the contract to qualify for the new or restructured job). One might also contend that such job restructuring or reassignment is either an "unreasonable" accommodation in and of itself, or presents an "undue hardship" for the employer.¹⁶⁴ In this regard, since the

The ADA and its legislative history include the "clear and express indications" that Title VII lacked, including the enumeration of "reassignment to a vacant position" in the statutory provision regarding "reasonable accommodations," and the statements in reports from both houses of Congress stressing that conflicts between requested accommodations and provisions of collective bargaining agreements (including seniority systems) are not "determinative" in the inquiry into whether the employer must provide the accommodations.

Aka v. Washington Hosp. Ctr., 116 F.3d 876, 896 n.14 (D.C. Cir. 1997) *reh'g en banc granted and judgment vacated*, 124 F.3d 1302 (D.C. Cir. 1997) *and aff'd in part, rev'd in part en banc*, 156 F.3d 1284 (D.C. Cir. 1998). However, despite the foregoing differences in legal analysis, both the Seventh Circuit and the D.C. Circuit agree that the ADA's more stringent duty of accommodation than that found in Title VII's protection of religion, "prevents the Supreme Court's Title VII decision in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) from being directly applicable to [an ADA] case." *Id.* (citing *Eckles*, 94 F.3d at 1048).

162. Several civil rights laws, but not the ADA, allow employers to engage in what would otherwise be discriminatory conduct if the employment decision at issue is based on a bona fide seniority system. For example, Title VII of the Civil Rights Act of 1964 provides an exception for employers "[t]o apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system." 42 U.S.C. § 2000e-2(h) (1994). Similarly, the ADEA explains that "[i]t shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system." 29 U.S.C. § 623(f)(2)(A) (1994). Courts have also held that the "reasonable accommodation" prong of the Rehabilitation Act of 1973 does not require employers to reassign employees in contravention of a bona fide seniority system. *See, e.g., Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996).

163. *See* 42 U.S.C. § 12132 (1994). The ADA protects only "qualified individuals" with disabilities. An individual with a disability is "otherwise qualified" if the individual satisfies the prerequisites for the position and can perform the essential functions of a job with or without a reasonable accommodation. *See* 29 C.F.R. § 1630.2(m) (1996).

164. *See* 29 C.F.R. § 1630.2(p) (1996). An employer is not required to make a reasonable accommodation if doing so would impose an "undue hardship" on the employer's business operations. One of the primary factors used in determining whether an "undue hardship" exists is the financial status of the business. *See generally id.*; *supra* note 67 and accompanying text.

The EEOC has suggested that an employer may invoke the terms of a collective bargaining agreement as a means of demonstrating "that the provision of a particular accommodation would be unduly disruptive to its other employees." 29 C.F.R. § 1630.2(n)(3)(v) (1996).

accommodation may abrogate certain employees' seniority rights, it could "unduly" subject the employer to contractual liability as well as unfair labor practice charges for unlawfully implementing unilateral changes during the term of a labor agreement. Notably, the EEOC interpretive guidelines explain that a collective bargaining agreement may be considered in assessing the extent of an employer's obligation to provide an accommodation under the ADA, but the agreement may not be viewed as a determinative factor.¹⁶⁵

As explained above, the ADA's plain language prohibits parties from attempting to enforce contracts which are repugnant to the Act's provisions. This mandate should provide courts with the impetus to actively scrutinize arbitral awards that fail to incorporate the external law of the ADA, particularly where consideration of the ADA's law is crucial for a proper and legal interpretation of a labor agreement.¹⁶⁶ As one scholar notes:

Given the overriding policy behind the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," courts undoubtedly will look carefully at the problem of accommodating the collective bargaining relationship to the requirements of the Act. Given the explicit provision prohibiting the use of a labor contract as a means of discrimination otherwise prohibited by the Act, it seems unlikely that a court routinely would permit a seniority provision to defeat the duty to accommodate under the ADA. Given the existence of two important competing federal statutes and sets of policies, a more careful, case-by-case analysis is needed.¹⁶⁷

165. See 29 C.F.R. § 1630.2(n)(3)(v) (1996). The National Labor Relations Board and the EEOC have developed a procedure for resolving complaints and charges where the National Labor Relations Act and the ADA are both implicated:

In November, 1993, the two agencies signed a Memorandum of Understanding intended to coordinate enforcement of both statutes through joint discussion and participation. The memorandum provides that when the NLRB receives unfair labor practice charges that also involve an evaluation of the parties' duties under the ADA, the General Counsel's office will talk with the EEOC's Office of Legal Counsel about the matter. Likewise, when the EEOC receives discrimination charges which require an evaluation of the parties' duties under the NLRA, a similar dialogue will take place.

Connye Y. Harper, *Origin and Nature of the Duty of Fair Representation*, 12 LAB. LAW. 183, 190-91 (1996).

166. See LABOR AND EMPLOYMENT ARBITRATION § 23.03[8][a], at 23-24 (Tim Bornstein et al. eds., 1997) (explaining that although labor contract provisions were given deference under the Rehabilitation Act of 1974, "it is likely that the courts may take a closer look at the relationship between collective bargaining agreements and the ADA").

167. George, *Legislation, Discrimination and Benefits*, 46 ANN. MEETING NAT'L ACAD. ARB. 130, 140 (BNA 1994) (footnotes omitted). See generally Eric H. J. Stahlhut, *Playing the Trump Card: May an Employer Refuse to Reasonably Accommodate Under the ADA by Claiming a Collective Bargaining Obligation?*, 9 LAB. LAW. 71 (1993).

Arbitrators, who consider disability issues either directly or indirectly, have a substantial amount of case law at their disposal addressing the problem of how to reconcile the ADA's "duty to accommodate" with conflicting terms contained in a collective bargaining agreement. Yet, the legal conclusions of a majority of these decisions may not be convincingly sound, and the rationale of the various cases reflects at least some difference in opinion within the court system.

C. Case Law

Several federal circuit courts have examined the issue of whether the terms of a collectively-bargained seniority system can limit the duty of an employer to provide a reasonable accommodation under the ADA. Most courts, to this point, have concluded that employers are not required to accommodate an employee with a disability if to do so would violate a contractual seniority provision of a labor contract.¹⁶⁸ In fact, an accommodation having this effect has been almost uniformly considered per se unreasonable. The federal courts of appeals that have supported this view include the Seventh Circuit, in *Eckles v. Consolidated Rail Corp.*,¹⁶⁹ the Third Circuit, in *Kralik v. Durbin*,¹⁷⁰ the Fifth Circuit, in *Foreman v. Babcock & Wilcox Co.*,¹⁷¹ the Sixth Circuit, in the unpublished decision of *Boback v. General Motors*

168. See, e.g., *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996). The issue presented in *Eckles* was: "whether the ADA requires as 'reasonable accommodation' that a disabled individual be given special job placement . . . in violation of a bona fide seniority system in place under a collectively bargained agreement, when such accommodation is the only way of meeting the job restrictions of that disabled individual." *Id.* at 1045-46. The *Eckles* court held that the ADA does not require that the plaintiff be placed in a different job to accommodate his disability where the reassignment would violate the terms of the collective bargaining agreement. See *id.* at 1052. In addition, the Seventh Circuit emphasized that its holding was limited to "individual seniority rights and should not be interpreted as a general finding that all provisions found in collective bargaining agreements are immune from limitation by the ADA duty to reasonably accommodate." *Id.* at 1052-53.

169. 94 F.3d 1041, 1051 (7th Cir. 1996) "After examining the text, background, and legislative history of the ADA duty of 'reasonable accommodation,' we conclude that the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees. . . . Congress did not intend that other employees lose their positions in order to accommodate a disabled coworker." *Id.* at 1047.; see also *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 912-13 (7th Cir. 1996) (explaining that the ADA does not entitle a disabled employee to "superseniority," and that the employer is not required to reassign an employee with a disability where doing so would violate terms of a collective bargaining agreement).

170. 130 F.3d 76, 82 (3d Cir. 1997) (following *Eckles*).

171. 117 F.3d 800, 810 (5th Cir. 1997) ("[T]he ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement.").

Corp.,¹⁷² the Eighth Circuit, in *Benson v. Northwest Airlines, Inc.*,¹⁷³ the Ninth Circuit, in *Willis v. Pacific Maritime Ass'n*,¹⁷⁴ and the Tenth Circuit, in *Aldrich v. Boeing Co.*¹⁷⁵ The conclusions of these courts are arguably supported by analogous precedent under the Rehabilitation Act of 1973,¹⁷⁶

172. 107 F.3d 870 (Table), No. 95-3836, 1997 WL 3613, at *5 (6th Cir. Jan. 3, 1997) (unpublished disposition) (stating, in dicta, that "the ADA does not require an employer to violate the contractual rights of other workers in an effort to accommodate a single employee." Dicta from another Sixth Circuit opinion also supports the adoption of the majority rule. See *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998) ("[A] reassignment will not require . . . violating another employee's rights under a collective bargaining agreement."

173. 62 F.3d 1108, 1114 (8th Cir. 1995) ("The ADA does not require that [the employer] take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."); see also *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995) ("An employer is not required [under the ADA] to make accommodations that would violate the rights of other employees."

174. 162 F.3d 561, 566 (9th Cir. 1998) (holding that "an employee's proposed accommodation under the ADA is [per se] unreasonable if it conflicts with a bona fide seniority system established under a CBA.").

175. 146 F.3d 1265, 1271 n.5 (10th Cir. 1998) (explaining that the ADA does not require an employer to transfer a disabled employee as an accommodation if to do so would violate the seniority provisions of a collective bargaining agreement).

176. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended in various sections of chapter 29 of the United States Code). "In applying the Rehabilitation Act's reasonable accommodation requirements, the courts have given deference to collective bargaining agreements. . . . [and] have held that it would be a breach of a labor contract if the employer restructured a job or made a job assignment in violation of contractual seniority provisions." LABOR AND EMPLOYMENT ARBITRATION § 23.03[7], at 23-22 (Tim Bornstein et al. eds., 1997). See *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) ("Consequently, we . . . conclude that the postal service was not required to accommodate plaintiff further by placing him in a different position since to do so would violate the rights of other employees under the collective bargaining agreement."); *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987) ("Reassigning [employee] to permanent light duty, when he was not entitled to one of a limited number of light duty positions, might have interfered with the rights of other employees under the collective bargaining agreement."); see also *Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985); *Daubert v. United States Postal Serv.*, 733 F.2d 1367 (10th Cir. 1984); *Hurst v. United States Postal Serv.*, 653 F. Supp. 259 (N.D. Ga. 1986). But see *Ignacio v. United States Postal Serv.*, 30 M.S.P.R. 471, 475 (Spec. Pan. 1986) (explaining that Rehabilitation Act takes precedence over any contrary terms in the collective bargaining agreement)).

Prior to the enactment of the ADA, the Rehabilitation Act of 1973 served as the principal federal statute prohibiting employment discrimination against persons with disabilities. See 29 U.S.C. §§ 791, 793, 794 (1994). The Rehabilitation Act of 1973 prohibits the federal government, federal contractors, and entities that receive federal funding from discriminating against handicapped persons. See 29 U.S.C. § 791 (1994) (federal government); 29 U.S.C. § 793 (1994) (federal contractors); 29 U.S.C. § 794 (1994) (entities receiving federal funds). The ADA and the Rehabilitation Act of 1973 are statutorily integrated laws because the agencies that enforce employment discrimination claims under the ADA and under the Rehabilitation Act of 1973 are responsible for developing procedures so that administrative complaints filed under both Acts are handled in a way that "avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements." 42 U.S.C. § 12117(b) (1994). See also 42 U.S.C. § 12201(a) (1994) (explaining that Congress intended for courts to interpret the ADA by considering precedent established by the Rehabilitation Act of 1973); *Ennis v.*

legislative history tending to show that “bumping” was meant to be excluded from the scope of reasonable accommodation, and precedent under Title VII of the Civil Rights Act of 1964;¹⁷⁷ all of which may imply that the duty to accommodate does not require the breach of a collective bargaining agreement.¹⁷⁸ Specifically, the Seventh Circuit, in the leading case of *Eckles v. Consolidated Rail Corp.*, explained that “the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees.”¹⁷⁹ The *Eckles* court adopted a strict rule that “individual seniority rights . . . are immune from limitation by the ADA’s duty to reasonably accommodate.”¹⁸⁰ The court further clarified its ruling by asserting that “collectively bargained seniority rights have a pre-existing special status in the law and that Congress to date has shown no intent to alter this status by the duties created under the ADA.”¹⁸¹

However, in *Aka v. Washington Hospital Center*,¹⁸² a District of Columbia Circuit Court of Appeals decision that was vacated and reheard en banc,¹⁸³ a three-judge panel of the court sharply disagreed with the Seventh

National Ass’n of Bus. & Educ. Radio Inc., 53 F.3d 55, 57 (4th Cir. 1995) (“To the extent possible, we adjudicate ADA claims in a manner consistent with decisions interpreting the Rehabilitation Act.”).

177. Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2000e(17) (1994)).

178. See generally *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1048 (7th Cir. 1996), cert. denied, 117 S. Ct. 1318 (1997) (citing *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977)); see also LABOR AND EMPLOYMENT ARBITRATION § 23.03[8][a], at 23-25 (Tim Bornstein et al. eds., 1997).

179. *Eckles*, 94 F.3d at 1051.

180. *Id.* at 1052.

181. *Id.*

182. 116 F.3d 876 (D.C. Cir. 1997) *reh’g en banc granted and judgment vacated*, 124 F.3d 1302 (D.C. Cir. 1997), and *aff’d in part, rev’d in part en banc*, 156 F.3d 1284 (D.C. Cir. 1998).

183. The D.C. Circuit’s vacated panel decision, although lacking in precedential value, remains important because of its thorough analysis and marked divergence from the majority rule on this issue. However, the D.C. Circuit, sitting en banc, concluded that the district court had misconstrued some of the facts in the case; and thus the court’s consideration of a conflict between seniority rights and the ADA was premature, and perhaps unnecessary. See *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1302 (D.C. Cir. 1998) (en banc). The court noted that the language of the collective bargaining agreement’s seniority provision and the law of the ADA were not necessarily in conflict in this instance. See *id.* The D.C. Circuit found that the trial court failed to consider whether the collective bargaining agreement’s handicapped-transfer provision may have in fact provided the defendant with the means of reassigning the plaintiff without invoking the ADA’s reasonable accommodation requirements. See *id.* at 1306. The court of appeals remanded the case to the trial court with instructions to reanalyze the facts under a specific paradigm. See *id.* at 1306. The D.C. Circuit explained:

[T]he district court was incorrect in perceiving a conflict under all circumstances between the terms of the CBA and the ADA, and so need not have reached the issue of what would occur in the event of such a conflict. We thus reverse the district court’s grant of summary judgment to [the defendant] on this issue. On remand, the

Circuit's analysis in *Eckles*.¹⁸⁴ The *Aka* court rejected the per se rule of *Eckles* regarding the superiority of seniority rights, and imposed a more general affirmative duty upon the employer to attempt to diligently comply with the ADA's duty to accommodate, notwithstanding conflicting language in a collective bargaining agreement.¹⁸⁵ The *Aka* decision instituted a balancing

district court should determine, through summary judgment or trial, whether on the facts of this case [the defendant] had an obligation under the ADA to reassign [the plaintiff] to a vacant position. This entails deciding, among other questions, whether a vacant position for which [the plaintiff] was qualified was available, and whether reassigning [the plaintiff] would have been an undue hardship. If [the defendant] was obliged to reassign [the plaintiff], the district court should then decide whether the [reassignment provision for handicapped employees in the collective bargaining agreement] permitted [the defendant] to perform this reassignment. Only if the district court concludes that [the defendant] did not have the power to reassign [the plaintiff] under [language of the collective bargaining agreement] but that the ADA required [the defendant] to reassign him will the ADA and the CBA be in conflict. Given the large number of contingencies that could preclude such a conflict, we see no need to address whether, if such a conflict arose, the CBA or the ADA would give way in the circumstances of this case.

Id. at 1305-06. Although the en banc court passed on an opportunity to resolve the potential conflict between the duty to accommodate under the ADA and contractual seniority rights, the court did offer some insight into the importance of fully recognizing the ADA's mandates. The court indicated that, "collective bargaining agreements are interpreted wherever possible so as to be consistent with federal labor law." *Id.* at 1303 (citing *International Union, United Automobile, Aerospace and Agricultural Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1480 (6th Cir. 1983)). "Thus, an interpretation of [the instant collective bargaining agreement's provisions] which allows [the defendant] to implement its ADA obligations is distinctly preferred." *Id.* at 1304. The court further remarked: "Indeed, Congress expressly suggested that, as a way of avoiding conflicts between [collective bargaining agreements] and the ADA, collective bargaining agreements incorporate provisions 'permitting the employer to take all actions necessary to comply with this legislation.'" *Id.* at 1304 (citing H.R. REP. NO. 485(II), 101st Cong., 2d Sess. at 63 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 346). Apparently, the D.C. Circuit, for one, is prepared to view the ADA as a statutory scheme that is not to be diluted, if at all possible, by other rights and obligations associated with a collective bargaining agreement.

184. See *Aka*, 116 F.3d at 895-96. The D.C. Circuit's disagreement with the *Eckles* court, and its unique analysis of the conflict between the duty to accommodate and seniority rights has been the topic of much scholarly debate as of late. See, e.g., Estella J. Schoen, Note, *Does the ADA Make Exceptions in a Unionized Workplace? The Conflict Between the Reassignment Provision of the ADA and Collectively Bargained Seniority Systems*, 82 MINN. L. REV. 1391 (1998); Belinda Spaeth, Comment, *Aka v. Washington Hospital Center and Kralick v. Durbin: Is it "Reasonable" to Require an Employer to Accommodate an ADA Plaintiff When Doing So Violates the Collectively Bargained Seniority Rights of Other Employees?*, 42 ST. LOUIS U. L.J. 989 (1998).

185. See *Aka*, 116 F.3d at 896. The *Aka* court rejected much of the Seventh Circuit's reasoning in *Eckles*, and held that an employer is required to provide a reasonable accommodation unless it would be unreasonable or impose an undue hardship. See *id.* at 895-97. The court explained that the existence of a conflict between the contractual language of a collective bargaining agreement and the duty to reasonably accommodate under the ADA is "relevant only insofar as it undermines the employee's claim that the requested accommodation

approach where “conflicts between accommodations to disabled employees and the terms of applicable bargaining agreements exist on a continuum, rather than functioning like an on/off switch.”¹⁸⁶ *Aka* asserted that, under a faithful reading of the plain language of the ADA, an employer is required to

is ‘reasonable’ or bolsters the employer’s affirmative defense that the accommodation could not be provided without ‘undue hardship’.” *Id.* at 894. The *Aka* court further stated: “[C]onflicts between accommodations to disabled employees and the terms of applicable collective bargaining agreements exist on a continuum, rather than functioning like an ‘on/off’ switch.” *Id.* at 896 (citation omitted). The court suggested that among the relevant factors to be considered in assessing this continuum is the nature of the seniority rights upon which the employee’s accommodation has infringed. *See id.* at 896-97. Where, as in the *Aka* case, the collective bargaining agreement contains language that arguably authorizes an employer to comply with the ADA and accommodate disabled employees, the infringement is considered minimal. *See id.* Although the *Aka* court did not opine on the issue, presumably where no such enabling language is present in a collective bargaining agreement, the employer’s duty to accommodate would be more tenuous in the face of conflicting contractual and statutory mandates.

186. *Id.* at 896; *see also* *Emrick v. Libbey-Owens-Ford Co.* 875 F. Supp. 393, 396-97 (E.D. Tex. 1995) (“[W]hen reassignment of an otherwise qualified employee would conflict with an otherwise valid collective bargaining agreement or seniority system, this conflict shall be weighed by the fact finder in evaluating the reasonableness of such an accommodation under the ADA.”).

The Ninth Circuit, in *Willis v. Pacific Maritime Ass’n*, 162 F.3d 561 (9th Cir. 1998), cited one commentator who had suggested a model balancing approach that would include a consideration of the following factors:

- 1) the difference between the amount of seniority required for the position and the amount of seniority acquired by the disabled employee;
- 2) the number of employees over whom the disabled employee would pass for the position;
- 3) the frequency with which the position becomes available;
- 4) the presence or absence of senior employees who would voluntarily surrender their eligibility to the position in order to accommodate the disabled co-worker;
- 5) the prospects possessed by the disabled employee for securing alternate employment both within and without the organization.

Id. at 567-68 (citing William J. McDevitt, *Seniority Systems and the Americans with Disabilities Act: The Fate of “Reasonable Accommodation” After Eckles*, 9 ST. THOMAS L. REV. 359, 384 (1997)). However, the *Willis* court proceeded to adopt the per se rule of *Eckles* and predicted that such a balancing approach would be unreliable in practice. The Ninth Circuit explained:

We believe that the balancing approach would leave employers too vulnerable to the possibility of guessing wrong when trying to weigh the relative benefits and burdens on disabled and non-disabled employees. The consequences of guessing wrong are especially burdensome in the context of a collectively bargained seniority system, where the employer and/or union might be subjected to grievances or lawsuits filed by workers who were “bumped,” and employers would be vulnerable to charges of unfair labor practices under the NLRA. We are persuaded that it would be improper to subject an employer to the Hobson’s choice of violating the ADA or the NLRA, or at least subjecting itself to the threat of litigation under these statutes, depending on the outcome of the “balancing” approach.

Id. at 568.

provide an accommodation unless to do so would be "unreasonable" or would impose an "undue hardship."¹⁸⁷ The District of Columbia Circuit suggested that the text of the ADA, its legislative history, "and the relevant EEOC regulations clearly indicate that the fact that a particular accommodation would require some departure from the terms of a collective bargaining agreement should not in itself determine the question of whether an employer may be required to provide the accommodation."¹⁸⁸ Rather, the analysis should operate on a sliding scale and measure "the degree of infringement imposed by a 'reasonable accommodation' . . . on a 'right' held by other employees under the collective bargaining agreement."¹⁸⁹ Under this rationale, a court or an arbitrator could more accurately carry out the ADA's directive of determining whether, based on all of the circumstances, the proposed accommodation would "impose an 'undue hardship' or would be 'unreasonable'" for the employer.¹⁹⁰

In support of the *Aka* rationale, Third Circuit Judge Manssman, in the dissenting opinion in *Kralik v. Durbin*,¹⁹¹ noted:

Although I recognize that the opinion of the Court of Appeals for the D.C. Circuit in *Aka v. Washington Hospital*, lacks precedential value, I find its analysis and rejection of *Eckles* sound and adopt its reasoning as the essence of my disagreement with the majority. . . .¹⁹²

The approach adopted by the majority in reliance on *Eckles* could well lead to absurd results which run counter to the broad remedial purposes of the ADA. The better approach would be to jettison the per se rule developed in the context of the far less sweeping Rehabilitation Act in favor of the balancing process already in place under the ADA in the determination of "undue hardship." The result reached in *Eckles* under the undue hardship balancing analysis would likely be unchanged where in this case, the outcome would be far less certain.¹⁹³

Judge Manssman also indicated that the "academic response to the decision in *Eckles* has been less than enthusiastic."¹⁹⁴ In particular, Manssman noted

187. See *Aka*, 116 F.3d at 895-96.

188. *Id.* at 896.

189. *Id.*

190. *Id.* at 895.

191. 130 F.3d 76, 84-88 (3d Cir. 1997) (Manssman, J., dissenting).

192. *Id.* at 87 (citation omitted).

193. *Id.* at 88 (footnotes omitted).

194. See *id.* at 88 n.b. (citing William J. McDevitt, *Seniority Systems and the Americans with Disabilities Act: The Fate of "Reasonable Accommodation" After Eckles*, 9 ST. THOMAS L. REV. 359 (1997); Condon A. McGlothlen & Gary N. Savine, *Eckles v. Consolidated Rail Corp.: Reconciling the ADA with Collective Bargaining Agreements: Is This the Correct Approach?*, 46 DEPAUL L. REV. 1043 (1997)).

that to hold “a requested accommodation . . . per se unreasonable where it conflicts with the seniority provisions of a collective bargaining agreement” ignores the practical and complex tension between the ADA and other labor relations statutes, specifically the National Labor Relations Act (NLRA).¹⁹⁵ Accordingly, Judge Manssman referenced one scholar’s observation:

While the ADA fosters equal employment opportunities for all Americans without regard to disability, its drafters ignored a very serious problem. The ADA, while promoting the rights of individual Americans in the workplace, conflicts dramatically with the [NLRA], an act designed to promote collective rights in the workplace. The ADA, the regulations, and the Interpretive Guidance all fail to address the issue of how to reasonably accommodate an individual with a disability under the ADA in a unionized setting—where such rights are typically received as part of a collective bargaining agreement. As a result of this oversight, conflicts between the NLRA and the ADA have arisen.¹⁹⁶

Notably, the EEOC’s position on this matter echoes the sentiment of the *Aka* court and Judge Manssman. In fact, the EEOC set forth its rationale in an amicus brief filed for the plaintiff, Terry Eckles, in the Seventh Circuit case of *Eckles v. Consolidated Rail Corp.*¹⁹⁷ The brief acknowledged that “the ADA does not require displacement or ‘bumping’ of another employee to accommodate a disabled individual.” However the EEOC further explained that, when an employer and union are faced with conflicting duties arising out of the ADA and a labor contract, they have a duty “to negotiate in good faith a variance from collectively bargained seniority rules when the only available effective accommodation contravenes these rules and the proposed accommodation will not unduly burden other employees.”¹⁹⁸

The *Aka* majority opinion, the dissent in *Kralik*, and the EEOC’s position demonstrate that the resolution of the problem of applying the external “accommodation” law of the ADA to the collective bargaining agreement context, and to grievance arbitration itself, is not a straightforward issue. Interestingly, only three of the courts above, [the Seventh Circuit, in *Eckles*, the Third Circuit, in *Kralik*, and the Ninth Circuit, in *Willis*], even considered the fact that the ADA actually contains an outright prohibition against participating “in a contractual or other . . . relationship that has the effect of subjecting a covered entity’s qualified applicant or employee with a disability

195. See *id.* at 84-85.

196. *Id.* at 85 (quoting Robert W. Pritchard, *Avoiding the Inevitable: Resolving the Conflicts Between the ADA and the NLRA*, 11 LAB. LAW. 375 (1995)).

197. 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1318 (1997).

198. *Id.* at 1051.

to the discrimination prohibited [by the ADA].¹⁹⁹ Of further note is the fact

199. See 42 U.S.C. § 12112(b)(2) (1994); see also *Eckles*, 94 F.3d at 1046; *Kralik*, 130 F.3d at 80; *Willis v. Pacific Maritime Ass'n*, 162 F.3d 561, 566-67 (9th Cir. 1998). The *Eckles* opinion, in discussing this issue, stated:

The ADA likewise prohibits "discrimination defined as "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 under this subchapter. . . ." 42 U.S.C. § 12112(b)(2). *Eckles* maintains that the defendants also violated this provision. We find, however, that in the circumstances of this case, establishing a violation of section 12112(b)(2) depends upon establishing a violation of section 12112(b)(5)(A), since the only form of discrimination actually alleged is a failure to provide reasonable accommodation. If "reasonable accommodation" under the ADA does not require reassignment to a position held by another employee, the collective bargaining agreement at issue did not subject *Eckles* to prohibited discrimination by establishing a bona fide seniority system that regulated the holding of positions at Conrail. It is true that covered entities cannot avoid their ADA duties by contractual manipulation: "An employer cannot use a collective bargaining agreement to accomplish what it would be prohibited from doing under [the ADA]." Yet *Eckles* does not claim that the seniority system was established, even in part, in order to bypass the duty to accommodate under the ADA; and there is no evidence of such a subterfuge. Consequently, if the ADA does not require that collectively bargained seniority rights be compromised in order to reasonably accommodate a disabled individual, *Eckles* cannot establish that Conrail and the union are guilty of participating in a contractual arrangement that has the effect of subjecting him to prohibited discrimination. Hence the issue is simply what is required by "reasonable accommodation."

See *Eckles*, 94 F.3d at 1046 (citing S. REP. NO. 116, 101st Cong., 1st Sess. 32 (1989); H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 63 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 345) (internal footnote omitted). In commenting on relevant legislative history, the *Eckles* court also observed:

The House Report on the ADA explicitly recognizes that the contractual discrimination provision does not expand the duties imposed by the ADA. Looking at the text of section 12112(b)(2), the House Report concludes:

The basic intent of this provision is that any entity may not do through a contractual provision what it may not do directly. The type of discrimination prohibited is that 'prohibited by this title' -i.e., that set forth in the substantive provisions of the bill. . . . The contractual relationship adds no new obligations in and of itself beyond the obligations imposed by the Act, nor does it reduce the obligations imposed by the Act.

Id. at 1046 n.10 (citing H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 59-60 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 342). The Third Circuit's majority opinion in *Kralik* adopted the above language and rationale from *Eckles* when discussing the obligations under 42 U.S.C. § 12112(b)(2) in its opinion. See *Kralik*, 130 F.3d at 81-83.

The Ninth Circuit responded to an argument by the plaintiffs, which cited this provision of the ADA, by stating that "the operation of a bona fide seniority system is not discriminatory simply because it does not allow for accommodations which would upset the operation of the seniority system itself." See *Willis v. Pacific Maritime Ass'n*, 162 F.3d 561, 567 (9th Cir. 1998). This reasoning appears to be somewhat circular since the court is taking the position that the source of the alleged discrimination (i.e., the contractual seniority system) is, in fact, also the basis for a finding of non-discrimination (i.e., an accommodation that violates the seniority system is unreasonable and thus not required under the ADA).

that this prohibition does not have a counterpart in the Rehabilitation Act of 1973, yet many of the circuit courts that have allowed seniority provisions to “trump” the ADA’s “accommodation” law, use cases decided under the Rehabilitation Act to support their holdings.²⁰⁰ Moreover, the rationale for relying on cases decided under the Rehabilitation Act of 1973 to resolve this issue suffers from an additional significant flaw. As the *Aka* court pointed out:

With regard to the cases construing the Rehabilitation Act, we note that although this Act is quite similar to the ADA in most respects, . . . the two acts diverge sharply on this particular question, because the ADA explicitly suggests “reassignment to a vacant position” as a form of “reasonable accommodation” that may be required of employers.²⁰¹

Thus, although Congress intended that the ADA and the Rehabilitation Act of 1973 be construed as statutorily integrated laws, it is questionable and perhaps error to place great reliance on judicial interpretations of the Rehabilitation Act of 1973 when analyzing this particular issue under the ADA.

D. Additional Applications of the ADA

The foregoing conflict in decisional law involves the relatively narrow issue of whether the law of the ADA can require job restructuring (i.e., transfer, reassignment, reclassification, promotion, etc.) for a disabled worker to accommodate his or her disability even though that employee does not enjoy the contractual seniority privileges necessary for such restructuring. Yet, other provisions of the Act may also influence the rights and obligations of employees and employers under the terms of a collective bargaining agreement. Potential scenarios include, but are clearly not limited to: Whether an employer may discharge or discipline employees with mental

200. See *Kralik*, 130 F.3d at 82 (“[T]he *Eckles* court explained that Congress adopted the ADA against ‘the backdrop of well established precedent that reasonable accommodation under the Rehabilitation Act had never been held to require trumping the seniority rights of other employees.’”) (citing *Eckles*, 94 F.3d at 1048) (internal quotation marks omitted). The *Eckles* court noted:

[C]ourts have been unanimous in rejecting the claim that “reasonable accommodation” under the Rehabilitation Act requires reassignment of a disabled employee in violation of a bona fide seniority system. In fact, a virtual per se rule has emerged that such reassignment is not required under the Rehabilitation Act’s duty to reasonably accommodate.

Eckles, 94 F.3d at 1047.

201. *Aka*, 116 F.3d 876, 893 (D.C. Cir. 1997), *reh’g en banc granted and judgment vacated*, 124 F.3d 1302 (D.C. Cir. 1997) (citing 42 U.S.C. § 12111(9)(1994)), and *opinion reinstated in part on reh’g en banc*, 156 F.3d 1284 (D.C. Cir. 1998).

impairments;²⁰² whether discharge is appropriate when an employee's disability can be adequately controlled by medication;²⁰³ whether an employer may discharge or discipline a worker due to excessive absenteeism;²⁰⁴ whether an employer must provide medical leave as an accommodation for an employee's disabling condition;²⁰⁵ whether an employer may discharge an employee with HIV or AIDS;²⁰⁶ whether an employer may discipline or discharge employees with alcohol or drug addictions;²⁰⁷ whether an employer

202. See LABOR AND EMPLOYMENT ARBITRATION § 23.03[9][b], at 23-31 (Tim Bornstein et al. eds., 1997) (citing *American Smelting & Ref. Co.*, 59 Lab. Arb. (BNA) 722 (1972) (Rentfro, Arb.)). Although the case was outside the context of the ADA, Arbitrator Rentfro, in *American Smelting & Ref. Co.*, observed:

Arbitrators are reluctant to uphold a discharge for such [emotional] disability unless the employer has shown that not only can the disabled employee no longer perform his own job adequately, but that there is no other job available that he can do. . . . [T]here is a degree of callousness involved in turning out a senior employee because of disabilities [physical or emotional] if he is capable of doing a less demanding job satisfactorily.

American Smelting & Ref. Co., 59 Lab. Arb. (BNA) at 725.

203. See LABOR AND EMPLOYMENT ARBITRATION § 23.04[2], at 23-34 (citing *Mobil Oil Corp.*, 81 Lab. Arb. (BNA) 1090 (1983) (Taylor, Arb.); *Mead Corp.*, 81 Lab. Arb. (BNA) 1000 (1983) (Heinsz, Arb.); *Barth Smelting & Ref. Co.*, 42 Lab. Arb. (BNA) 374 (1964) (Berkowitz, Arb.) (standing for the proposition that dismissal in this situation is considered inappropriate, and although these cases were decided before the enactment of the ADA, the rule established therein is even more likely to prevail today if such employees are able to perform the essential functions of their jobs with the reasonable accommodation of medication) (*See supra* note 129)).

204. See *id.* § 23.04[4], at 23-38 (“[A]n employer’s duty of reasonable accommodation under the ADA may include the duty to tolerate additional absences by individuals with a disability in order to accommodate their disability.”) (citing, for example, *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989), *cert. denied*, 498 U.S. 814 (1990) (discharge of employee for poor attendance as consequence of cluster migraines violated Washington state statute prohibiting discrimination on the basis of handicap)); see also *Pacific Bell*, 91 Lab. Arb. (BNA) 653 (1988) (Kaufman, Arb.) (reinstating diabetic employee who was terminated for excessive absenteeism because employer failed to ascertain whether employee’s condition had been sufficiently controlled by medication and that her attendance was likely to improve).

205. See *id.* § 23.06, at 23-45. “A leave of absence to obtain medical treatment is a reasonable accommodation if it is likely that, following the treatment, the employee will be able safely to perform his or her duties.” *Id.* (citing *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Or. 1994)).

206. See *id.* § 23.08, at 23-49 & n.3 (noting that under the ADA and the Rehabilitation Act of 1973, an employer may discriminate against an employee with HIV or AIDS if that person poses a “significant risk to the health and safety of others”) (citing *Scoles v. Mercy Health Corp.*, 887 F. Supp. 765 (E.D. Pa. 1994) (construing ADA case where surgeon was infected with HIV)).

207. See *id.* § 23.10, at 23-57 to 58.

An alcoholic is a disabled individual under the ADA if the alcoholic, with a reasonable accommodation, can perform the essential functions of the job. However, employees “currently engaging in the illegal use of drugs” are excluded from the protection of the ADA. The ADA permits an employer to hold any employee who engages in the illegal use of drugs or who is an alcoholic to the same

must accommodate an employee's learning disability,²⁰⁸ or even whether an employer can require an employee to submit to a medical examination.²⁰⁹ As is evident, the interplay between the ADA and a collective bargaining agreement regarding matters beyond the scope of seniority rights, such as discipline, discharge, and even employee assistance programs, can run wide and deep. Thus, although some arbitrators may take the position that they are only required to consider the external law of the ADA if the collective bargaining agreement contains provisions to that effect,²¹⁰ others might argue

qualification standards for employment or job performance and behavior to which other employees are held, even if the unsatisfactory performance or behavior is caused by the drug use or alcoholism of the employee. . . .

Under the ADA, an employer may be required to provide a leave of absence to an employee with an alcohol problem, particularly if the employer would provide that accommodation to an employee with some other illness requiring medical treatment.

Employers may discharge persons who are currently engaged in the illegal use of drugs on the basis of such use.

Id. (internal footnotes omitted) (citing 42 U.S.C. §§ 12111, 12114(a) (1994); 29 C.F.R. §§ 1630.3, 1630.16(b)(4) (1996); *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991 (D. Or. 1994); *Mead Prods., St. Joseph Div.*, 96 Lab. Arb. (BNA) 240 (1991) (Fowler, Arb.) (discharge for off-duty drinking incident reduced to suspension); *cf. Thermo King Corp.*, 102 Lab. Arb. (BNA) 612 (1993) (Dworkin, Arb.) (ADA does not require employers to make reasonable accommodations for users of illegal drugs) with *Oshe Foods, Inc.*, 100 Lab. Arb. (BNA) 814 (1993) (Eisler, Arb.) (employee who tested positive for marijuana improperly discharged where collective bargaining agreement provided "conditional employment" program)); *see also Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 251 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 441 (1993) (holding arbitrator violated public policy and exceeded his authority in ordering the reinstatement of an employee who tested positive for cocaine and using the ADA to support the decision through the assertion: "By placing drug users outside the ADA's protective ambit, Congress explicitly refused to open employment doors . . ." for drug users.).

208. *See* LABOR AND EMPLOYMENT ARBITRATION § 23.09[5], at 23-55 (Tim Bornstein et al. eds., 1997) (explaining that "[a]n employer has a duty to accommodate an employee's learning disability.") (citing 29 C.F.R. § 1630.2(h)(2); *Iowa Elec. Light & Power Co.*, 100 Lab. Arb. (BNA) 393 (1993) (Pelofsky, Arb.) (holding that employer had improperly discharged a learning disabled worker at a nuclear power plant for failing to pass a hazardous materials handling course and ruling that where an employer is cognizant of a learning disability, it has a duty to reasonably tailor its instructions to that particular disability)).

209. *See id.* § 23.11, at 23-58 to 60 (explaining the ADA's various restrictions on subjecting employees to medical examinations).

210. *See id.* ("Whether an employer has a duty of accommodation in such situations may turn on the inclusion of an accommodation provision in the labor agreement."). For a recent discussion as to why the ADA should not be considered by an arbitrator where the Act has not been explicitly incorporated into a collective bargaining agreement, *see Shell Oil Co., Inc.*, 109 Lab. Arb. (BNA) 965, 968-69 (1998) (Baroni, Arb.). Arbitrator Barry J. Baroni explained:

Courts, such as the eleventh circuit in *Brisentine*, have stated that statutory and contractual claims have legally independent origins and are equally available to the aggrieved party, and, it is not enough that the arbitrator can resolve contract claims in a case in which factual issues arising from the contract claims overlap with the statutory claims. . . . In summary, the ADA is not a part of the subject Agreement.

that an arbitrator always has an affirmative duty to ensure that an employer and a union are not permitted to enforce a contract that violates the ADA.

Indeed, arbitrators perhaps should be legally obligated to recognize the ADA's prohibition against employers and labor organizations entering into contracts that could potentially run afoul of the Act. Regardless of whether the contract specifically includes provisions concerning accommodation or discrimination on the basis of disability, arbitrators should not "be comfortable rendering a decision which results in a clear violation of the ADA."²¹¹

... Moreover, the Agreement does not even make reference to the application of external law. . . . Absent such language, this arbitrator has no authority to exercise jurisdiction over Grievant's ADA claim, and is therefore confined to review and decide issues that are allegedly in violation of specific provisions of the subject Agreement.

Id. (citations omitted). Compare the foregoing absolutist view with the more indeterminate explanation from Arbitrator James E. Giblin in *Champion Int'l Corp.*, 109 Lab. Arb. (BNA) 753, 759-60 (1997) (Giblin, Arb.) (explaining the relevant positions but deciding that the issue did not have to be resolved in the instant case):

The Company contends that this Arbitrator has no authority to address the rights of the Grievant under the ADA because the Arbitrator's authority is strictly limited to the interpretation and application of the contract. Such issue requires a decision as to whether the labor contract authorizes the Arbitrator to incorporate the law to abrogate a provision in the contract. Such question involves a profound difference of opinion among labor relations authorities.

One school of thought maintains the principal [sic] that the parties to a labor contract cannot be presumed to intend that any of its provisions shall be contrary to law. Therefore, it follows that the law is incorporated therein by reference. By further inference, the arbitrable forum is the proper place to adjudicate the legal issue.

The contrary school of thought holds to the principal [sic] that, where the contract is silent as to specific arbitrable authority in this area, the Arbitrator has no jurisdiction to address legal issues. The Arbitrator's authority is strictly limited to the interpretation of the contract.

Champion Int'l Corp., 109 Lab. Arb. (BNA) at 760.

211. LABOR AND EMPLOYMENT ARBITRATION § 23.03[8][a], at 23-26 n.51 (Tim Bornstein et al. eds., 1997) (citing George, *Legislation, Discrimination and Benefits*, 46 ANN. MEETING NAT'L ACAD. ARB. 130, 141 (1994)). Professor George recommended the following situations in regard to how an arbitrator should analyze the duty to accommodate in reference to conflicting collective bargaining agreement language:

If the labor contract contains no prohibition of discrimination on the basis of disability, the arbitrator may rely on the traditional role of interpreting only the agreement.

If the labor contract prohibits the proposed accommodations (such as a seniority requirement for transfer to a light duty position) and also prohibits discrimination on the basis of disability, the arbitrator may have to resolve the conflict. (In interpreting the discrimination prohibition, the arbitrator would turn to the ADA for guidance.)

If several accommodations are possible and at least one alternative does not violate the collective bargaining agreement, the arbitrator may hold true to the contract and at the same time condemn the employer's refusal to implement a

Cases heard by arbitrators regarding the issue of conflicts between accommodations and seniority rights have yielded contrasting results.²¹² Yet, arguably, the firmness and finality of any arbitration decision that fails to incorporate fully the ADA's mandates in this context could be successfully challenged and vacated under a theory of contrariness and repugnance to the explicit public policy espoused by the ADA²¹³ and/or a manifest disregard of the law.²¹⁴

reasonable accommodation consistent with the contract.

Id. at 23-26 to 23-26.1.

212. See, e.g., *Clark County Sheriff's Dep't*, 102 Lab. Arb. (BNA) 193 (1994) (Kindig, Arb.) (declining to consider the impact of the ADA on the employer's duty to accommodate where the proposed accommodation was clearly inconsistent with the collective bargaining agreement); *accord Alcoa Bldg. Prods.*, 104 Lab. Arb. (BNA) 364 (1995) (Cerone, Arb.). *But see City of Dearborn Heights*, 101 Lab. Arb. (BNA) 809 (1993) (Kanner, Arb.) (holding that an employer's duty to comply with the collective bargaining agreement in providing a reasonable accommodation was not absolute, and rather, was to be weighed in assessing the reasonableness of the employer's decision).

213. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (explaining that arbitration awards may be set aside if they are contrary to "some explicit public policy" that is "well defined and dominant" and ascertained "by reference to the laws and legal precedents . . ."). The Supreme Court, in *Misco*, noted that "federal courts are empowered to set aside arbitration awards" based on the FAA's judicial review provisions. See *id.* at 40. The *Misco* Court also noted:

The Arbitration Act does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce,' . . . but the federal courts have often looked to the Act for guidance in labor arbitration cases, especially in the wake of the holding that § 301 of the Labor Management Relations Act . . . empowers the federal courts to fashion rules of federal common law to govern '[s]uits for violation of contracts between an employer and a labor organization' under the federal labor laws.

Id. at 40 n.9 (alterations added) (citations omitted).

In this regard, the FAA recognizes several limited grounds upon which arbitration awards may be vacated:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (1994). Under the FAA, arbitration awards may also be modified or corrected by a federal district court:

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

VI. ANALYSIS AND RECOMMENDATION

What is clear from the discussion above is that a grievance which implicates a disability issue can quickly evolve into an hotly-contested, ADA court claim if the employee does not obtain satisfactory relief from the internal grievance procedure. Under this premise, an arbitrator who skillfully and deliberately addresses disability issues where they arise, and who specifically recognizes the ADA in his or her decision, may prevent the grievant from suing the employer. In such a case, the judicial system and the potential adversaries could both prevail in their own ways. Conversely, if grievance arbitrators choose not to consider the ADA when it is clearly implicated, the result may be a greater propensity on the part of an aggrieved employee to use the same facts and circumstances surrounding the grievance to pursue an individual ADA claim. An employee who is dissatisfied with the grievance process or who harbors hostility toward an employer even after bringing a successful grievance may pursue a claim out of frustration, revenge, or simply in order to have his or her "day in court" on the ADA issue.

In an effort to minimize potential ADA claims, where appropriate, arbitrators should participate actively in incorporating the ADA into their decisions. To accommodate arbitrators in this task, employers and labor organizations should recognize their responsibilities to draft collective bargaining agreements that specifically provide for consideration of the

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- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11 (1994). A district court's order in this regard "may modify and correct the award, so as to effect the intent thereof and promote justice between the parties." *See id.* *See supra* note 102 for an explanation of how courts have ruled with respect to whether the FAA applies to collective bargaining agreements.

214. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (citing Wilko v. Swan, 346 U.S. 427, 436-37 (1953), *overruled on other grounds* in Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (indicating that arbitration awards can be vacated if they are in "manifest disregard of the law")); *see also* Cole v. Burns Int'l Security Servs., 105 F.3d 1465, 1486-87 (D.C. Cir. 1997) (explaining that although the Supreme Court has not defined the term "manifest disregard of the law," such a standard should be "sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law"); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990) (holding that to set aside an award for manifest disregard for the law, a challenger is required to demonstrate the award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) (holding that an award is in manifest disregard of the law if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle"); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992) (holding that an award is in manifest disregard of the law if the arbitrator deliberately disregards what he or she knows to be the law).

external law of the ADA in resolving grievances.²¹⁵ In this way, arbitrators would no longer have to confront the jurisdictional issue of “arbitrability or, in other words, whether they have been empowered by the parties to apply statutory law. Until a time when all agreements contain such language, however, arbitrators should recognize that the ADA sets forth clear prohibitions against entering into labor contracts that result in violations of the Act’s provisions. And any decision contrary to the Act’s requirements and policy underpinnings is subject to being vacated even upon the somewhat limited judicial review of arbitral awards. Compelling grievants to go to court to enforce their rights because arbitrators choose not to consider the implications of the ADA defeats many of the major economic benefits of the arbitral process. ADA cases may end up being heard in at least two forums instead of one, and the resources of the federal judiciary will be needlessly consumed where an arbitrator may have had an opportunity to resolve the relevant disability issues in the first instance.”²¹⁶

Apart from the grievance arbitration context, however, case law dictates that arbitrators should not hesitate to adjudicate statutory claims under the ADA where such a forum selection arises out of voluntary individual arbitration agreements. Nevertheless, many observers insist that arbitrators must be well-trained in order to substitute adequately for a judge and jury in such cases. As one court has asserted: “[A]rbitrators must step up to the challenges presented by the resolution of statutory issues and must be vigilant to protect the important rights embodied in the laws entrusted to their care.”²¹⁷

215. In *Aka*, 116 F.3d 876, 894 (D.C. Cir. 1997) *reh'g en banc granted and judgment vacated*, 124 F.3d 1302 (D.C. Cir. 1997), and *aff'd in part, vacated in part, rev'd in part en banc*, 156 F.3d 1284 (D.C. Cir. 1998), the D.C. Circuit explained that “Congress hoped that post-ADA collective bargaining agreements would include provisions enabling employers to offer accommodations to disabled employees without creating any conflict with the agreements—provisions along the lines of: ‘The employer may take all actions necessary to comply with the Americans with Disabilities Act.’” *See id.* (citing H.R. REP. NO. 101-485, pt. 2, at 63 (1990) *reprinted in* 1990 U.S.C.C.A.N. 267, 303, 346; accord S. REP. NO. 101-116, at 32 (1989)).

216. For example, in *Aka*, 116 F.3d at 876, the plaintiff, Etim Aka, originally submitted his claim to the internal arbitration process but, apparently, the arbitrator’s decision “never even referred to the ADA, the collective bargaining agreement’s handicapped-transfer provision, or ‘reasonable accommodation.’” *See id.* at 893. As a result, the court refused to defer to the arbitrator’s decision and Etim Aka, after initially filing his grievance in 1993, continues to litigate his claim today, six years later.

217. *See Cole v. Burns Int’l Security Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997) (noting that the Supreme Court’s endorsement of arbitration as an effective alternative resolution process for discrimination claims rests on “the assumption that ‘competent, conscientious, and impartial arbitrators’ will be available to decide these cases” and explaining that “[g]reater reliance on private process to protect public rights imposes a professional obligation on arbitrators to handle statutory issues only if they are prepared to fully protect the rights of statutory grievants.”). The *Cole* court also advocated the notion that judicial review of

Arbitrators should also consider whether individual pre-dispute waivers of statutory rights are entered into knowingly and voluntarily, and, in a union context, whether the waivers are "clear and unmistakable." Moreover, all arbitral processes should follow the lead of the Department of Labor Commission on the Future of Worker-Management Relations (Dunlop Commission) with respect to requirements for procedural fairness (i.e., due process):

[I]f private arbitration is to serve as a legitimate form of private enforcement of public employment law, these systems must provide: [1] a neutral arbitrator who knows the laws in question and understands the concerns of the parties; [2] a fair and simple method by which the employee can secure the necessary information to present his or her claim; [3] a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees; [4] the right to independent representation if the employee wants it; [5] a range of remedies equal to those available through litigation; [6] a written opinion by the arbitrator explaining the rationale for the result; and [7] sufficient judicial review to ensure that the result is consistent with the governing laws.²¹⁸

The effect and enforceability of union-negotiated arbitration clauses, analagous to those found in individual employment contracts, which purport to limit an individual plaintiff's right to pursue an ADA claim in federal court, is a controversial issue and remains unresolved following the Supreme Court's decision in the *Wright* case.²¹⁹ Admittedly, most courts have held that a

arbitration awards in discrimination cases should perhaps involve a heightened degree of scrutiny because of the important substantive rights at stake. In this regard, the court explained that arguments favoring "the arbitration of statutory claims are valid only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." *See id.* at 1487. The *Cole* court concluded further that "there will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review the arbitrator's award to ensure that its resolution of public law issues is correct." *Id.*

218. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 30-31 (1994). The Dunlop Commission was chaired by John T. Dunlop, who is a former Secretary of Labor and current Professor Emeritus at Harvard University.

219. The National Academy of Arbitrators has expressed opposition to mandatory "arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." NATIONAL ACADEMY OF ARBITRATORS, STATEMENT OF THE NATIONAL ACADEMY OF ARBITRATORS ON CONDITION OF EMPLOYMENT AGREEMENTS (adopted May 1997). Notwithstanding such opposition, the National Academy of Arbitrators has also adopted specific guidelines for arbitrating statutory employment disputes, which are in addition to the requirements of the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*. *See* NATIONAL ACADEMY OF ARBITRATORS, GUIDELINES ON ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-PROMULGATED SYSTEMS, (adopted May 1997). The guidelines state, in part: "Members should

collective union cannot bind an individual to a prospective waiver of his or her statutory rights under employment discrimination laws. But, clearly, submitting such claims to arbitration would alleviate much of the present overflow on federal court dockets, and would allow employers and employees to settle their disputes more practically and efficiently.²²⁰ As the Dunlop Commission explained:

[L]itigation has become a less-than-ideal method of resolving employees' public law claims. As spelled out in the Fact Finding Report, employees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint. Moreover, the average profile of employee litigants . . . indicates that lower-wage workers may not fare as well as higher-wage professional in the litigation system; lower-wage workers are less able to afford the time required to pursue a court complaint, and are less able to afford the time required to pursue a court complaint, and are less likely to receive large monetary relief from juries. Finally, the litigation model of dispute resolution seems to be dominated by "ex-employee" complainants, indicating that the litigation system is less than useful to employees who need redress for legitimate complaints, but also wish to remain in their current jobs.²²¹

Unions and employers should not be foreclosed from agreeing to utilize arbitral processes to resolve statutory claims under the ADA. However, in order to properly demonstrate that a waiver of rights is knowingly and voluntarily agreed to by individual employees who are represented by a labor organization, any arbitration clause that is "clearly and unmistakably" aimed at resolving statutory claims should perhaps, at a minimum, be signed, or not signed, by each employee. Thus, each individual agreement could supplement the remainder of a collective bargaining agreement which, by itself, might only provide a mandatory and binding arbitration process for traditional contract disputes. Furthermore, legitimate arbitration processes must strive

recognize that in adjudicating a statutory claim they are in some respects acting as substitutes for a court rather than serving as the final step of a grievance procedure under a collective bargaining agreement." *Id.* at 1.

220. See generally Garylee Cox, *The Appropriate Arena for ADA Disputes: Arbitration or Mediation?*, 10 ST. JOHN'S J. LEGAL COMMENT. 591, 596 (1995) ("[One] thing that has been proven over and over again is that any good ADR [Alternative Dispute Resolution] system lowers the number of disputes. . . . The mere fact that a final and binding decision or a complete discussion of the matter is an absolute right leads to more intense negotiations or faster settlement.").

221. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 30 (1994) (quotation marks added).

to afford employers and employees with a suitable forum in which to properly resolve their statutory disputes.²²²

Notably, on July 10, 1997, the EEOC issued EEOC Notice No. 915.002 which expressed opposition to pre-dispute agreements requiring mandatory binding arbitration of statutory claims, including those brought under the ADA.²²³ The EEOC explained its position by asserting that only the federal courts should be charged with the responsibility of developing and interpreting the law and, accordingly, by awarding damages in certain cases placed on the public record, the courts provide society with notice of the costs of discrimination.²²⁴ The EEOC also stated that "private actions serve not only the interests of the claimant, but also those of the public, because such claimants serve as private attorneys general. Conversely, the arbitration system is private and allows for little public accountability."²²⁵ Arbitration was also criticized as a means of curtailing the development of the law and for not involving juries or encouraging extensive discovery.²²⁶ The EEOC further observed that, because

222. A specific example of a collective bargaining agreement's grievance-arbitration process, that may be problematic as potentially applied to statutory discrimination claims, is the National Bituminous Coal Wage Agreement of 1998 ("NBCWA"). The NBCWA, and derivations thereof, which covers approximately 18,000 members of the United Mine Workers of America, contains a non-discrimination clause that specifically cites the ADA, amongst other statutes. However, in its grievance-arbitration clause, the NBCWA contains a provision entitled: "Exclusion of Legal Counsel". See Article XXIII, Section (i). This provision states: "Neither party will be represented by an attorney licensed to practice law in any jurisdiction [at any step] of the grievance [-arbitration] procedure except by mutual agreement applicable only to a particular case." Thus, a party who might be compelled to arbitrate a statutory dispute under the NBCWA's procedures will apparently not have a right to counsel unless he or she is able to obtain the consent of the opposing party. This eventuality may raise questions as to whether the NBCWA's arbitral process provides an adequate forum for addressing anti-discrimination laws. Moreover, at least one circuit court of appeals has held that, under the terms of the NBCWA, an arbitrator may not award punitive damages to a prevailing party. See *Island Creek Coal Co. v. District 28, United Mine Workers of America*, 29 F.3d 126, 131 (4th Cir. 1994) (explaining that the Fourth Circuit "has repeatedly held that an arbitrator may not award punitive damages if the collective bargaining agreement does not expressly provide for such an award," but also recognizing conflicting case law in other circuits). The absence of punitive damage awards may raise additional concerns as to the sufficiency of the NBCWA's grievance-arbitration process for the purpose of resolving employment-discrimination claims. However, it should be noted that it is open to speculation whether the exclusion of legal counsel and/or the unavailability of punitive awards are factors that render an arbitration process inadequate where the parties have otherwise entered into a clear and unmistakable mandatory agreement.

223. See HENRY H. PERRITT, JR., *AMERICANS WITH DISABILITIES ACT HANDBOOK* § 9.22, at 44 (3d ed. 1997, Supp. 1998).

224. See *id.*

225. See *id.*

226. See *id.*

employers were usually repeat participants in the process, they had unfair structural advantages over claimants.²²⁷

The EEOC's position, although not without support, perhaps overlooks the possibility that a pre-dispute arbitration system may in fact offer a fair outcome if the process is sufficiently developed and scrutinized. For example, a built-in appeals process for the arbitration of statutory claims, one that is more broad and rigorous than the traditional judicial review for arbitration awards, could bolster a process where adequate justice could be achieved. Along these lines, on March 3, 1998, the Education and the Workforce Subcommittee on Employer-Employee Relations held an oversight hearing to review EEOC budget issues. The subcommittee heard testimony from several witnesses who stressed the importance of alternative dispute resolution processes for resolving workplace conflicts. One former EEOC Commissioner, Fred Alvarez, testified that the "EEOC could make a major contribution toward the prompt resolution of discrimination complaints if it embraced rather than resisted employer-established ADR, including so-called 'mandatory' arbitration. . . ." ²²⁸ Another former Commissioner, Cathie Shattuck, testifying on behalf of the Society for Human Resource Management, explained that the EEOC should "adopt policies which encourage employees to use an employer's internal grievance procedure before EEOC begins to process a charge. . . ." ²²⁹ Alvarez supported Shattuck's opinion by asserting that "[t]he Commission should consider adopting the National Labor Relations Board Collyer/Spielberg doctrine whereby it 'defers' consideration of discrimination charges to an employer-established ADR system, so long as that system has procedural and substantive safeguards." ²³⁰ Suggestions for

227. *See id.* at 45.

228. *See* 42 Daily Lab. Rep. AA-1 (March 4, 1998) (comments of Fred Alvarez, who currently practices in Palo Alto, California with the law firm of Wilson Sonsini Goodrich & Rosati)

229. *See id.*

230. *See id.* The NLRB's "deferment" (i.e., pre-arbitration deferral) policy for certain unfair labor practice charges requires exhaustion of arbitration remedies provided by a collective bargaining agreement before the NLRB will attempt to resolve the case. Certain conditions must be met before the "deferment" policy will be invoked. The NLRB's position is to defer if:

- there is a long-standing bargaining relationship between the parties;
- there is no enmity by the employer toward the employee's exercise of rights;
- the employer manifests a willingness to arbitrate;
- the collective bargaining agreement's arbitration clause covers the dispute at issue;
- and the contract and its meaning lie at the center of the dispute.

See Collyer Insulated Wire, 192 N.L.R.B. 837, 842 (1971); *see also United Technologies Corp.*, 268 N.L.R.B. 557, 560 (NLRB 1984) (adding a sixth criterion to the five requirements for "deferment" noted in *Collyer*: "The Respondent must, of course, waive any timeliness provisions of the grievance arbitration clauses of the collective-bargaining agreement so that the

new EEOC policies included establishing guidelines requiring minimum standards for ADR systems, "inquiry from EEOC to the employer regarding its procedures, including possible precertification from EEOC, a provision that the time for filing a charge is tolled pending the conclusion of the employer process, and a provision that a charging party may not be retaliated against for using the process."²³¹

An arbitration process that incorporated these safeguards could provide claimants and employers with a legitimate method for resolving disputes internally and thereby relieve the EEOC and the court system of some of its workload. Perhaps the EEOC should consider a "deferral" policy to employer-sponsored arbitration where an internal system truly provides an employee with a fair and complete resolution of his or her claim. Although the EEOC's negative view of pre-dispute arbitration agreements may accurately reflect deficiencies in many current arbitral processes, a more creative future approach to utilizing alternative dispute resolution processes to settle ADA claims may be on the horizon. More uniformity in arbitral systems is probably needed, and a certification procedure for training arbitrators in statutory employment laws and for legitimizing employer-sponsored arbitration processes would likely ameliorate many of the problems noted by the EEOC in its policy statement. The current trend in claim filings suggests that ADA cases will only increase as the Act gains more publicity and the law continues to develop. A beneficent approach to alternative dispute resolution mechanisms such as arbitration is deserved, and such an outlook will certainly assist in furthering Congress's intent in enacting the ADA.

Union's grievance may be processed . . ."). Alternatively, the NLRB's "deference" (i.e., post-arbitration deferral) policy involves the level of deference to be given to an arbitrator's resolution of an unfair labor practice claim. Certain conditions must also be met for the "deference" policy to take effect. The NLRB's position in this scenario is to defer to an existing arbitration award if:

- the arbitration proceedings were fair and regular;
- the parties agreed to be bound by the arbitration award;
- the arbitration award was not clearly repugnant to the purposes and policies of the NLRA;
- the contractual issue is factually parallel to the unfair labor practice issue; and
- the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.

See *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).

231. See 42 Daily Lab. Rep. AA-1 (Mar. 4, 1998).

VII. CONCLUSION

The above proposals are intended to foster a more user-friendly and readily available forum for the settlement of disability-related claims. They are also intended to persuade labor arbitrators to examine more closely the important legal implications of the ADA and its expanding influence as applied to collective bargaining agreements. The arbitration process offers an array of public and private benefits, and the ADA clearly embraces alternative dispute resolution processes as a means to effectuate its purpose.²³² Furthermore, the increasing complexity and expanding scope of the Act, as well as other employment laws, have caused observers to rethink traditional notions of the "law of the shop," and to reconsider exactly which rights, and whose rights, are being affected by what were formerly one-dimensional employment decisions.

Arbitrators are indeed valuable arms of the judicial system in our country, and one can safely admit they have been officially recognized as such by our highest courts. By this same token, however, today's arbitrators are more than ever responsible for recognizing that the decision-making power with which they are vested and entrusted may often require that they look beyond the "four corners" of the labor contract at issue in order to achieve a

232. See *supra* note 71 and accompanying text for an explanation of how the alternative dispute resolution process of mediation, or a combination of mediation and arbitration ("med/arb"), may also be an effective method of resolving ADA claims. Mediation may be particularly effective depending on the situation, because it is less structured than arbitration. The designated mediator does not render a decision as an arbitrator would, but rather is given the task of encouraging open communication and negotiation between the parties for the purpose of eventual settlement. The free discourse involved in mediation may, at times, be even more effective than the arbitral process for solving certain employment disputes, while simultaneously minimizing the risk of permanent damage to the working relationship. The arbitral forum may not always be proper for an employee's purpose because arbitration compels parties to present their respective positions in a more rigid, adversarial setting where the result is a binding, third-party determination. However, oftentimes arbitration can be a worthwhile secondary step where preliminary attempts to mediate and settle a dispute fail. Mediation and arbitration may be equally effective whether used in combination or as separate alternative dispute resolution mechanisms. The relative merits of one process as compared to the other is beyond the scope of this paper, but the reader should recognize that employment disputes can be appropriately resolved using either mediation or arbitration—or perhaps even other alternative dispute resolution methods (e.g., minitrial). In essence, the ultimate goals at issue are the conservation of judicial resources, quick and inexpensive results, and the preservation of the employer-employee relationship. Employers and employees should consider the particular facts and circumstances unique to their case and choose a mutually beneficial process that will best serve their interests. For a thorough discussion comparing arbitration and mediation as ways of resolving ADA disputes, see Garylee Cox, *The Appropriate Arena for ADA Disputes: Arbitration or Mediation?*, 10 ST. JOHN'S J. LEGAL COMMENT. 591, 596 (1995) ("[W]e should not ever prohibit nor mandate any ADR system. . . . [I]t should be left flexible . . .").

just and legally sound result. The ADA will certainly continue to create crossroads with labor arbitration and will undoubtedly persevere on many legal and social fronts. Therefore, it is crucial that informed, responsive, and progressive steps are taken in charting a future course for this important piece of legislation.