Cornell Journal of Law and Public Policy

Volume 2
Issue 1 *Fall 1992*

Article 7

Title I of the Americans with Disabilities Act: Conflicts between Reasonable Accommodation and Collective Bargaining

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TITLE I OF THE AMERICANS WITH DISABILITIES ACT: CONFLICTS BETWEEN REASONABLE ACCOMMODATION AND COLLECTIVE BARGAINING

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INTRODUCTION

Title I of the Americans with Disabilities Act[1] (ADA or Act) prohibits employment discrimination on the basis of disability,[2] and requires employers to provide reasonable accommodation to disabled applicants and employees who desire to work.[3] One way — often the only way — an employer can accommodate an employee is to reassign that employee to a position which the employee is capable of performing.[4] Often, however, collective bargaining agreements, by imposing seniority requirements on certain job classifications, such as light-duty work, limit an employer's ability to reassign an employee to such a position.[5] The ADA thus puts the employer in a "Catch-22" situation: if the employer reassigns the employee, the employer will violate the collective bargaining agreement; if the employer does not, the employer may violate the ADA. This article discusses how courts and the Equal Employment Opportunity Commission (EEOC) have resolved and should resolve this dilemma.

This particular conflict between workers' collective rights, embodied in collective bargaining agreements, and workers' individual rights, created by external laws such as the ADA, arises within a debate on how law can best protect workers. American labor law is currently at a crossroad.[6] For the last fifty years, American labor law has relied on the industrial pluralist vision embodied in the National Labor Relations Act[7] (NLRA) for guidance. Industrial pluralism, an ideology of social interaction between employers and employees, eschews outside interference and instead envisions workers sufficiently empow-

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[1] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (Supp. II 1990)).

[2] 42 U.S.C. § 12112(a) (Supp. II 1992).

[3] 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1991).

[4] *See, e.g.*, Konieczko v. United States Postal Serv., 47 M.S.P.R. 509 (1991) (for discussion, *see infra* notes 123-133 and accompanying text) (post office fired plaintiff letter carrier because a leg injury rendered the plaintiff "unfit for duty"; plaintiff could, however, have performed light-duty window clerk work).

[5] *Id.* (collective bargaining agreement gave preference for window clerk positions by seniority).

[6] Clyde W. Summers, *Labor Law As the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988).

[7] 29 U.S.C. §§ 151-166 (1982).

ered to look after themselves.[8] The NLRA, following this model, establishes a framework through which employees can organize to acquire the bargaining power necessary to significantly influence wages, working conditions, and other terms and conditions of employment.[9] Thus defined, workplace relations are analogous to miniature political democracies:[10] employers and employees, rough equals,[11] jointly negotiate and enforce[12] an agreement which establishes the conditions of employment.[13] The NLRA confers no substantive employment rights;[14] rather, it establishes the framework through which employees may negotiate their own.[15] The process of collective bargaining gives employees a voice in decisions that significantly influence their lives, freeing them from the "dictatorships" established by the "lords of industry."[16]

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[8] Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007 (1955) (arguing that the collective bargaining process and the grievance procedures created therein constitute an "autonomous rule of law").

[9] *Id.* at 1000 (explaining that the NLRA established a "bare legal framework [that] is hardly an encroachment on the premise that wages and other conditions of employment be left to autonomous determination by employers and labor.").

[10] Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 276 (1948).

[11] JOHN ROGERS AND JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 43 (4th rev. ed. 1936).

[12] David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 742 (1973) ("the enforcement mechanism, then, is the essence of the industrial collective bargaining agreement.").

[13] CLINTON S. GOLDEN AND HAROLD J. RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY 23 (1942).

[14] Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952) ("The [NLRA] does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement.").

[15] Shulman, *supra* note 8, at 1005 (stating that a collective bargaining agreement, together with the grievance procedure created therein, creates a private rule of law which eliminates or reduces employer discretion).

[16] *See* William M. Leiserson, *Constitutional Government in American Industries*, 12 AM. ECON. REV. 56, 66 (Supp. 12 1922); GOLDEN & RUTTENBERG, *supra* note 13, at chapter II.

An alternative vision for ordering the American workplace is the individual rights model. This model focuses, not on the collective power of workers to protect themselves, but on legislative and judicial rules protecting workers through the imposition of universal work rules.[17] The individual rights model is epitomized by such statutes as Title VII,[18] the Age Discrimination in Employment Act,[19] and the Americans with Disabilities Act.

Many commentators see these two models as mutually exclusive. Such theorists see the statutory creation of individual employment rights as both signaling and causing the demise of the industrial pluralist model of collective bargaining.[20] The purpose of this article is to examine in detail one instance in which the two models come head-to-head and one model must be chosen over the other: whether the ADA provides disabled employees an individual right to job reassignment despite contrary provisions in a collective bargaining agreement.[21]

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[17] *See generally* Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991).

[18] 42 U.S.C. § 2000e-2 (1988).

[19] 29 U.S.C. §§ 621-634 (1982).

[20] *See* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992) (arguing that the broad § 301 preemption doctrine has caused unions to decline in number and political power by hindering unionized workers' ability to implement their contractual rights and depriving them of individual employment rights under external law); Summers, *supra* note 6, at 10-11 (arguing that because labor unions have proven to be an ineffective regulator of the labor market, individual rights laws are in the process of supplanting the NLRA as the chief guarantor of worker protection); Rabin, *supra* note 17, at 171 (explaining, but not endorsing, the view that the creation of individual employment rights is the cause of the decline of collective bargaining). For the general view that industrial pluralism and individual rights are mutually exclusive, *see* GOLDEN & RUTTENBERG, *supra* note 13, at 23. Golden & Ruttenberg, as well as most early advocates of industrial pluralism, believed that the collective bargaining process would adequately protect whatever rights workers felt warranted negotiation; the essentially democratic nature of union representation would ensure that workers' voices were adequately represented at the bargaining table. *See, e.g.*, GOLDEN & RUTTENBERG, *supra* note 13, at 43; Leiserson, *supra* note 16, at 75.

[21] The Equal Employment Opportunity Commission ("EEOC") has thus far declined to provide any guidance for such conflicts and appears itself torn between longstanding industrial pluralist labor policy, giving priority to collective bargaining, on the one hand, and to the apparent congressional

Part I of this Article discusses Title VII and the Rehabilitation Act of 1973 (Rehabilitation Act),[22] two statutes which preceded the ADA and which provide guidance for interpreting ADA language. Part II analyzes in detail the provisions and requirements of the ADA and discusses the meaning of key phrases such as "reasonable accommodation" and "undue hardship." Parts III and IV examine two conflicts between collective bargaining and the ADA. Part III describes the Act's prohibition of discrimination through contractual relations which, *inter alia*, may make employers liable for the discriminatory behavior of union hiring halls. Part IV discusses whether a collective bargaining agreement is a defense to an employer's duty to provide reasonable accommodation to a disabled applicant or employee. The Summary and Conclusion, which ties together Parts III and IV, draws three conclusions. First, the distinction between the discriminatory use of a contractual relationship, which the ADA outlaws, and the use of a collective bargaining agreement as a defense to reasonable accommodation, which the ADA permits, is unclear. Second, neither the legislative history of the ADA nor the case histories of the Rehabilitation Act and Title VII provide any significant guidance toward resolving conflicts between the individual employment rights created by the ADA and the collective rights created by collective bargaining agreements. Third, courts should interpret the ADA to impose upon employers a duty to provide reasonable accommodation to disabled employees by reassigning them when necessary to different positions, even if such reassignment contravenes a collective bargaining agreement.

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grant of individual employee rights on the other. *See* 29 C.F.R. app. pt. 1630 (1992):

> The divergent views expressed in the public comments demonstrate the complexity of employment-related issues concerning . . . collective bargaining agreement matters. These highly complex issues require extensive research and analysis and warrant further consideration. Accordingly, the Commission [EEOC] has decided to address the issues in depth in future Compliance Manual sections and policy guidances.

The EEOC has yet to release any such guidance.

[22] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 357, § 2, *reprinted in* 1973 U.S.C.C.A.N. 409, 410 (codified as amended at 29 U.S.C. § 701-794 (1988)).

I. PREDECESSOR STATUTES TO THE ADA

By passing the Americans with Disabilities Act, Congress acknowledged that existing antidiscrimination statutes, such as Title VII and the Rehabilitation Act of 1973, were inadequate to protect the rights of disabled Americans.[23] Discussing these two statutes, however, is useful because some of the language of the ADA mirrors that of the Rehabilitation Act. Both Title VII and the Rehabilitation Act will provide guidance in interpreting the ADA.

A. TITLE VII

Title VII prohibitions against employment discrimination do not extend to discrimination based on disability.[24] Several attempts were made in the late 1970s and early 1980s to amend Title VII to include the disabled.[25] However, civil rights groups opposed reform of Title VII, fearing that opening up the statute to substantive amendments meant risking the efficacy of the statute's civil rights guarantees.[26] Further, commentators pointed to fundamental differences between the needs of the disabled and the traditional recipients of Title VII protection.[27]

First, Title VII does not offer effective remedies against disability discrimination. For example, the prohibition on disparate treatment merely requires the use of employment

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[23] 42 U.S.C. §§ 12131, 12101(a)(7) (Supp. II 1991) (finding that individuals with disabilities "have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.").

[24] Title VII prohibits discrimination on the basis of race, sex, religion, or national origin.

[25] *See, e.g.*, H.R. 370, 99th Cong., 1st Sess. (1985); S. REP. NO. 316, 96th Cong., 1st Sess. (1979); H.R. 1200, 98th Cong., 1st Sess. (1983).

[26] Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 429 (1991); *see also* Ellen Saideman, Title I of the ADA from a Historical Perspective, Address at the *Cornell Journal of Law and Public Policy* Symposium "Enabling the Workplace" (March 28, 1992) (videotape on file with *Cornell Journal of Law and Public Policy*).

[27] *See, e.g.*, UNITED STATES COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 142-146 (1983).

criteria that are not tainted with bias.[28] Remedies such as individualized reasonable accommodation and removal of architectural, transportation, and communication barriers are not available under traditional Title VII analysis.[29] Second, disability may create a difference in the ability of an employee to perform a given job,[30] particularly if the employer is not under a duty to provide reasonable accommodation to the employee. Title VII standards are likely to be useless to the disabled individual because employment criteria which have a disparate impact are quite likely to meet the business necessity[31] exception allowed under Title VII.[32]

B. SECTION 504 OF THE REHABILITATION ACT

Congress enacted the Rehabilitation Act of 1973[33] to provide vocational rehabilitation for the handicapped.[34] Section 504 was intended to prevent discrimination against handicapped individuals by affording them equal opportunities in federally funded programs.[35] Originally an "inconspicuous part" of the Rehabilitation Act,[36] section 504 became significant several

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[28] *See* Jeffrey O. Cooper, Note, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423, 1429 (1991).

[29] *See* Burgdorf, *supra* note 26, at 430 n.92; NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE A-35 to A-39 (1986).

[30] *See* Alexander v. Choate, 469 U.S. 287, 298 (1985) ("[T]he handicapped typically are not similarly situated to the nonhandicapped . . . .").

[31] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (permitting the use of facially neutral criteria that have a disparate impact on a protected class if those criteria constitute a "business necessity").

[32] Cooper, *supra* note 28, at 1429.

[33] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 357, § 2, *reprinted in* 1973 U.S.C.C.A.N. 409, 410 (codified as amended at 29 U.S.C. § 701-794 (1988)).

[34] *See* 119 Cong. Rec. 24, 571 (1973).

[35] S. REP. NO. 1297, 93rd Cong., 2d Sess. 38, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388. For this reason, a disproportionately large number of Rehabilitation Act cases are public sector cases, mostly brought by employees of the United States Postal Service. That Rehabilitation Act defendants are often public sector employers, however, does not distinguish such cases from those in which the defendant is a private sector employer.

[36] RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS 1 (1984), *cited in* Julie Brandfield, Note, *Undue Hardship: Title I of the Americans with*

years after its enactment, when the Department of Health, Education, and Welfare (HEW) empowered the Office of Civil Rights to draft implementing regulations for the Rehabilitation Act.[37]

A section 504 plaintiff establishes a prima facie case of discrimination by showing that the plaintiff was (1) an individual with a handicap within the meaning of the Rehabilitation Act; (2) qualified for the job but for a handicap; (3) denied a job, promotion, or raise for which the plaintiff applied; and (4) excluded solely because of a handicap.[38] Once the plaintiff has established a prima facie case, the burden shifts to the employer to show either that the plaintiff was not otherwise qualified,[39] or that any possible accommodation would cause the employer undue hardship.[40] Finally, the plaintiff has the opportunity to rebut the employer's contention of undue hardship by showing that the proposed accommodation is, in fact, reasonable.[41]

Thus, an employer need not accommodate a handicapped individual if the individual is not otherwise qualified for the job or if the accommodation in question would impose upon the employer an undue hardship. HEW regulations specify three factors which courts are to consider in determining whether an accommodation imposes an undue hardship:

> (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
> (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

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Disabilities Act, 59 FORDHAM L. REV. 113, 116 n.25 (1990).

[37] *Id.* The regulations were finally implemented in 1978. SCOTCH, *supra* note 36, at 80.

[38] *See* Prewitt v. United States Postal Service, 662 F.2d 292, 309-10 (5th Cir. 1981); Arneson v. Heckler, 879 F.2d 393, 396 (8th Cir. 1989); Gardner v. Morris, 752 F.2d 1271, 1280 (8th Cir. 1985); Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1148 (3rd Cir. 1988), *cert denied*, 490 U.S. 1004 (1989).

[39] Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) (holding that an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap).

[40] Arneson v. Heckler, 879 F.2d at 397-8.

[41] *Id.*; *see also* Prewitt v. United States Postal Service, 662 F.2d at 310.

(3) The nature and cost of the accommodation needed.[42]

The factors specified by the HEW regulations, however, provide little indication of precisely when a hardship becomes "undue."[43] One commentator has labeled them an "ambiguous list of unweighted characteristics,"[44] which, as another commentator has noted, gives courts the freedom to create widely varying pictures of undue hardship.[45] Courts have done just that.[46] Each case turns on its own facts,[47] and courts apparently label as an "undue hardship" any accommodation that they have already decided not to impose on an employer.[48]

II. THE ADA

A. PROVISIONS

Congress in 1990 promulgated the Americans with Disabilities Act to rectify the status of disabled Americans.[49] One of the initial hurdles in drafting such legislation was to define whom the Act would cover.

1. *Who Is Protected*

The term "disability" means, with respect to an

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[42] 45 C.F.R. § 84.12(c) (1992).

[43] *See* Brandfield, *supra* note 36, at 118.

[44] William G. Johnson, *The Rehabilitation Act and Discrimination Against Handicapped Workers: Does the Cure Fit the Disease?*, in DISABILITY AND THE LABOR MARKET 242, 260 (Monroe Berkowitz and M. Anne Hill eds. 1986).

[45] Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997, 1002-03 (1984).

[46] *See* Steven William Gerse, Note, *Mending the Rehabilitation Act of 1973*, 1982 U. ILL. L. REV. 701, 713, 717 (1982).

[47] *See* Gregory S. Crespi, *Efficiency Rejected: Evaluating "Undue Hardship" Claims Under the Americans with Disabilities Act*, 26 TULSA L.J. 13 (1990).

[48] *See* Note, *Employment Discrimination Against the Handicapped, supra* note 45, at 1011.

[49] 42 U.S.C. § 12101(a)(6) (Supp. II 1991).

individual:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.[50]

The first category in the ADA's definition of disability includes physiological disorders, cosmetic disfigurement, and mental or psychological disorders,[51] and is to be determined without regard to mitigating factors such as medicines or assistive or prosthetic devices.[52] The purpose of the second category of the definition — a record of such an impairment — is to ensure that people are not discriminated against because of a history of disability.[53] The third category of the definition — being regarded as having such an impairment — is designed to protect an individual discriminated against because of the "myths, fears, and stereotypes" associated with a disability.[54]

2. *Scope of Coverage*

The broad coverage of the ADA far surpasses the limited scope of the Rehabilitation Act.[55] When fully implemented, the antidiscrimination provisions of the ADA will extend to employment,[56] public services,[57] public transportation,[58] public accom-

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[50] 42 U.S.C. § 12102(2) (Supp. II 1991).

[51] 29 C.F.R. § 1630.2(h)(1)-(2) (1992).

[52] 29 C.F.R. app. § 1630.2(h) (1992). Physical characteristics, such as left-handedness are not covered; nor are environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record. *Id.* Major life activities include, but are not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i) (1992).

[53] 29 C.F.R. app. § 1630.2(k) (1992). For example, former cancer patients may not be discriminated against on the basis of their prior medical history. This provision also protects persons who have been misclassified as disabled, e.g. as having a learning disability. *Id.*

[54] 29 C.F.R. app. § 1630.2(l) (1992).

[55] *See* Burgdorf, *supra* note 26, at 453.

[56] 42 U.S.C. §§ 12111-12117 (Supp. II 1991). The regulations thus adopt the finding of the United States Supreme Court in the section 504 case of School Board of Nassau County v. Arline, 480 U.S. 273 (1987), in which the

modations and commercial facilities,[59] and telecommunication.[60]

3. *Employment*

The ADA's general rule against employment discrimination states that:

> No covered entity[61] shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[62]

To aid interpretation, the ADA provides several rules of construction, explaining that discrimination by a covered entity includes: (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee; (2) participating in a contractual or other arrangement that has the effect of subjecting a covered entity's applicant or employee to discrimination; (3) using standards, criteria, or methods of administration that either have a negatively disparate impact on the disabled or that perpetuate the discrimination of others; (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association; (5)(A) not making reasonable accommodation to the known limitations of an otherwise qualified individual, unless doing so would impose an undue hardship on the covered entity;

Court stated that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 284.

[57] 42 U.S.C. §§ 12131-12134 (Supp. II 1991).

[58] 42 U.S.C. §§ 12141-12165 (Supp. II 1991).

[59] 42 U.S.C. §§ 12181-12189 (Supp. II 1991).

[60] 47 U.S.C. § 225(c) (Supp. II 1991).

[61] The ADA defines "covered entity" to include an "employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2) (Supp. II 1991).

[62] 42 U.S.C. § 12112(a) (Supp. II 1991).

(5)(B) denying employment opportunities to an otherwise qualified individual on the basis of the need to provide reasonable accommodation to that individual; (6) using qualification standards, employment tests, or other selection criteria that tend to screen out either a disabled individual or a class of disabled individuals, unless such standards, tests, or criteria are job-related and consistent with business necessity; and (7) selecting and administering tests that discriminate against individuals with impaired sensory, manual, or speaking skills, unless such skills are the factors that the test purports to measure, in which case the employer must show that the skills are job-related and consistent with business necessity.[63]

Title I attempts to improve the status of disabled Americans and provide them with a "meaningful equal employment opportunity";[64] i.e., an opportunity to attain the same level of performance available to able-bodied people.[65] This part of this article examines in greater detail the duty imposed by the Act on employers and the exceptions afforded by the Act.

B. REASONABLE ACCOMMODATION

As noted above, Title I of the ADA defines discrimination by employers as "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[66] This definition imposes a duty on employers to provide reasonable accommodation to applicants and employees.

The EEOC Regulations to Title I delineate three areas where employers must make reasonable accommodation.[67]

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[63] 42 U.S.C. § 12112(b) (Supp. II 1991).

[64] H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 66 (1990).

[65] *Id.*

[66] 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1991).

[67] "Reasonable accommodation" is a term of art in the context of Title VII religious discrimination. In Trans World Airlines v. Hardison, 432 U.S. 63 (1977), the United States Supreme Court held that the undue hardship limitation of EEOC regulations does not require employers to "reasonably accommodate" workers' religious beliefs if the proposed accommodation imposes more than a de minimis cost. However, such an interpretation of "reasonable accommodation" is inappropriate in ADA cases. The report of the House Commission on Education and Labor expressly rejects application of the

First, an employer must modify or adjust the job application process to allow an otherwise qualified disabled applicant to be considered for the position. Second, the employer must modify or adjust the work environment, or the manner in which the job is customarily performed, to enable a qualified individual with a disability to perform the essential functions of that position.[68] Third, the employer must make modifications or adjustments to enable disabled employees to enjoy equal benefits and privileges of employment as are enjoyed by able-bodied employees.[69]

C. EXCEPTIONS TO AN EMPLOYER'S DUTY TO PROVIDE REASONABLE ACCOMMODATION

The ADA provides four circumstances in which an employer need not reasonably accommodate an applicant or employee. First, an employer does not have to provide an accommodation that would impose an undue hardship on the employer or the operation of the business.[70] Second, an employer need not provide an accommodation to an employee otherwise unqualified for the job.[71] Third, an employer does not have to accommo-

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de minimis approach to reasonable accommodation to the ADA:

> The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, U.S. 63 (1977) [sic] are not applicable to this legislation . . . . [U]nder the ADA, reasonable accommodations must be provided unless they rise to the level of "requiring significant difficulty or expense" on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in *Hardison*.

H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 68 (1990).

[68] The ADA imposes a duty on employers to modify both the work environment and the job itself. Examples of altering the environment include making the workplace, break rooms, restrooms, training rooms, and employer-provided transportation accessible to disabled employees and applicants. 29 C.F.R. § 1630.2(o) (1992). Examples of altering the job itself include altering when or how the function is performed, reallocating marginal job functions, and reassigning the disabled employee to another position. The ADA does not require employers to reallocate essential job functions, and the reassignment option is strictly limited to avoid segregation or discrimination. *See* 29 C.F.R. § 1630.2(o) (1992); H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 64 (1990).

[69] 29 C.F.R. § 1630.2(o)(1)(iii) (1992).

[70] See *infra* part II.C.1.

[71] See *infra* part II.C.2.

date an individual who, even with the accommodation, would be unable to perform the essential functions of the job.[72] Fourth, an employer need not accommodate an employee if the employee, or if the accommodation itself, would pose a direct threat to the health or safety of other individuals.[73]

1. *Undue Hardship*

Title I of the ADA imposes no duty to accommodate where the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the [employer's] business."[74] "Undue hardship" refers to the effects of any accommodation that would be unduly costly, extensive, substantial, disruptive, or that would fundamentally alter the nature or operation of the business.[75]

As with the undue hardship exception to section 504 of the Rehabilitation Act, determining precisely when a hardship becomes "undue" is difficult. Congress rejected several proposals that would have made this determination significantly easier. The original version of the Act stated that an accommodation would be reasonable unless it threatened the continued existence of the employer's business.[76] Confronted by strident opposition by business interests,[77] Congress retreated and adopted the present balancing approach. Congress subsequently rejected an amendment that would have imposed a ceiling of ten percent of the employee's annual salary as the upper limit for what an employer must spend to reasonably accommodate the employee.[78] Instead of promulgating a bright-line test, Congress decreed that each case shall turn on its own facts.[79]

The undue hardship test is composed of six factors. Congress, in the text of the Act, established the first four. The

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[72] See *infra* part II.C.3.

[73] See *infra* part II.C.4.

[74] 42 U.S.C. § 12112(5)(A) (Supp. II 1991).

[75] 29 C.F.R. app. § 1630.2(p) (1992).

[76] *See* Bonnie P. Tucker, *The Americans With Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923, 927.

[77] *Id.*

[78] 136 CONG. REC. H2471, H2475 (daily ed. May 17, 1990).

[79] *See* H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 70 (1990).

EEOC, in the regulations to the Act, added the fifth. The Act's legislative history indicates the sixth.

First, courts must consider the nature and cost of the accommodation.[80] Second, courts must examine the financial resources of the local facility.[81] Third, courts must consider the financial resources of the covered entity as a whole. For example,

> [A] small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job.[82]

Courts must also consider the geographic separateness and administrative or fiscal relationship between the entity and its facility or facilities. This does not appear to be an independent factor, but rather an amalgam of the two previous factors, relevant when determining whether the court should focus more on the financial resources of the particular facility (factor two) or on the financial resources of the covered entity as a whole (factor three). For example, if the financial relationship between a franchisor and an independently owned and operated franchisee is limited to payment of an annual franchise fee, only the financial resources of the franchisee would be considered in determining whether or not providing the accommodation would constitute an undue hardship.[83]

Fourth, courts must examine the types of operations conducted by the covered entity.

EEOC regulations add a fifth factor to the undue hardship test: the effect of the proposed accommodation on the operation of the facility, including the effect on the ability of other employees to work and on the employer's ability to conduct business on

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[80] 42 U.S.C. § 12111(10)(B)(i) (Supp. II 1991).

[81] 42 U.S.C. § 12111(10)(B)(ii) (Supp. II 1991); 29 C.F.R. app. § 1630.2(p) ("[C]onsideration of the financial resources of the employer or other covered entity as a whole may be inappropriate because it may not give an accurate picture of the financial resources available to the particular facility that will be actually required to provide the accommodation.").

[82] H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 67 (1990).

[83] 29 C.F.R. app. § 1630.2(p)(2)(ii) (1992).

the premises.[84] For example, it may be an undue hardship to maintain wheelchair accessibility at a construction worksite where the site's terrain and building structure change daily.[85]

The legislative history of the ADA suggests a sixth factor: the number of applicants or employees[86] that will potentially benefit from the accommodation.[87] For example, a ramp installed for a new employee with a wheelchair will also benefit future mobility-impaired applicants and employees.[88]

The undue hardship provision applies just as it does currently under section 504,[89] which, as noted above,[90] provides no constructive guidance. Congress has thus imposed a ceiling of bankruptcy[91] and a floor of de minimis,[92] but between these two extremes has left courts with broad discretion and a mandate to proceed on a case-by-case basis.[93]

2. *Otherwise Qualified*

An employer need not accommodate a disabled applicant or employee who, even absent the disability, is unqualified for the job.[94] EEOC regulations define a qualified individual as one who "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires . . . ."[95] If a law firm requires all incoming lawyers to have graduated from an accredited law school and to have passed the bar examination, the firm need not accommodate a disabled individual who has not met these

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[84] 29 C.F.R. § 1630.2(p)(2)(v) (1992).

[85] H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 69-70 (1990).

[86] Customers are not mentioned, but I see no logical reason why they should be excluded from consideration under this factor.

[87] H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 69 (1990).

[88] *Id.*

[89] H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 67, 70 (1990).

[90] *See supra* text accompanying notes 43-48.

[91] *See supra* text accompanying note 76.

[92] *See supra* note 67.

[93] *See supra* text accompanying note 79.

[94] The general rule against discrimination states that "No covered entity shall discriminate against a *qualified individual* with a disability . . . ." [emphasis added]. 42 U.S.C. § 12112(a) (Supp. II 1991).

[95] 29 C.F.R. § 1630.2(m) (1992).

selection criteria; such an individual is not otherwise qualified for the position.[96]

A harder case arises, however, when an employer claims that an applicant or employee is not otherwise qualified for the position because the applicant cannot, even with reasonable accommodation, perform the "essential functions" of the position. This scenario is discussed in the next section.

3. *Essential Functions*

The ADA does not require an employer to accommodate an applicant or employee unless that accommodation will enable the applicant or employee to perform the essential functions of the position.[97] Congress based the "essential functions" requirement on two considerations. Congress did not want to force employers to hire employees who could not perform the job.[98] However, neither did Congress wish to give employers the opportunity to define the job so as to exclude applicants merely because of their inability to perform purely peripheral tasks.[99] Congress compromised by stating that courts must consider the employer's definition of essential job functions, but that the definition is neither conclusive nor presumptive.[100]

The EEOC subsequently issued a non-exclusive, non-conclusive list of factors for determining whether a particular function is essential.[101] A court must consider (i) the

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[96] H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 65 (1990); 29 C.F.R. app. § 1630.2(m) (1992).

[97] The Act defines a "qualified individual with a disability" (i.e., one covered by Title I of the Act) as "an individual with a disability who, with or without reasonable accommodation, can perform the *essential functions* of the employment position . . . ." [emphasis added]. 42 U.S.C. § 12111(8) (Supp. II 1991). *See also* 29 C.F.R. § 1630.2(o)(1)(ii) (1992) (reasonable accommodation includes "modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the *essential functions* of the position." [emphasis added]). For application of the "essential functions" requirement under section 504 of the Rehabilitation Act, *see* School Board v. Arline, 480 U.S. 273, 287 n.17 (1987).

[98] *See* H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 55-56 (1990).

[99] *See generally id.* at 55 (citing a drivers' license requirement for a job that does not involve driving as an example of an overly-exclusionary policy).

[100] *See* H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 3, at 33 (1990); Cooper, *supra* note 28, at 1442-43.

[101] *E.g.*, if an employer wants to hire someone to proofread documents, the

employer's judgment as to which functions are essential; (ii) written job descriptions prepared before advertising or interviewing applicants for the job; (iii) the amount of time spent on the job performing the function; (iv) the consequences of not requiring the incumbent to perform the function; (v) the terms of a collective bargaining agreement; (vi) the work experience of past incumbents in the job; and (vii) the current work experience of incumbents in similar jobs.[102]

4. *Safety*

An employer need not reasonably accommodate an applicant or employee if doing so would pose a "direct threat"[103] to the health or safety of "other individuals"[104] in the workplace.

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ability to read is an essential function of that job. *See* 29 C.F.R. app. § 1630.2(n) (1992).

[102] 29 C.F.R. § 1630.2(n)(3)(i)-(vii) (1992).

[103] 42 U.S.C. § 12113(b) (Supp. II 1991). EEOC regulations define a "direct threat" as a "significant risk of substantial harm" and require a case-by-case determination of whether an individual poses a "direct threat." 29 C.F.R. § 1630.2(r) (1992). Employers must consider the following four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. *Id.*

[104] 29 C.F.R. § 1630.2(r) (1992) The statutory language seems to preclude a paternalistic employer from refusing to hire an applicant with a disability for what the employer perceives to be the applicant's own good. *See* 42 U.S.C. § 12101(a)(5) (Supp. II 1991) (citing "overprotective rules and policies" as an obstacle to be overcome); Cooper, *supra* note 28 at 1448 n.146.

The EEOC Regulations, on the other hand, would allow an employer to reject such an applicant:

> An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm.

29 C.F.R. app. § 1630.2(r) (1992).

One would assume that the phrase "other individuals" includes customers and passers-by as well as fellow employees.

III. DISCRIMINATION THROUGH THE USE OF CONTRACTUAL RELATIONS

The ADA prohibits participation in a contractual or other arrangement that subjects a covered entity's qualified, but disabled, applicants or employees to discrimination.[105] The ADA includes the employer-union relationship within this stricture.[106] EEOC regulations repeat the prohibition, adding that it applies regardless of whether the employer intended for the contractual relationship to have the discriminatory effect.[107] The Report of the House Committee on Education and Labor states explicitly that an employer cannot use a collective bargaining agreement to accomplish what the Act prohibits the employer from doing directly, and cites as an example of violative behavior a collective bargaining agreement containing physical criteria having a disparate impact on individuals with disabilities.[108]

Though the ADA clearly imposes a duty upon employers to avoid discrimination, the Act does not definitively state whether such a duty extends to unions. However, by including "labor organization[s]" and "joint labor-management committee[s]" within its definition of entities covered by the Act,[109] promulgating the general rule that "[n]o covered entity shall discriminate. . .,"[110] and defining discrimination in terms broad enough to apply to unions,[111] the Act strongly suggests that the ADA antidiscrimination provisions do apply to unions.[112]

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[105] 42 U.S.C. § 12112(b)(2) (Supp. II 1991).

[106] *Id. Cf.* General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (holding that an employer cannot be held vicariously liable for the discriminatory conduct of a union or a joint union-trade association committee).

[107] 29 C.F.R. § 1630.6 (1992).

[108] H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 63 (1990). An employer's requirement that all employees, regardless of job duty, have a driver's license is an example of a uniformly applied criterion that screens out individuals who have a disability which makes it impossible for them to obtain a license (e.g. blind individuals). 29 C.F.R. app. § 1630.15 (b) & (c) (1992).

[109] 42 U.S.C. § 12111(2) (Supp. II 1990).

[110] 42 U.S.C. § 12112(a) (Supp. II 1990).

[111] *See supra* note 61.

[112] Joanne Jocha Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, 1991 DET. C. L. REV. 925, 956-58 (discussing the applicability to unions of

A contrary conclusion would hold employers liable in situations where they were unable to accommodate disabled employees because of union opposition.[113]

IV. COLLECTIVE BARGAINING AGREEMENTS AND REASONABLE ACCOMMODATION

While dismissing the notion that a collective bargaining agreement allows an employer to discriminate in a way otherwise prohibited by the Act, the Report of the House Committee on Education and Labor states that a collective bargaining agreement "could be relevant" in determining whether a given accommodation is reasonable.[114] This section analyzes the impact of the reasonable accommodation requirement on collective bargaining by examining whether the ADA requires reassignment in the face of a contrary provision in a collective bargaining agreement.

One way an employer may reasonably accommodate a disabled employee is to reassign that employee to an equivalent vacant position.[115] Reassignment is a last resort, only permitted when accommodation within the individual's current posi-

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both the Rehabilitation Act and the ADA).

[113] *Id.* at 958 (arguing that Congress was not likely to have intended such a result). Unions may argue that Congress intended employers alone to be liable, thereby shifting to employers the burden of bargaining for the authority to disregard provisions of a collective bargaining agreement when the employer's duty to offer reasonable accommodation so requires. For a general discussion of the distributive effects of allocating duties to bargain, *see* Paul Weiler, GOVERNING THE WORKPLACE 263 (1990); Katherine Van Wezel Stone, *Labor Markets, Employment Contracts, and Corporate Change* (forthcoming 1992); Katherine Van Wezel Stone, *Labor and the Corporate Structure*, 55 U. CHI. L. REV. 73, 86-120 (1988) (discussing aspects of labor law that allocate power between labor and management). *See also* Joyce E. Margulies, Practical Considerations Regarding the Collective Bargaining Relationship Under the Americans with Disabilities Act at 49 (PLI Corp. Law & Practice Course Handbook Series No. 714, 1990) (arguing that an employer may be liable under the ADA for the discriminatory behavior of union hiring halls).

[114] H. R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 63 (1990). This statement is, on its face, ambiguous. It seems to preclude the application of per se rules either in favor of the ADA or the collective bargaining agreement, but provides no guidance as to how, between these two extremes, courts are to decide concrete cases.

[115] *See supra* note 68.

tion would pose an undue hardship.[116] A policy restricting reassignment may thus dash a disabled employee's last hope of receiving accommodation.

Job reassignment often conflicts with collective bargaining agreements, which commonly require the employer to fill vacant positions according to employee seniority.[117] An employer may legitimately argue that the employer cannot reassign a disabled employee to a vacant position due to the seniority provisions of a collective bargaining agreement.[118] This scenario exemplifies the policy conflict between the industrial pluralist model, which creates employment rights through collective bargaining, and the individual employment rights model, which creates employment rights through statutes such as the ADA.

Three different bodies of law offer insights into whether the ADA requires reassignment in the face of a contrary collective bargaining agreement: the legislative history of the Americans with Disabilities Act, the case law concerning the Rehabilitation Act, and the case law concerning Title VII of the Civil Rights Act of 1964.

A. LEGISLATIVE HISTORY OF THE ADA

The House Report of the Committee on Education and Labor states that although an employer cannot use a collective bargaining agreement to accomplish what the Act would otherwise prohibit:

> [t]he collective bargaining agreement could be relevant . . . in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability

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[116] 29 C.F.R. app. § 1630.2(o) (1992).

[117] *See, e.g.*, Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982) (discussed *infra* at notes 143-145 and accompanying text) (collective bargaining agreement limited access to light duty positions to employees with five or more years seniority).

[118] *See, e.g.*, the Rehabilitation Act cases cited *infra* part IV.B.

> without seniority to the job. However, the agreement would not be determinative on the issue.[119]

The ADA's legislative history thus fails to provide definitive guidance to resolve conflicts between the ADA and collective bargaining agreements.

The Committee's analysis of an analogous issue may provide slightly more concrete guidance as to congressional intent. The duty to provide reasonable accommodation to a disabled employee by reassigning the employee to a vacant position does not require the employer to "bump" another employee from a position to create a vacancy.[120] This arguably means that an employer would not be required to displace a person entitled to a vacancy under a collective bargaining agreement.[121] By this analysis, the employee entitled to a position under the collective bargaining agreement — not a disabled employee who requires reassignment — would get the coveted position.

B. THE REHABILITATION ACT

Cases examining collective bargaining agreements as defenses to an employer's duty under the Rehabilitation Act to reassign employees indicate several distinct approaches to the issue. These approaches are, to varying degrees, relevant to interpreting the ADA.

1. *Undue Hardship Approach*

An employer may argue that reassigning a disabled employee contrary to a collective bargaining agreement, potentially triggering a labor conflict, constitutes an undue hardship, thus exempting the employer from reasonably accommodating the employee.[122] The employer in *Konieczko v. United States Postal Serv.*[123] apparently took this approach. Konieczko, a letter

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[119] H.R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2, at 63 (1990). The Senate report contains nearly identical language. S. REP. NO. 116, 101st Cong., 1st Sess. 32 (1989).

[120] H.R. REP. NO. 485, 101st Cong., 2nd Sess., pt. 2 at 63 (1990).

[121] Margulies, *supra* note 113, at 50.

[122] *See* Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 244 n.254 (1991); *see also infra* part IV.B.1.

[123] 47 M.S.P.R. 509 (1991).

carrier with coronary artery disease, requested reassignment on the basis of this handicap to one of three vacant window clerk positions.[124] The Postal Service refused, citing a collective bargaining agreement which gave preference for such positions according to seniority.[125] The Merit Systems Protection Board stated that "where an agency demonstrates that its nondiscriminatory collective bargaining agreement precludes it from reassigning an individual with a handicap to another position, such evidence is sufficient to establish that the reassignment would place an undue hardship on the agency."[126] The Board held, however, that such analysis was inapplicable to the particular case. Since the Postal Service's collective bargaining agreement only established a "preference" for senior employees, it did not preclude Konieczko's reassignment.[127] The Board thus found that, by refusing to reassign Konieczko to a vacant window clerk position, the Postal Service had discriminated against him on the basis of handicap.[128]

To find undue hardship under either the Rehabilitation Act[129] or the ADA,[130] courts must conduct an extensive balancing test. Although the *Konieczko* Board concluded that requiring reassignment in the face of a contrary mandate in the collective bargaining agreement constituted an undue hardship, the Board did not employ a balancing test. This may indicate that, despite language indicating the contrary, the Board was actually applying a per se approach to the issue.[131] On the other hand, the *Konieczko* Board cited several unreported EEOC decisions[132] establishing that a collective bargaining agreement that precludes reassignment constitutes an undue

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[124] *Id.* at 511.

[125] *Id.* at 514.

[126] *Id.* at 514-515.

[127] *Id.* at 515.

[128] *Id.*

[129] *See supra* text accompanying notes 42-48.

[130] *See supra* part II.C.1.

[131] For discussion of the per se approach, *see infra* part IV.B.2.

[132] Wiley v. Frank, EEOC Appeal No. 01860672, slip op. at 4 (July 31, 1990); Ferguson v. Frank, EEOC Appeal No. 01873282, slip op. at 7 (May 8, 1990); Byers v. Frank, EEOC Petition No. 03010024, slip op. at 4 (Feb. 7, 1991). All of these decisions are unreported, and all are cited in *Konieczko*, 47 M.S.P.R. at 515.

hardship.[133] The EEOC may have conducted the required balancing test in these decisions; the *Konieczko* Board may have simply adopted the EEOC conclusion.

An undue hardship approach is most appropriate in cases where the union opposes accommodatory reassignments contravening the collective bargaining agreement. In such cases, the employer can point to specific costs which the employer will incur as a result of accommodating the employee. These costs may include bargaining concessions made to obtain the union's acquiescence to reassignments or, if this is not a viable alternative, labor strife caused by the offending reassignment. In the Title VII case of *Robinson v. Lorillard Corp.*,[134] the employer argued that changing a racially discriminatory seniority system, pursuant to a district court order, would likely precipitate a costly strike.[135] The Fourth Circuit held that avoiding union pressure and the costs of a potential strike were not legitimate business purposes which could override Title VII proscriptions of adverse racial impact.[136] The same conclusion will not necessarily follow in a similar ADA case. Cost is an irrelevant consideration when ameliorating discrimination based on race[137] or sex,[138] but is a major factor in ADA

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[133] For a contrary conclusion by the Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs, *see* Coley v. Secretary of the Army, 689 F. Supp. 519, 523 (D. Md. 1987):

> In defending any failure to reassign a handicapped employee, the agency must show that such action would have created an undue hardship on its operations. The existence of a negotiated collective bargaining agreement preventing such reassignment is insufficient to show undue hardship inasmuch as any such provisions of the agreement is [sic] rendered unlawful and hence inoperative by the Rehabilitation Act.

[134] 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971), *and cert. dismissed sub nom* Tobacco Workers International Union v. Robinson, 404 U.S. 1007 (1972).

[135] *Id.* at 799.

[136] *Id.*

[137] *See*, in addition to *Lorillard*, United States v. N.L. Industries, 479 F.2d 354, 366 (8th Cir. 1973) (rejecting an employer's argument that avoiding the increased training expense of changing employment practices is a business purpose that will validate the racially differential effects of an otherwise unlawful business practice); United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 310 (8th Cir. 1972), *cert. denied sub nom* United Transp. Union v. United States, 409 U.S. 1107 (1973), *and cert. denied* 409 U.S. 1116 (1973) (requiring an employer to create and implement a costly and extensive retraining program).

determinations of undue hardship.[139] Costs to an employer of either bargaining for a change in the collective bargaining agreement, or of violating the collective bargaining agreement in order to accommodate a disabled employee, may pose an undue hardship on the employer, excusing her from reassigning the employee.

2. *Per Se Approaches*

In addition to arguing undue hardship, an employer may argue that collective bargaining agreements per se "trump" the ADA, and that the employer is therefore not required to accommodate employees by reassignment. This approach has the advantage (from the courts' and the employers' points of view) of not requiring a balancing of factors; if a court adopts this approach, the employer will always win. Courts construing the Rehabilitation Act have taken three routes to find that collective bargaining agreements per se "trump" the Rehabilitation Act.

a. *The Employee Is "Not Otherwise Qualified"*

The ADA does not require an employer to accommodate a disabled applicant or employee who, even absent the disability, is unqualified for the job.[140] EEOC regulations define a qualified individual as one who "satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires . . . ."[141] A disabled employee who lacks the requisite seniority for a job to which he wishes to be reassigned thus seems to fit squarely into the "not otherwise qualified" category. However, one could challenge the use of seniority as a hiring criteria under the ADA section proscribing the use of "qualification standards, employ-

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[138] *See, e.g.,* International Union, UAW v. Johnson Controls, 111 S.Ct. 1196, 1209 (1991) ("[T]he incremental cost of hiring women cannot justify discriminating against them.").

[139] *See supra* notes 79-83 and accompanying text (four of the six factors courts must consider when making determinations of undue hardship concern cost or the employer's ability to pay).

[140] The general rule against discrimination states, "No covered entity shall discriminate against a *qualified individual* with a disability . . . ." 42 U.S.C. § 12112(a) (West Supp. 1990) (emphasis added). *See supra* text accompanying notes 94-96.

[141] 29 C.F.R. § 1630.2(m) (1992).

ment tests or other selection criteria that . . . tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test, or other selection criteria . . . is shown to be job-related . . . and is consistent with business necessity."[142]

Courts construing the Rehabilitation Act, however, have been reluctant to strike seniority provisions on similar reasoning. In *Bey v. Bolger*,[143] for example, an employee challenged the validity of the five-year seniority requirement established by the Postal Service's collective bargaining agreement, which limited disabled employees' access to light duty positions.[144] The court held that the five year minimum requirement was "reasonably and substantially related" to the employer's purpose of:

> providing a substantial benefit to its employees who are no longer able to meet the daily physical requirements of employment status while limiting these positions to persons with the necessary seniority in order to maintain a high level of efficiency and to keep the attendant costs down.[145]

Another application of the "not otherwise qualified" approach appears in *Davis v. United States Postal Service*.[146] In *Davis*, an arthritic hemophiliac who failed to qualify for an entry level position claimed that his employer, pursuant to its duty of reasonable accommodation, should have considered him for a non-entry level position filled, according to a collective bargaining agreement, by competitive bidding based on seniority.[147] Rejecting any such duty, the district court held that sections 501 and 504 of the Rehabilitation Act do not require an employer to consider an otherwise unqualified handicapped individual for a different position as part of the employer's duty to provide reasonable accommodation.[148]

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[142] 42 U.S.C. § 12112(b)(6) (Supp. II 1990).

[143] 540 F. Supp. 910 (E.D. Pa. 1982).

[144] *Id.* at 912.

[145] *Id.* at 927.

[146] 675 F. Supp. 225 (M.D. Pa. 1987).

[147] *Id.* at 226-27.

[148] *Id.* at 236.

The court's holding rested on two independent grounds. First, the court held that an employer need not consider a disabled applicant for a position other than that for which the applicant applies.[149] This is true a fortiori for ADA cases, because EEOC regulations pertaining to the ADA state that reassignment is not available for applicants.[150] The second basis for the court's decision in *Davis* was that an employer is not required to reassign an applicant or employee who is otherwise unqualified for the job. A person who does not possess requisite seniority is not otherwise qualified.[151]

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[149] *Id.* at 234-35. The court, discussing Hoffman v. United States Army, No. 85 C. 6045, 1987 WL 8616 (N.D. Ill. Mar. 24, 1987), stated that the *Hoffman* Court had cited several district court opinions that had held that the "position in question" for which the employer must provide reasonable accommodation "does not refer to other possible positions within the federal agency. . . ." The court then held that because the collective bargaining agreement and Postal Service regulations prohibit an applicant from obtaining the non entry-level position that the plaintiff was seeking, *Id.* at 234, the plaintiff was unqualified for that position. *Id.* at 236. Because the ADA deletes the "position in question" assignment, this analysis is inapplicable to cases brought under the ADA. *See infra* notes 186-188 and accompanying text.

[150] 29 C.F.R. app. § 1630.2(o) (1992) ("An applicant for a position must be qualified for, and be able to perform the essential functions of, the position sought with or without reasonable accommodation.").

[151] *Davis*, 675 F. Supp. at 236 ("Moreover, the Rehabilitation Act, whether it be § 504 or § 501, does not mandate that an otherwise unqualified handicapped individual for a particular position be considered for a position not otherwise available.").

However, whether the second prong of the *Davis* analysis can be applied outside the context of suits brought against the United States Postal Service is unclear. EEOC regulations concerning a federal employer's duty to provide reasonable accommodation to a disabled employee by reassignment state that "an employee of the United States Postal Service shall not be considered qualified for any offer of reassignment that would be inconsistent with the terms of any applicable collective bargaining agreement." 29 C.F.R. § 1614.203(g) (1992). While this provision provides clear guidance in Postal Service cases, its implications for similar cases involving other federal agencies are unstated. The EEOC regulation fails to state a general rule concerning the obligation of non-Postal Service agencies to reassign employees in the face of a contravening collective bargaining agreement, leaving two possibilities open. The Postal Service proviso may illustrate a general rule that agencies are under no obligation to reassign employees; or the regulation may be an exception to an implicit general rule that agencies *are* under an obligation to reassign employees.

In support of this second possibility, Kenneth Allen Greene argues that although the provisions of a collective bargaining agreement negotiated between a federal union and a federal agency constitute nondiscretionary

b. *The Rehabilitation Act Does Not Require Reassignment*

The Rehabilitation Act defines a qualified handicapped person as one "who, with or without reasonable accommodation, can perform the essential functions of the position in question . . ."[152] The interpretation of the phrase "position in question" has proven problematic. One line of cases interprets the phrase to refer only to the position involved in the particular lawsuit. These cases hold that an employer has no duty to offer a disabled employee reassignment. As an illustration, in *Fowler v. Frank*,[153] a postal employee charged that the Postal Service discriminated against her on the basis of handicap by failing to transfer her to a position close to her residence.[154] Rejecting the claimant's petition, the court held that "[n]othing in the statute or the regulations suggests that a federal employer must create a new position for, or even reassign, an employee that has become handicapped."[155] The federal district court in *Carty v. Carlin*[156] used the same reasoning. Noting that the EEOC regulations do "not enumerate reassignment as a required accommodation," the *Carty* court held that the employer was under no duty to reassign an employee to a permanent light duty position, stating that "[t]here is nothing in the law or accompanying regulations to suggest that reasonable accommodation requires an agency to reassign an employee to another

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policy under which the agency must operate, those provisions, like other regulations or policies, may be changed by statute or other authority. Greene states that the Rehabilitation Act may preempt relevant provisions of a federal union's collective bargaining agreement and, criticizing the Postal Service's ability to avoid reassigning disabled employees, concludes that "It is time for the federal courts to give effect to the Rehabilitation Act, and cease to allow the United States Postal Service to opportunistically hold up the union banner because it is now a means of avoiding lawful accommodation." Kenneth Allen Greene, *Burdens of Proving Handicap Discrimination Using Federal Employment Discrimination Law: Rational Basis or Undue Burden?*, 1989 DET. C.L. REV. 1053, 1101.

[152] 29 C.F.R. § 1613.702(f) (1992) (emphasis added).

[153] 702 F. Supp. 143 (E.D. Mich. 1988).

[154] *Id.* at 145.

[155] *Id.* at 147.

[156] 623 F. Supp. 1181 (D. Md. 1985).

position."[157] Several other courts have reached the same conclusion.[158]

Courts are far from unanimous in holding that an employer has no duty under the Rehabilitation Act to offer a disabled employee reassignment. *Ignacio v. United States Postal Service*[159] illustrates vividly the judicial and administrative confusion over the conflicts between the Rehabilitation Act and collective bargaining agreements. The Postal Service fired Ignacio upon determining that he was unfit for duty as a letter carrier due to a leg injury.[160] At his initial hearing, the presiding official found Ignacio's discharge to be handicap discrimination because of the Postal Service's refusal to consider reassigning Ignacio to a clerk position.[161] The Postal Service appealed to the Merit Systems Protection Board (MSPB). The Board reversed, holding first that an employer's duty to provide reasonable accommodation to an employee does not require reassignment; and second that the reassignment would have violated the Postal Service's collective bargaining agreement.[162]

Ignacio then appealed to the EEOC, which reversed the MSPB, holding first that an employer's duty to provide reasonable accommodation to an employee requires reassignment; and second that the Rehabilitation Act takes precedence over any contrary terms in a collective bargaining agreement.[163] On remand,[164] the MSPB agreed that the Rehabilitation Act overrules the contrary terms of a collective bargaining agreement, but also reiterated its earlier position that reasonable accommodation does not require reassignment.[165] Finally, the MSPB

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[157] *Id.* at 1189.

[158] *See, e.g.,* Alderson v. Postmaster General of the United States, 598 F. Supp. 49, 55 (W.D. Okla. 1984) (the job restructuring requirement of EEOC regulations does not require assignment to a different job); Dancy v. Kline & Davia, No. 84-C-7369, 44 Fair Empl. Prac. Cases (BNA) 380, 384 (N.D. Ill. 1987) ("position in question" refers to the position which is the subject of the lawsuit; "reasonable accommodation" refers to making the job for which the handicapped person was hired, not another job, accessible).

[159] 30 M.S.P.R. 471 (Spec. Pan. 1986).

[160] *Id.* at 474.

[161] *Id.*

[162] *Id.* at 474-75.

[163] *Id.* at 475.

[164] *Id.*

[165] *Id.*

certified the case to the Special Panel, which adopted in whole the decision of the EEOC, i.e., that an employer's duty to provide reasonable accommodation to an employee requires consideration of reassignment to a vacant position and that the Rehabilitation Act overrules any contrary terms in a collective bargaining agreement.[166] *Ignacio* thus illustrates the strand of cases requiring employers to offer reassignment to disabled employees.[167]

c. *The Rehabilitation Act Requires Reassignment, But a Collective Bargaining Agreement Prohibiting Such Reassignment Per Se Vitiates an Employer's Duty to Reassign*

Ignacio represents the minority view that the Rehabilitation Act takes precedence over any contrary terms in a collective bargaining agreement.[168] The majority of cases have held that, even assuming that the Rehabilitation Act requires reassignment, an employer has no duty to reassign a disabled employee, if such reassignment would violate the provisions of a collective bargaining agreement. *Shea v. Tisch* is illustrative of these cases.[169] In *Shea*, a Vietnam veteran, employed by the United States Postal Service and suffering from anxiety disorder, sought reassignment to a post office within ten to fifteen miles of his residence.[170] The Postal Service accommodated him by giving him both a temporary reassignment to a nearby post office and an opportunity to bid on positions as they became available, using seniority as required by the collective bargaining agreement. However, the only positions near Shea's home which became available were for late shifts or for split

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[166] *Id.* at 485.

[167] *See also* Arneson v. Heckler, 879 F.2d 393, 397 (8th Cir. 1989) (remanding a § 501 decision for factual findings concerning the possibility of transferring plaintiff to another facility where physical accommodations were possible); Coley v. Secretary of the Army, 689 F. Supp. 519, 522 (D. Md. 1987) (where Federal Personnel Manual clearly articulated a policy to reassign disabled employees, "position in question" includes "all positions to which a handicapped person might be assigned.").

[168] *Ignacio*, 30 M.S.P.R. at 475.

[169] 870 F.2d 786 (1st Cir. 1989).

[170] *Id.* at 787.

time off arrangements.[171] Shea refused to bid on these positions because he claimed they would exacerbate his medical condition.[172] Thus, when Shea's temporary reassignment expired without Shea having bid on any assignments, the Postal Service assigned him to a post office more than fifteen miles from his home.[173] Shea refused to report for work, so the Postal Service fired him.[174] Shea sued, claiming that the Postal Service, as part of its duty to provide reasonable accommodation to him, was required to assign him to a preferred post office instead of merely accommodating him within the established bidding procedure for new jobs.[175] The First Circuit disagreed, holding that an employer was "not required to accommodate plaintiff further by placing him in a different position since to do so would violate the [seniority] rights of other employees under the collective bargaining agreement."[176]

Similarly, in *Carter v. Tisch*,[177] an employee with asthma requested reassignment from a job as custodian to a permanent light duty position.[178] A collective bargaining agreement, however, reserved permanent light duty assignments for employees with five or more years seniority; Carter had but two and one-half.[179] The Fourth Circuit held that the employer's duty to accommodate by reassigning Carter, if such a duty existed, "would not defeat the provisions of a collective bargaining agreement unless it could be shown that the agreement had the effect or the intent of discrimination."[180]

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[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* at 786-90.

[176] *Id.* at 790.

[177] 822 F.2d 465 (4th Cir. 1987).

[178] *Id.* at 466.

[179] *Id.*

[180] *Id.* at 469. For other cases reaching the same conclusion, *see* Carty v. Carlin, 623 F. Supp. at 1189 ("If the plaintiff were automatically reassigned to another department, this would eliminate his need to compete with other qualified employees. Such a reassignment might also violate other employees' rights secured by the collective bargaining agreement between the Postal Service and the unions."); Daubert v. United States Postal Service, 733 F.2d 1367, 1370 (10th Cir. 1984) (employer not required to transfer plaintiff to light duty job because "union contract provisions barred this alternative").

3. *ADA Distinguished from the Rehabilitation Act*

By refusing to recognize an employer's duty under the Rehabilitation Act to reassign a disabled employee, many courts never reach the issue of whether a collective bargaining agreement limits an employer's duty to provide reasonable accommodation to the disabled employee.[181] When courts do recognize such a duty, they usually find that the collective bargaining agreement "trumps" that duty.[182] Therefore, if courts look solely to cases decided under the Rehabilitation Act to interpret the ADA, they are likely to conclude, based on one of two rationales, that an employer is per se not required to provide reasonable accommodation to a disabled employee by reassignment. They will likely conclude either that reassignment is not required at all, or that the duty is vitiated by the existence of contrary provisions in a valid collective bargaining agreement.

While similar to and modeled on the Rehabilitation Act, the Americans with Disabilities Act differs in many important respects. The ADA may compel compliance with its provisions despite contrary duties established by a collective bargaining agreement. First, the ADA, as noted in Part III *supra*, proscribes discrimination through the use of contractual relations. The collective bargaining agreements relevant in *Shea* and *Carter* constitute this type of discrimination. The *Shea* and *Carter* collective bargaining agreements, restricting access to light duty work to employees with a certain amount of seniority, would adversely impact disabled employees, and hence should violate the ADA.

In *Department of Fair Employment and Hous. v. Bay Area Rapid Transit Dist.*,[183] the claimant wanted reassignment to a light duty position to accommodate his injured back, but he lacked the seniority required by the collective bargaining agreement for such a position. The Federal Employment and Housing Commission cited a provision of the Fair Employment Practice Act ("FEPA") proviso (the language of which closely tracks the ADA) directing that "an employer cannot achieve

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[181] *See, e.g.*, Fowler v. Frank *and* Carty v. Carlin, discussed *supra* accompanying text at notes 151-158.

[182] *See, e.g.*, Shea v. Tisch *and* Carter v. Tisch, discussed *supra* at notes 169-180 and accompanying text.

[183] FEHC Decision No. 80-21, Case No. FEP 77-78 A4-1930ph N-13650 80-21 (July 16, 1980).

indirectly, or via a collective bargaining agreement, that which it is unlawful to do directly."[184] Based on this language, the Commission held that the collective bargaining agreement provision restricting light duty positions to senior individuals violated the FEPA proviso. Further, the Commission concluded that "where as here, such policy would have the effect of subjecting qualified handicapped persons to unlawful discrimination on the basis of handicap, it [the collective bargaining agreement] is no defense to liability."[185]

Second, the ADA definition of a "qualified individual with a disability" differs sharply from the definition provided by the Rehabilitation Act. The ADA defines "qualified person with a disability" as an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[186] Regulations to section 504 of the Rehabilitation Act, on the other hand, define "qualified" in the context of the "position in question."[187] The ADA change thus eliminates the inference that only the current job may be considered.[188]

Third, the ADA adds the term "reassignment" to the list of possible accommodations to be offered to disabled employees.[189] Rehabilitation Act cases such as *Fowler* and *Carty*, which held that employers have no duty to offer reassignment, are thus inapplicable to ADA cases.

Fourth, the legislative history of the ADA states that terms in collective bargaining agreements are "relevant" to and "a factor" in determining whether an employer is required to offer reassignment to disabled employees. Though not dispositive, this language at least precludes conclusions, as per *Shea* and *Carter*, that collective bargaining agreement provisions per se override the ADA.

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[184] *Id.*

[185] *Id.*

[186] 42 U.S.C. § 12111(8) (West Supp. 1990).

[187] 29 C.F.R. § 1613.702(f) (1992).

[188] *See* Arlene Mayerson, *Title I — Employment Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 499, 515 (1991).

[189] 42 U.S.C. § 12111(9)(B) (Supp. II 1990).

C. TITLE VII

Title VII is relevant to the question of whether the ADA permits a collective bargaining agreement to be a defense to an employer's duty to provide reasonable accommodation to a disabled applicant or employee in two contexts. The first involves remedying past discrimination under terms of a collective bargaining agreement, and typically involves an applicant or employee who argues that the remedy should include benefits established by the collective bargaining agreement, such as promotions or seniority, that the applicant or employee would have obtained but for the discrimination. Remedying past discrimination does not necessarily create a conflict between collective bargaining agreements and substantive rights. The second context arises when either a substantive right, or the process of obtaining that right, directly conflicts with a collective bargaining agreement, and typically involves an applicant or employee who challenges the legality of a seniority system established by a collective bargaining agreement.

1. *Remedying Past Discrimination*

Courts are usually quite generous in awarding remedies for past discrimination. Courts must strive to grant "the most complete relief possible" for a Title VII violation,[190] and must make the victim "whole" by placing him, "as near as may be, in the situation he would have occupied if the wrong had not been committed."[191] In *Lander v. Lujan*,[192] the D.C. Circuit held that an employer must displace ("bump") an innocent incumbent worker in order to reinstate an employee who had been discharged in violation of Title VII. Similarly, in *Franks v. Bowman*,[193] the Supreme Court held that retroactive seniority may be awarded as relief from an employer's discriminatory hiring

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[190] Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976).

[191] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975) (quoting Wicker v. Happock, 73 U.S. (6 Wall.) 94, 99 (1867)).

[192] 888 F.2d 153 (D.C. Cir. 1989). *See contra* Spagnuolo v. Whirlpool, 717 F.2d 114 (4th Cir. 1983) (holding that the district court abused its authority in requiring bumping).

[193] 424 U.S. 747 (1976).

and assignment policies even if the collective bargaining agreement itself makes no provision for such relief.[194]

Direct challenges to the validity of seniority systems are less likely to succeed, as illustrated in *California Brewers Ass'n v. Bryant*.[195] The collective bargaining agreement at issue in *Bryant* created two parallel career ladders, one for permanent employees (those who worked at least forty-five weeks in one calendar year) and one for temporary employees (those who worked fewer than forty-five weeks in one calendar year).[196] Bryant, an African-American, brought a class action alleging that the forty-five week requirement perpetuated discrimination by precluding him and members of his class from a reasonable opportunity of achieving permanent status, as the employer always fired African-Americans a few days before they completed forty-five weeks of work in any one year.

Statutes and judicial construction exempt bona fide seniority systems from Title VII prohibitions of disparate impact, even if the seniority systems perpetuate pre-Title VII discrimination.[197] As such, Bryant's ability to recover turned on whether the forty-five week rule was a bona fide seniority system.[198] The Court held that the rule focused on the length of employment and, as such, constituted a valid provision of a permissible seniority system.[199] Explaining the need to allow a broad range of seniority systems, the Court stated:

> [C]ongress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. It

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[194] *Id.* at 778-79.

[195] 444 U.S. 598 (1980).

[196] *Id.* at 602-03.

[197] International Brotherhood of Teamsters v. United States, 431 U.S. 324, 352 (1977), construing the Civil Rights Act of 1964, tit. VII, § 703(h), 42 U.S.C. § 2000e-2(h) (1988).

[198] California Brewers Ass'n v. Bryant, 444 U.S. at 601. This was the only issue before the Supreme Court. *Id.*

[199] *Id.* at 606.

> does not behoove a court to second-guess either that process or its products.[200]

This broad policy of allowing collective bargaining agreements to displace Title VII rights is based solely on the explicit statutory exemption created by section 703(h).[201] Since the ADA contains no comparable exemption, disabled claimants will have a greater opportunity to challenge discriminatory seniority systems.[202]

Like Title VII claimants, victims of disability discrimination will seek — and will likely receive — "make-whole" remedies such as retroactive seniority. The framework of rights and responsibilities created by the collective bargaining agreement accommodates such a remedy by placing a discriminated-against person where that person would have been but for the discrimination. In fact, the collective bargaining agreement may guide courts in determining the appropriate remedy. Such remedial action will not necessarily provoke union opposition. The United States Supreme Court, in the Title VII case of *Interna-*

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[200] *Id.* at 608 (citation omitted).

[201] "There can be no doubt, for instance, that a threshold requirement for entering a seniority track that took the form of an educational prerequisite would not be part of a 'seniority system' within the intendment of § 703 (h)." *Id.* at 609. Despite the court's lofty industrial pluralist rhetoric, and excluding the 703(h) exemption, Title VII appears to override contrary provisions of the collective bargaining agreement. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 778 (1976) ("[E]mployee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest."); McDaniel v. Essex Int'l, Inc., 696 F.2d 34 (6th Cir. 1982) (employer must make reasonable accommodation of employee's religious beliefs even at the expense of violating a collective bargaining agreement); Kendall v. United Air Lines, Inc., 494 F. Supp. 1380 (N.D. Ill. 1980) (same); Nottelson v. Smith Steel Workers D.A.L.U. 19806, 643 F.2d 445 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981) ("[A] collective bargaining agreement . . . does not of itself provide a defense for Title VII violations."). *But see* United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (an affirmative action-based racial quota for admission to training programs, collectively bargained-for by an employer and a union, does not violate Title VII); Pinsker v. Joint Dist. 28J, 735 F.2d 388 (10th Cir. 1984) (employer need not accommodate religious needs by violating leave policy established by collective bargaining).

[202] *See* Ervin, *supra* note 112, at 960-62 (arguing that Congress presumably knew, when drafting the ADA, of the 703(h) exemption in Title VII, and therefore must have intended different treatment for the operation of seniority systems under the ADA).

tional Brotherhood of Teamsters v. United States,[203] pointed out that "[i]ndeed, the union asserts that under its collective bargaining agreements the union will itself take up the cause of the post-Act victim and attempt, through grievance procedures, to gain for him full 'make whole' relief, including appropriate seniority."[204] Often, however, unions *will* oppose remedial measures. Their duty to represent incumbent members, particularly against a large class of persons seeking entry into the field (*e.g.*, the disabled), may provide a disincentive for unions to carry forcefully the banner of antidiscrimination.[205] Despite potential union hesitancy to support remedies such as retroactive seniority and "bumping" innocent incumbents, these remedies nonetheless fit within the terms of a collective bargaining agreement, and hence pose no direct conflict between the statute and the agreement.

2. *Conflicts Between Substantive Rights and Collective Bargaining Agreements*

The hard cases under individual rights statutes arise when a disabled individual requests an accommodation that falls entirely outside the terms of a collective bargaining agreement. The disabled individual who asks for reassignment to a position for which the individual does not possess the requisite seniority

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[203] 431 U.S. 324 (1977).

[204] *Id.* at 346.

[205] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974) ("[H]armony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made."); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 749-50 (1981) (Burger, C.J., dissenting) (noting the "long history of union discrimination" against minorities and women); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (union-negotiated collective bargaining agreement which provided that "not more than 50% of the firemen . . . shall be Negroes" struck as violating the Railway Labor Act).

Employees who do not receive favorable treatment from their union do have the option of suing the union for a breach of the union's duty of fair representation. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). Courts, however, give broad deference to unions in such cases. Air Line Pilots Ass'n, Int'l v. O'Neill, 111 S.Ct. 1127, 1135 (1991). As Joanne Ervin points out, because of this deference, a union which acquiesces to an employer's desire to reassign a disabled employee is unlikely to be found to violate its duty to fairly represent its constituents unless it merely rubber-stamps each employer request. *See generally* Ervin, *supra* note 112, at 967-69.

wants more than retroactive seniority to compensate for an unjust discharge or a refusal to hire; the individual wants to bypass the seniority system altogether. A Title VII remedy restores a discriminated-against person to that person's rightful position but for the discrimination. It does not make that person better off than he or she would have been absent the discrimination. Disability, however, arguably creates a difference, which may justify differential (preferential) treatment.[206] This preferential treatment will likely violate the terms of existing collective bargaining agreements.

The closest analogy to this issue in Title VII law arises under an employer's duty to provide reasonable accommodation to employees whose religious beliefs conflict with their work duties.[207] In *Trans World Airlines v. Hardison*,[208] Hardison's religious beliefs prohibited him from working on Saturdays, but he did not possess sufficient seniority to bid for a shift with Saturdays off.[209] After being discharged for refusing to work, Hardison brought an action for injunctive relief against his employer claiming that his discharge constituted religious discrimination in violation of Title VII.[210] The Supreme Court held that an employer's obligation reasonably to

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[206] As discussed *supra* text accompanying notes 115-116, accommodation by reassignment is a last resort, and will only be permitted when accommodation within the disabled individual's current position would pose an undue hardship. Therefore, if reassignment is not available, the individual will almost certainly not receive any accommodation at all. The policy issue is thus transformed into whether the law should make disabled individuals *better* off (via reassignment to a preferential position) than they would have been absent their disability, or whether the law should make them *worse* off (i.e., not require accommodation). Title VII, by awarding reinstatement and damages (*see supra* text accompanying notes 190-194) treads a middle ground by (ostensibly) making the victim of discrimination "whole." This is, as discussed *supra*, impossible for disability discrimination.

[207] 42 U.S.C. § 2000e(j) (1988). At least one district court has held this duty is an unconstitutional governmental intrusion into religion. Isaac v. Butler's Shoe Corp., 511 F. Supp. 108 (N.D. Ga. 1980).

[208] 432 U.S. 63, 79 (1977).

[209] *Id.* at 68.

[210] *Id.* at 69.

accommodate religious objectors does not require departure from a collectively bargained seniority system:[211]

> [N]either 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 . . . lies at the core of our national labor policy . . . . Without a clear and express indication from Congress, we cannot agree . . . that an agreed-upon seniority system must give way when necessary to accommodate religious observances.[212]

In balancing the industrial pluralist labor policy as embodied in the National Labor Relations Act[213] against the Title VII policy against religious discrimination, the Court concluded that employers had no obligation to accommodate workers' religious beliefs if doing so would impose more than a de minimis cost.[214]

Nonetheless, *Hardison* does not apply to the ADA. The report of the House Commission on Education and Labor expressly rejects the application of the de minimis approach to reasonable accommodation under the ADA; it instead states that the ADA imposes a "significantly higher" standard than that articulated in *Hardison*.[215] The precise contours of this standard are unclear. Neither the Act[216] and its legislative history,[217] nor the EEOC regulations,[218] give any firm indication as to how a similar balancing test would be resolved under the ADA.[219]

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[211] *Id.* at 81.

[212] *Id.* at 79 (footnote omitted).

[213] 29 U.S.C. §§ 151-169 (1988).

[214] *Hardison*, 432 U.S. at 84.

[215] *See supra* note 67.

[216] *See supra* notes 74-83 and accompanying text.

[217] *See supra* notes 67, 79, 85, 87 and accompanying text.

[218] *See supra* notes 21, 83, 84 and accompanying text.

[219] *See, e.g.*, R. Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans with Disabilities Act*, (draft copy on file with the *Cornell Law and Public Policy Journal*):

Title VII cases involving racial discrimination — cases which require employers to show far more than de minimis cost to justify discrimination[220] — may provide some guidance. In *Emporium Capwell Co. v. Western Community Org.*,[221] a union, after investigating complaints of racial discrimination, invoked the collective bargaining agreement grievance procedure by demanding the convening of a joint union-management Adjustment Board.[222] Several employees found the procedure inadequate and refused to participate. Against the union's advice, these employees picketed the employer's store, for which they were fired.[223] The NLRB found that the employer properly discharged the employees for attempting to bargain with the company over the terms and conditions of employment.[224] The Court of Appeals for the D.C. Circuit reversed, concluding that concerted activity directed against racial discrimination enjoys a "unique status" under the NLRA and Title VII;[225] that the NLRB "should inquire . . . whether the union was actually remedying the discrimination to the *fullest extent possible, by the most expedient and efficacious means*;"[226] and that "[w]here the union's efforts fall short of this high standard,

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> [The six-factor balancing test, as discussed *supra* at notes 76-92,] provide[s] no constructive guidance to courts faced with concrete cases, and will create the same indeterminacy that currently plagues section 504 cases. A legal approach telling judges to examine all the facts and balance them avoids formulating a rule of decision. People are entitled to know the legal rules before they act, yet under the standards articulated by Congress, no one can know where she stands until litigation has been completed and the last appeal rejected. Such indeterminacy breeds litigation that a bright-line test, such as the proposal to impose a ceiling of ten percent of an employee's annual salary as the upper limit for what an employer must do to reasonably accommodate the employee, would avoid. Litigation imposes stiff costs and high risks on both parties in a potential lawsuit, costs and risks which disabled persons are disproportionately unable to bear. Indeterminacy may be good business for employment litigators, but it is bad law.

Id.

[220] *See supra* note 137.

[221] 420 U.S. 50 (1975).

[222] *Id.* at 54.

[223] *Id.* at 55-56.

[224] *Id.* at 57.

[225] *Id.* at 58-59.

[226] *Id.* at 59-60.

the minority group's concerted activities cannot lose its section 7 protection."[227] Reversing the D.C. Circuit, the Supreme Court held that minority employees may not engage in concerted activity to alter an employer's racial policies in derogation of the union's role as exclusive bargaining representative. The Court stated that a substantive right conferred by Title VII to be free of racial discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA."[228]

Like disabled employees seeking light duty positions for which they do not possess the requisite seniority, the *Emporium Capwell* plaintiffs tried to bypass the established collective bargaining process altogether. The Supreme Court refused to permit action proscribed by the collective bargaining agreement.[229] Though this decision would appear to bode badly for disabled claimants, the two situations may be readily distinguished. The *Emporium Capwell* plaintiffs had available, but rejected, the option of pursuing their grievances through mechanisms established by the collective bargaining process.[230] They could have filed individual grievances, acceded to the union's submission of the issue to the Adjustment Board, or filed Title VII claims. If the plaintiffs had pursued any of these options, their Title VII rights would not have conflicted with the collective bargaining agreement. Disabled employees, however, have no alternative options which would avoid the conflict; by the terms of the EEOC regulations, reassignment is to be used only as a last resort.[231] Because the options noted above are not available to disabled employees, courts should not prohibit them from seeking a remedy which is contrary to collective bargaining agreement provisions. *Emporium Capwell*'s strong industrial pluralist stance should not preclude the reassignment of a disabled employee contrary to a collective bargaining agreement.

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[227] Western Addition Community Org. v. NLRB, 485 F.2d 917, 931 (D.C. Cir. 1973).

[228] Emporium Capwell, 420 U.S. at 69.

[229] *Id.* at 66-70.

[230] *Id.*

[231] *See supra* notes 115-116 and accompanying text. Further, the first two of the three listed options (filing grievances or submitting the issue to an Adjustment Board) are only available if the employees are unionized.

SUMMARY AND CONCLUSION

The ADA prohibits the discriminatory use of contractual relations,[232] but simultaneously permits the use of a collective bargaining agreement as a defense to reasonable accommodation.[233] The EEOC has provided no significant guidance to reconcile these provisions,[234] leaving the problem to the courts.

Neither the legislative history of the ADA nor the case histories of the Rehabilitation Act and Title VII provide definitive guidance to resolve conflicts between the individual employment rights created by the ADA and the collective rights created by collective bargaining agreements. The House Report of the Committee on Education and Labor stated that the existence of a collective bargaining agreement is "relevant" to and constitutes "a factor" in determining whether an accommodation is reasonable. Such statements are virtually meaningless;[235] EEOC silence provides even less guidance.[236] The "undue hardship" approach under the Rehabilitation Act appears superficially to provide a cogent defense for employers who wish to avoid a duty to reassign disabled employees, but it rests on one ambiguous and several unreported (and inaccessible) agency decisions.[237] Several cases have adopted per se rules to resolve conflicts between collective bargaining agreements and the Rehabilitation Act, but since the reported cases reach contradictory results, they too offer little guidance.[238] Title VII promises generous remedies to victims of discrimination,[239] but since Title VII remedies seldom conflict with collectively bargained rights, the majority of cases are inapplicable.[240] Congress declared the standard established by the one Title VII case seemingly on point to be inapplicable to the ADA,[241] but declined to offer an alternative standard.

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[232] *See supra* part III.

[233] *See supra* part IV.

[234] *See supra* note 107 and accompanying text.

[235] *See supra* note 114 and accompanying text.

[236] *See supra* note 21 and accompanying text.

[237] *See supra* part IV.B.1.

[238] *See supra* part IV.B.2.

[239] *See supra* text accompanying notes 190-202.

[240] *See supra* test accompanying notes 203-205.

[241] *See supra* note 215 and accompanying text.

There is therefore no clear answer in the law as to whether the ADA provides disabled employees with the right to job reassignment if such reassignment conflicts with the provisions of a collective bargaining agreement. Courts faced with this issue must choose whether to give priority to the provisions of an individual rights statute or to the terms of a collectively bargained-for agreement.

Courts should interpret the ADA to require reassignment in the face of contrary provisions in collective bargaining agreements. Reassignment is the last hope of disabled employees who otherwise will not be accommodated and will therefore be deprived of employment opportunities.[242] In some circumstances, the only way to accommodate them may be to assign them to a job which they are able to perform, even if they do not possess the seniority mandated by a collective bargaining agreement. Courts should therefore interpret the ADA to impose upon employers a duty to provide reasonable accommodation to disabled employees by reassigning them when necessary to a different position, even if such reassignment contravenes a collective bargaining agreement. Such an interpretation imposes few significant impediments upon the exercise of collectively bargained-for rights; it merely removes from the field of negotiable issues the question of whether collective bargaining provisions which prohibit reassignment may perpetuate discrimination against disabled individuals. Disability discrimination, like race and sex discrimination, should be non-negotiable. The alternative is to ensure the perpetuation of such discrimination by permitting unions, through their insistence on the retention of discriminatory provisions in collective bargaining agreements which prohibit reassignment, to control the scope, direction, pace, and degree of disability discrimination.

R. Bales[†]

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[242] *See supra* notes 115-116.

[†] Candidate for J.D., 1993. Special thanks to Thelma Crivens and to Katherine Van Wezel Stone.