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AMERICANS WITH DISABILITIES ACT-- THE TOP COMPLIANCE ISSUES: A UNION PERSPECTIVE

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AMERICANS WITH DISABILITIES ACT-- THE TOP COMPLIANCE ISSUES: A UNION PERSPECTIVE

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I. INTRODUCTION

Labor organizations have played a unique role in the enactment and enforcement of the Americans with Disabilities Act.[2] They supported the legislation and since its enactment have sought to take advantage of its many remedial provisions to assist members to remain at work. Labor organizations, however, are also subject to the strictures of the ADA in a variety of ways. For instance, unions act as employers as well as bargaining agents, and thus must comply with the law as an employer. Some union activities may render the organizations subject to the public accommodations provisions of the ADA (Title III) requiring facilities to be accessible to disabled members. In addition, of course, unions often find it necessary to balance the rights of disabled members with those of the non-disabled. For example, unions are confronted with issues of whether cherished seniority rights may be trumped by claims for accommodation under the ADA.

Thus, labor organizations have sought, while attempting to protect the interests of disabled members, to also protect their institutional interests. These seemingly antagonistic concerns have frequently required their own form of accommodation. This paper sets forth the status of some of the issues most important to labor organizations, both institutionally and as they relate to the protection of their members. Those issues

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[2] 42 USC 12101

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covered are: the status of seniority agreements under the ADA; how arbitrators have dealt with ADA issues in deciding disputes under collectively bargained grievance/arbitration clauses; and the application of Title III of the ADA to unions.

II. SENIORITY ISSUES AND THE ADA

Perhaps no issue has divided the disabilities and labor communities more deeply than that of seniority. Unions have always maintained the sanctity of seniority systems, procedures that award preferred jobs to those who have worked the longest for an employer, and which similarly protect longer term employees from lay-off before junior employees. The controversy arises when the junior disabled employee seeks to save his or her job by taking a position that normally requires greater seniority. The classic case is the junior employee who because of disability cannot continue to work a night shift job. The disabled employee seeks transfer to days out of seniority.

Under the predecessor law to the ADA, Sections 503 and 504 of the Rehabilitation Act of 1973[3], the courts uniformly held that collective bargaining agreements, and especially seniority systems, were not overridden by obligations to accommodate under that Act. For example, in Carter v. Tisch, 822 F.2nd 465 (4th Cir. 1987), an employee with asthma was unable to continue to perform his regular duties as a laborer-custodian because of his asthmatic condition, which had been aggravated at work. The employee sought assignment to a permanent light duty custodian position. The employer refused to make the assignment because it would have violated the seniority provisions of the collective bargaining agreement.

[3] 29 USC §§ 793, 794

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In finding for the employer, the Fourth Circuit U.S. Court of Appeals held that the employer's duty to provide reasonable accommodation did not defeat the provisions of a collective bargaining agreement unless the agreement had the effect or intent of discriminating. Significantly, it was found that a bona fide seniority system governing assignment to permanent light duty positions did not have such a discriminatory effect or intent.

The Tenth Circuit reached a similar conclusion in Daubert v. U.S. Postal Service, 733 F.2d 1367 (10th Cir. 1984). The employee in that case requested that her mail handler job be altered to include only machine work or that she be reassigned to a permanent light duty position. Seniority provisions of the collective bargaining agreement would have been violated if the employer granted either request. The Tenth Circuit held that the employer could discharge the employee based on her failure to qualify for the job she then held. The employer's contractual obligation to its employees and their union under the collective bargaining agreement clearly constituted a legitimate business reason for the discharge.

Other federal courts have likewise held under the Rehabilitation Act that an employer cannot be required to accommodate an employee "in a manner which would usurp the legitimate rights of other employees in a collective bargaining agreement."[4] The courts have continued to maintain the sanctity of collective bargaining agreements when confronted with a request to accommodate under the ADA. In fact, no Circuit Court of

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[4] Jasany v. U.S. Postal Service, 755 F.2d 1244 (6th Cir. 1985) (employer not required to accommodate employee with visual disability because such accommodation would have violated seniority provisions of a collective bargaining agreement). See, also, Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989) (employer not required to accommodate employee with anxiety disorder who requested job assignment closer to home because such accommodation would have violated collective bargaining agreement requirement that employees bid on open jobs with jobs awarded based on seniority).

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Appeals has held that the ADA requires collective bargaining agreements be violated for disabled employees.

Set forth below, by Federal Circuit, is a review of leading cases decided concerning the ADA and collective bargaining agreements, primarily relating to seniority. As will be seen, most Circuit Courts of Appeals--the Third, Fifth, Sixth, Seventh, Eight, Ninth and Tenth--have specifically held that the ADA cannot require a collective bargaining agreement to be violated to accommodate a disabled employee. Although the First and Fourth Circuit Courts of Appeals have yet to render decisions concerning the ADA and collective bargaining agreements, those courts have made definitive decisions under the Rehabilitation Act, to wit, that collective bargaining agreements my not be violated to satisfy accommodation obligations. The D.C. Circuit has yet to render a definitive decision on the ADA/collective bargaining conflict. In the remaining Circuits--Second and Eleventh--District Courts have held that collective bargaining agreements may not be violated to accommodate disabled employees.

A. FIRST CIRCUIT COURT OF APPEALS

No decisions under the ADA concerning collective bargaining agreements have been decided within the First Circuit. However, the First Circuit did decide under the Rehabilitation Act that an employer was not required to accommodate an employee with anxiety disorder who had requested a job assignment closer to home because the accommodation sought would have violated the collective bargaining agreement. That Agreement required that employees bid on open jobs which would be filled pursuant to seniority. (Shea v. Tisch, supra, 870 F.2d 786 (1st Cir. 1989)).

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B. SECOND CIRCUIT COURT OF APPEALS

Although the Second Circuit U.S. Court of Appeals has not yet addressed the issue, one District Court within the Second Circuit has determined that seniority may not be sacrificed to accommodate a disabled employee. In Doe v. Town of Seymour, 1998 U.S. Dist. LEXIS 676 (D. Conn., filed January 16, 1998), the court held that reassignment to a day shift job was not required by the ADA. The court noted that such a transfer would violate the collective bargaining rights of other employees. In that case, the plaintiff police officer diagnosed with dysthymic disorder, alcoholism and depression, sought reassignment to a different shift and permission to trade assignments with a detective in the narcotics department. The court held that the seniority provisions of the collective bargaining agreement overcame the employer's obligation to accommodate under the ADA with respect to the requested shift change. The court, however, also held that a triable issue of fact existed over whether the employer should have permitted the plaintiff to trade assignments or whether he should have been afforded a temporary or special assignment. The collective bargaining agreement did not preclude such accommodations, since the latter requested accommodation did not "interfere with or compromise the reasonable expectations of other employees." [Id. at 12.]

C. THIRD CIRCUIT COURT OF APPEALS

One of the most significant Circuit Courts of Appeals opinions concerning collective bargaining agreements and the ADA was decided by the Third Circuit, in Kralik v. Durbin, 130 F.3d 76, 7 AD Cases 1040 (3rd Cir. 1997). The court held that an employer was not required by the ADA to excuse an employee from working forced overtime, because doing

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so would have violated the rights of other employees under the collective bargaining agreement. The plaintiff in that case, Karen Kralik, was a toll collector employed by the Pennsylvania Turnpike Authority. She suffered from a back injury incurred in an automobile accident unrelated to her work and sought to avoid overtime because her injuries prevented her from working more than eight hours at a time.[5]

The collective bargaining agreement provided that:

> Section 11. In a twenty-four (24) hour operation, if the Commission experiences difficulty in obtaining a replacement for any work shift, they will call employees using the seniority system described herein. If no employee accepts the assignment, it shall be offered by seniority to employees at the work site. In the event they refuse, the least senior employee, including any temporary employees in the needed job classifications, shall remain as the replacement. A temporary employee shall not be permitted to work overtime when a full- time employee is ready, willing and able to perform the overtime work in question. Temporary Toll Collectors who are scheduled to work forty (40) hours or who have already worked forty (40) hours in a given work week are not to be asked to work a vacant shift unless all the Temporary Toll Collectors who are not scheduled to work nor have worked forty (40) hours and all the permanent Toll Collectors have refused to work the vacant shift. All hours worked by a Temporary Toll Collector will be counted towards the forty (40) hours requirement except those hours worked which were first offered to and refused by all eligible permanent Toll Collectors [Id. at __, 7 AD Cases at 1041].

In holding that the employer could not be required to violate the collective bargaining agreement to accommodate her, the court left the union in control of the situation. That is, the court held that it was "appropriate for the union, rather than the

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[5] The court did not address whether an injury or illness that prevented one from working more than eight hours was covered by the ADA. See, e.g., Kolpas v. G.D. Searle & Co. 959 F.Supp. 525, 529 (N.D. Ill. 1997), holding that "inability to work more than forty-hours per week by itself does not constitute a major life activity of working." ; Duff v. Lobdell-Emery Mfg., 926 F.Supp. 799, 808 (N.D. Ind. 1996) finding that impairment that prevented a person from working more than 40 hours per week is not a disability under the ADA.; Shpargel v. Stage & Co., 914 F.Supp. 1468 (E.D. Mich. 1996) refusal to work overtime because of carpal tunnel syndrome is not actionable.; Brennan v. National Telephone Directory Corporation, 850 F.Supp. 331 (E.D. Pa. 1994)("Obviously, anyone who can work 40 hours a week as a limitation of their abilities is not suffering a substantial impairment of a major life activity, namely, the ability to work. The

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employer, to make the determination that the infringement is justifiable". More fully, the court held that:

> What makes the requested accommodation in this case unreasonable is not that it would disrupt the Commission's operations because we cannot say that it would do so. Rather, the requested accommodation is unreasonable because it would require the employer to violate its collective bargaining agreement and run the risks that the violation entails. Accordingly, we reject Kralik's suggestion that an accommodation which requires an employer to violate a collective bargaining agreement may impose virtually no hardship on the employer. In short, it is appropriate for the union, rather than the employer, to make the determination that the infringement is justifiable by releasing the employer from its obligation to follow the seniority provisions of the collective bargaining agreement to accommodate a qualified individual with a disability.8/ [Id. at __, 7 AD Cases at 1046].

Footnote 8, supra, captured the union's most pragmatic concerns about an accommodation that violates seniority, that is, that such an accommodation would not actually be visited on the employer, but upon the disabled employee's co-workers:

> We note, moreover, that if an employer grants an accommodation by violating seniority rights of other employees under the collective bargaining agreement, the employer in its operations may be making no accommodation at all. As the Eckles court [94 F.3d 1041 (7th Cir. 1996)] recognized, the accommodation instead will be made by the disabled employee's co-workers who will lose a benefit of their seniority status [Id. at __, 7 AD Cases at 1048].

D. FOURTH CIRCUIT COURT OF APPEALS

The Fourth Circuit, like the First, has not yet decided any cases under the ADA concerning collective bargaining agreements and accommodation. However, that court had decided one of the most relied upon Rehabilitation Act cases, Carter v. Tisch, supra, 822 F.2d 465 (4th Cir. 1987). As noted above, the employee in that case sought assignment to a permanent light duty custodian position because of his asthmatic

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inability to work overtime hardly makes a plaintiff handicapped.); Muthler v. Ann Arbor Machine, Inc., 13 NDLR Para. 145 (E.D. Mich. 1998) and cases cited therein.

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condition. When the employer refused because of seniority provisions in the collective bargaining agreement Mr. Carter sued.

In holding for the employer, the Fourth Circuit found that the employer's duty to provide reasonable accommodation did not defeat the provisions of a collective bargaining agreement unless the agreement had the effect or intent of discriminating. Significantly, it was found that a bona fide seniority system governing assignment to permanent light duty positions did not have a discriminatory effect or intent.

E. FIFTH CIRCUIT COURT OF APPEALS

The Fifth Circuit U.S. Court of Appeals has specifically held that the ADA did not require an employer to reassign an employee in violation of other employee's rights under a collective bargaining agreement. In Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 7 AD Cases 331 (5th Cir. 1997), cert. denied, __ US __, 7 AD Cases 1440 (1998), the plaintiff, Earl Foreman, had a pacemaker installed to treat his heart condition. His physician informed Babcock & Wilcox that Foreman could not work within six feet of any welding equipment or within 40-50 feet of power lines that ran through the shop because of possible electromagnetic interference with his pacemaker. As a result, he sought to return to work as an expeditor, but with permission to avoid making deliveries into the shop area. In the alternative, he sought to be reasonably accommodated with a new position.

The court affirmed dismissal of Foreman's suit on a variety of grounds. First, the court determined that Foreman's inability to make deliveries within the shop was too narrow a restriction on his ability to work and, therefore, that he was not disabled within the meaning of the ADA. The court considered evidence that Foreman was able to perform numerous other jobs within the plant.

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Second, the court held that even if Foreman was disabled, his requested accommodation was not reasonable. The court found that Foreman's requested accommodations included elimination of an essential function of the expeditor job (entry into the shop) or reassignment to other jobs for which he lacked the requisite seniority. With respect to the seniority issue the court stated that:

> Following the other circuits which have considered this issue, we hold that the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement. See Benson v. Northwest Airlines, Inc., [62 F3d 1108] 62 F.3d 1108, 1114 [[4 AD Cases 1234] 4 AD Cases 1234] (8th Cir. 1995); Eckles v. Consolidated Rail Corp., [94 F3d 1041] 94 F.3d 1041, 1051 [[5 AD Cases 1367] 5 AD Cases 1367] (7th Cir. 1996) (``After examining the text, background, and legislative history of the ADA duty of 'reasonable accommodation', we conclude that the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees."), cert. denied, ---- U.S. ----, [117 SCt 1318] 117 S.Ct. 1318, [137 LEd2d 480] 137 L.Ed.2d 480 [[6 AD Cases 928] 6 AD Cases 928] (1997); Milton v. Scrivner, Inc., [53 F3d 1118] 53 F.3d 1118, 1125 [[4 AD Cases 432] 4 AD Cases 432] (10th Cir. 1995) (recognizing that plaintiffs' collective bargaining agreement prohibits their transfer to any other job because plaintiffs lack the requisite seniority) [Id., at __, 7 AD Cases at 339; emphasis added.]

F. SIXTH CIRCUIT COURT OF APPEALS

In Cassidy v. Detroit Edison Co., 138 F.3d 629, 8 AD Cases 326 (6th Cir. 1998), the Sixth Circuit observed that the ADA does not require reassignment that would violate the rights of workers under a collective bargaining agreement. In that case, the court held that the plaintiff's claims for accommodation concerning her asthmatic condition were not sufficiently clear to require the employer to locate another job for her. The court, in dicta, observed that:

> Generally, transfer or reassignment of an employee is only considered when accommodation within the individual's current position would pose an undue hardship. Pattison v. Miejer, Inc., [897 FSupp 1002] 897 F.Supp. 1002, 1007-08 [[4 AD Cases 997] 4 AD Cases 997] (W.D.

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Mich. 1995). An employer may reassign an employee to a lower grade and paid position if the employee cannot be accommodated in the current position and a comparable position is not available. Pattison, [897 FSupp 1007] 897 F.Supp. at 1007-08. However, a reassignment will not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights under a collective bargaining agreement. Id./4 [Id. at __, 8 AD Cases at 330.]

4/ The MHCRA does not specifically provide for reassignment, but requires accommodation for a qualified individual with a disability unless it would be an undue hardship. Mich. Comp. Laws Ann. §37.1202(2) (West 1985). MHCRA does not require the creation of new jobs for a transfer. Hall v. Hackley Hospital, 210 Mich.App. 48 [[4 AD Cases 961] 4 AD Cases 961] (1995); Koster v. City of Novi, 213 Mich.App. 653 [[6 AD Cases 847] 6 AD Cases 847] (1995) [Id. at __, 8 AD Cases at 330.]

G. SEVENTH CIRCUIT COURT OF APPEALS

The Seventh Circuit, relying upon the unanimous body of law that developed under the Rehabilitation Act that seniority systems may not be overridden to accommodate disabled employees, held that the ADA similarly does not permit seniority systems to be trumped to accommodate. Thus, in Eckles v. Conrail, 94 F.3d 1041, 5 D Cases 1367 (7th Cir. 1996), cert. denied, __ US __, 6 AD Cases 928 (1997) plaintiff, Terry Eckles, sought accommodation due to his epilepsy. The circumstances that lead to the case were succinctly set forth by the court as follows:

> Rule 2-H-1 provides that upon written agreement by Conrail and the Union, a disabled employee may be allowed to take the position of, i.e., "bump," a more senior employee, in order to accommodate the disabled employee's job limitations. By the end of July, Conrail and the Union agreed, under Rule 2-H-1, to allow Eckles to bump an employee on the second shift at Hawthorne Yard in Indianapolis--where the yardmaster office was at ground level. The bumped employee was more than thirty spots ahead of Eckles on the yardmaster seniority roster. In October, however, the Union rescinded its agreement to Eckles' placement under Rule 2-H-1, and by mid-November Eckles was bumped from his position

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> at Hawthorne by a more senior employee [Id., at __. 5 AD Cases at 1369; footnote omitted.][6]

In coming to its decision the court noted that the ADA incorporated the duties and obligations of the Rehabilitation Act:

> We also recognized that "to a great extent the employment provisions of the [ADA] merely generalize to the economy as a whole the duties, including that of reasonable accommodation, that the regulations under the Rehabilitation Act imposed on federal agencies and federal contractors." Vande Zande, [44 F3d 542] 44 F.3d at 542 . It is therefore appropriate that we look to decisions interpreting the requirements of the Rehabilitation Act for guidance in understanding the meaning of analogous requirements under the ADA. Id. [Id., at __, 5 AD Cases at 1372.]

The court's review of the law that developed under the Rehabilitation Act lead to the conclusion that under that Act seniority systems could not be violated to accommodate a disabled employee:

> Unfortunately for Eckles, courts have been unanimous in rejecting the claim that "reasonable accommodation" under the Rehabilitation Act requires reassignment of a disabled employee in violation of a bona fide seniority system. In fact, a virtual per se rule has emerged that such reassignment is not required under the Rehabilitation Act's duty to reasonably accommodate. See, e.g., Shea v. Tisch, [870 F2d 786] 870 F.2d

[6] Rule 2-H-1 states as follows:

> Disabled employees--placement of. (a) Subject to agreement, in writing, between the Manager-Labor Relations and Division Chairman, a disabled employee covered by this Agreement may be placed in a new position or vacancy, or position or vacancy that is under advertisement but not yet filled, or in a position occupied by another employee, without regard to seniority, provided such an employee is capable of performing the duties required. An employee who is so placed shall be compensated at the rate of the position in which he has been placed. (b) An employee who has been placed in a position set forth in paragraph (a) hereof shall forfeit his right to continue in such position if he thereafter bids for other advertised positions or vacancies, and such position shall be advertised. In such case, if the disabled employee is not awarded the advertised position or vacancy for which he has bid [,] he shall exercise his seniority to a position the duties of which he is capable of performing. (c) A position in which a disabled employee has been placed by agreement under paragraph (a) hereof shall not be subject to the seniority or advertising provisions of this Agreement, except that a disabled employee so assigned may be displaced by a senior qualified employee if there is no other position covered by this Agreement to which such senior employee can exercise seniority. [Id. at __, 5 AD Cases at 1369]

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> 786, 789-90 [[1 AD Cases 1461] 1 AD Cases 1461] (1st Cir. 1989) (per curiam); Carter v. Tisch, [822 F2d 465] 822 F.2d 465, 467-69 [[1 AD Cases 1114] 1 AD Cases 1114] (4th Cir. 1987); Jasany v. United States Postal Service, [755 F2d 1244] 755 F.2d 1244 , 1251-52 [[1 AD Cases 706] 1 AD Cases 706] (6th Cir. 1985); Mason v. Frank, [32 F3d 315] 32 F.3d 315 , 319-20 [[3 AD Cases 835] 3 AD Cases 835] (8th Cir. 1994); Daubert v. United States Postal Service, [733 F2d 1367] 733 F.2d 1367, 1370 [[1 AD Cases 597] 1 AD Cases 597] (10th Cir. 1984); cf. Tyler v. Runyon, [70 F3d 458] 70 F.3d 458, 468 [[5 AD Cases 31] 5 AD Cases 31] (7th Cir. 1995) (noting importance of plaintiff's lack of seniority in rejecting claim that Rehabilitation Act required employer to train him for new position). Eckles and the amici who support his position have not cited, and we are not aware of, a Rehabilitation Act decision holding that a particular reasonable accommodation was required even though it violated the provisions of a seniority system. Thus Congress drafted the ADA against the backdrop of well-established precedent that "reasonable accommodation" under the Rehabilitation Act had never been held to require trumping the seniority rights of other employees. [Id.]

While not adopting the case law that developed under the Rehabilitation Act wholesale, nor similar case law under Title VII, the court did conclude that without a clearer intention from Congress that collective bargaining agreements be trumped by the ADA, the court would not do so. Thus, the court reasoned that:

> The Supreme Court decisively rejected the position of Hardison and the EEOC that the statutory requirement to accommodate necessarily superseded the collectively-bargained seniority rights of the other employees: "We agree that neither a collective bargaining contract nor a seniority system may be employed to violate a statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement." Id. at 79. The Court emphasized the importance of collective bargaining and the protected status of employee seniority rights obtained through such bargaining:
>
> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. Id.

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> The language of the ADA, like that of Title VII, falls far short of providing a "clear and express indication from Congress" that it intended "reasonable accommodation" to include infringing upon the seniority rights of other employees [Id. at __, 5 AD Cases at 1372; emphasis added; footnotes omitted.]

In rejecting the EEOC's position as amicus in the case, the court observed that:

> The EEOC's position in this case is rather curious. First, the EEOC explicitly acknowledges that "the ADA does not require displacement or 'bumping' of another employee to accommodate a disabled individual." But then it argues that under the ADA employers and unions faced with a disability case like that of Eckles have a duty "to negotiate in good faith a variance from collectively bargained seniority rules when the only available effective accommodation contravenes these rules and the proposed accommodation will not unduly burden other employees." This approach is admirable in its desire for moderation and compromise (not to mention its creativity). We find, however, that it lacks any foundation in the text, background, or legislative history of the ADA. While Congress could certainly choose to enact such a rule, it has not done so thus far; and we are not free to rewrite the ADA on our own. The unwieldiness of the proposed rule, in contrast to the "no bumping required" rule that we find in the ADA, is but further disincentive to "discover" such a rule within the overall gestalt of the ADA [Id. at __, 5 AD Cases at 1375; emphasis added.]

H. EIGHTH CIRCUIT COURT OF APPEALS

In Benson v. Northwest Airlines Inc., 62 F.3rd 1108, 4 AD Cases 1234 (8th Cir. 1995) the court held that:

> The ADA does not require that Northwest take action inconsistent with the contractual rights of other workers under a collective bargaining agreement, cf. Woodyard v. Hoover Group, Inc., [985 F2d 421] 985 F.2d 421 , 424 [[2 AD Cases 467] 2 AD Cases 467] (8th Cir. 1993) (affirming summary judgment which dismissed employee's claim under Nebraska state statute), nor does it require that Northwest create a new position. See White, [45 F3d 362] 45 F.3d at 362 ; Chiari v. City of League City, [920 F2d 311] 920 F.2d 311 , 318 [[1 AD Cases 1721] 1 AD Cases 1721] (5th Cir. 1991). Northwest is not required to create a permanent position as an accommodation, in part, because Benson's permanent assignment to the Recycling Unit might implicate the rights of more senior union members [Id. at __, 4 AD Cases at 1238; emphasis added.]

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The court did not dismiss the action, however, because of the possible availability of other jobs for the plaintiff that did not contravene the collective bargaining agreement.

I. NINTH CIRCUIT COURT OF APPEALS

In Willis v. Pacific Maritime Association, 162 F.2d 561 (9th Cir. 1998) the Ninth Circuit, in clear and unmistakable terms held that a collective bargaining agreement may not be violated to accommodate a disabled employee. The court stated:

> We must consider for the first time whether the Americans with Disabilities Act ("ADA"), *42 U.S.C. §§ 12101*-12213, requires an employer to violate the seniority provisions of a collective bargaining agreement to accommodate a disabled employee. We affirm because we conclude that such an accommodation would be per se unreasonable where, as here, the collective bargaining agreement contains bona fide seniority provisions [Id. at 561-62; emphasis added.]

In rendering its decision the court reviewed the state of the law within the other Circuits Courts of Appeals and observed that the Third, Fifth, Seventh, Eight and Tenth had all held that a bona fide seniority system could not be violated to accommodate a disabled employee; that the Sixth Circuit in an unpublished decision had held likewise under the ADA; and that the First and Fourth Circuits had held to the same effect under the Rehabilitation Act.[7]

[7] "In holding that the accommodations proposed by Willis and Gomez are unreasonable, we join five other United States Courts of Appeal (the Third, Fifth, Seventh, Eighth, and Tenth) n2 which have ruled that an employee's proposed accommodation under the ADA is unreasonable if it conflicts with a bona fide seniority system established under a CBA. See *Aldrich v. Boeing Co., 146 F.3d 1265, 1272 n.5 (10th Cir. 1998)* (holding that Plaintiff's proposed transfer which would violate the seniority provisions of a collective bargaining agreement is not required by the ADA); *Kralik v. Durbin, 130 F.3d 76, 81, 83 (3d Cir. 1997)* (holding that "an accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable"); *Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997)* (holding that the ADA does not require an employer to make an accommodation that would be inconsistent with the rights granted to other employees under [*12] a collective bargaining agreement and noting that "even if there were no CBA in place, B & W would not be obligated to accommodate Foreman by reassigning him to a new position"), cert. denied, *140 L. Ed. 2d 113, 118 S. Ct. 1050 (1998); Eckles, 94 F.3d at 1051; Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995)* ("The ADA does not require that Northwest take action inconsistent with the contractual rights of other workers under a collective bargaining agreement.").

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The court thus adopted a "per se rule", to wit that "an accommodation that would compel an employer to violate a CBA is unreasonable." [Id. at 561-562.]

J. TENTH CIRCUIT COURT OF APPEALS

The Tenth Circuit has also held that the ADA does not compel transferring a disabled employee in violation of another's seniority rights under a collective bargaining agreement. Adrich v. Boeing Co., 146 F.3[d] 1265, 8 AD Cases 424 (10th Cir. 1998) primarily dealt with estoppel issues raised because the plaintiff had applied for disability benefits under a private disability insurance plan and for worker's compensation benefits. However, in reviewing the possible jobs to which plaintiff could and could not be transferred, the court observed that:

> Finally, had Boeing transferred Aldrich to any of the last three disputed jobs--Maintenance Oiler, Assembler Sub-Assembly B, and Assembler Installer General B--it would have violated the seniority provisions of the collective bargaining agreement. This is not required by the ADA. See Milton v. Scrivner, Inc., [53 F3d 1118] 53 F.3d 1118, 1125 [[4 AD Cases 432] 4 AD Cases 432] (10th Cir. 1995) (holding transfer to another job that would violate seniority rights under collective bargaining

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n2 In addition, the Sixth Circuit has held, in an unpublished disposition, that an employer is not required to violate the seniority rights of other workers to accommodate a single employee. See *Boback v. General Motors, 107 F.3d 870, 1997 WL 3613,* *5 (6th Cir. 1997). Dicta from another opinion also indicates that the Sixth Circuit would follow the per se rule. See *Cassidy v. Detroit Edison Co., 138 F.3d 629, 633 (6th Cir. 1998)* ("[A] reassignment will not require . . . violating another employee's rights under a collective bargaining agreement.").

In addition, although the First and Fourth Circuits have not addressed the issue since the passage of the ADA, both had ruled that, under similar provisions of the Rehabilitation Act, an employer was not required to take action that would contravene the seniority rights of other employees under a CBA. See *Shea v. Tisch, 870 F.2d 786, 790 (1st Cir. 1989); Carter v. Tisch, 822 F.2d 465, 469 (4th Cir. 1987).* In fact, under Rehabilitation Act case law, which is "widely used to interpret reasonable accommodation under the ADA," *Barnett, 157 F.3d at 750,* a "virtual per se rule" developed that reassigning an employee in violation of a seniority system is unreasonable, see *Eckles, 94 F.3d at 1047* (citing cases). Finally, although a three-judge panel of the D.C. Circuit found that the Congressional history of the ADA mandates a case by case analysis, that decision was later vacated. See *Aka v. Washington Hospital Center, 325 U.S. App. D.C. 255, 116 F.3d 876,* reh'g en banc granted and judgment vacated, *124 F.3d 1302 (D.C. Cir. 1997),* aff'd in part, vacated in part, rev'd in part, *156 F.3d 1284 (D.C. Cir. 1998).* Sitting en banc, the court declined to rule on the question of whether a per se or balancing approach is more appropriate, and instead remanded the case to the district court to determine whether the proposed accommodation actually conflicted with the seniority system. *Id., 156 F.3d at 1303".* [Id. at ___].

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agreement unreasonable); see also Kralik v. Durban, [130 F3d 76] 130 F.3d 76, 83 [[7 AD Cases 1040] 7 AD Cases 1040] (3d Cir. 1997) (``[A]n accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable."); Foreman v. Babcock & Wilcox Co., [117 F3d 800] 117 F.3d 800, 810 [ [7 AD Cases 331] 7 AD Cases 331] (5th Cir. 1997) (``Following the other circuits which have considered this issue, we hold that the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."); Eckles v. Consolidated Rail Corp., [94 F3d 1041] 94 F.3d 1041, 1051 [[5 AD Cases 1367] 5 AD Cases 1367] (7th Cir. 1996) (``[T]he ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees."); Benson v. Northwest Airlines, Inc., [62 F3d 1108] 62 F.3d 1108, 1114 [ [4 AD Cases 1234] 4 AD Cases 1234] (8th Cir. 1995) (``The ADA does not require that [the employer] take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."); cf. Shea v. Tisch, [870 F2d 786] 870 F.2d 786, 790 [[1 AD Cases 1461] 1 AD Cases 1461] (1st Cir. 1989) (employer ``not required [under Rehabilitation Act] to accommodate plaintiff further by placing him in a different position since to do so would violate the rights of other employees under the collective bargaining agreement"); Carter v. Tisch, [822 F2d 465] 822 F.2d 465, 469 [[1 AD Cases 1461] 1 AD Cases 1461] (4th Cir. 1987) (duty to reassign under Rehabilitation Act ``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"). But see Aka v. Washington Hosp. Ctr., [116 F3d 876] 116 F.3d 876, 894-897 [[6 AD Cases 1629] 6 AD Cases 1629] (D.C. Cir.) (holding terms of collective bargaining agreement only a factor in weighing reasonableness of accommodation), reh'g en banc granted and judgment vacated, [124 F3d 1302] 124 F.3d 1302 [7 AD Cases 1088] (D.C. Cir. 1997) [Id. at __, fn. 5, 8 AD Cases at 430; emphasis added.]

K. ELEVENTH CIRCUIT COURT OF APPEALS

In Taylor v. Food World Inc., 946 F.Supp. 937 (N.D. Ala 1997) a U.S. Federal District Court within the Eleventh Circuit held that the ADA does not require accommodations that would violate a collective bargaining agreement. That decision was, however, reversed on other grounds. [133 F.3d 1419 (11th Cir. 1998).

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L. D.C. CIRCUIT COURT OF APPEALS

The D.C. Circuit has yet to decide wither the ADA requires a collective bargaining agreement to be violated to accommodate a disabled employee. In Aka v. Washington Hospital Ctr., 156 F.3d 1284, ____ 8 AD Cases 1093, 1108 (D.C. Cir. 1998) the court could not determine based upon the record whether any conflict existed between the collective bargaining agreement and the accommodation sought. In that case, Section 8.1(b) of the collective bargaining agreement provided that:

> An employee who becomes handicapped and thereby unable to perform his job shall be reassigned to another job he is able to perform whenever, in the sole discretion of the Hospital, such reassignment is feasible and will not interfere with patient care or the orderly operation of he Hospital. [Id. at __, 8 AD Cases at 1108].

The Hospital argued that the foregoing clause only came into play once the seniority provision of the agreement was exhausted. The seniority clause of the Agreement provided that:

> It is expressly understood that employees with the ability to perform the work and who possess an acceptable work record will be given preferential treatment over non-Hospital employees in filling bargaining unit vacancies.
>
> If more than one employee bids for a particular job, and if in the Hospital's judgment competing employees have equal ability to perform the work and possess equally acceptable work records, the employee with greater seniority shall be awarded the job. It shall be the obligation of the employee first to make application for the position involved. In any case where there is a dispute as to whether an applicant possesses requisite ``ability,'' the burden of proof shall be with the employee and/or the Union . . . [Id.]

The Hospital argued that:

> [S]ection 14.5 is not intended to function as an exception to those provisions, and that an employee can only be reassigned under section 14.5 after the CBA's posting and seniority rules have been complied with. [Id. at __, 8 AD Cases at 1108].

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III. ARBITRATION ISSUES

Labor organizations traditionally seek to resolve disputes with employers through grievance/arbitration mechanisms contained in their collective bargaining agreements. Due to the unique nature of the ADA, which are statutorily distinct from other anti-discrimination laws, the issues to be arbitrated are far more complex. Moreover, incorporating ADA obligations within a collective bargaining agreement may impose upon unions liability for accommodations that would not otherwise arise. Such incorporation may also vest an arbitrator with jurisdiction to interpret and apply the strictures of the ADA in a contract arbitration.[8]

The standard collective bargaining agreement anti-discrimination clause provides that:

> The Company and the Union agree there shall be no discrimination in the application of the terms of this Agreement against any employee because of race, sex, religion, color or national origin.[9]

Many arbitrators would apply external law--Title VII of the Civil Rights Act of 1964[10] or that Age Discrimination in Employment Act[11]--in deciding a grievance that implicates that clause.[12] These laws, as noted above, are far less complex than the ADA in application. Neither Title VII nor the ADEA contain "reasonable accommodation" requirements nor entail analysis of "undue hardship" standards, and neither require

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[8] In light of the U.S. Supreme Court's decision in Wright v. Universal Maritime Service Corporation, __ U.S. __, 119 S. Ct. 391 (1998), it is unlikely that a contract provision that incorporates the ADA will be construed as a waiver of an individual's right to commence a private action under the ADA, unless the contract contains a "clear and unmistakable waiver" of such rights.

[9] See, Alcoa Building Products, 104 LA 364, 365 (Cerone, 1995).

[10] 42 USC 2000e, et seq.

[11] 29 USC 621 et seq. ["ADEA"].

[12] See, Elkouri & Elkouri, How Arbitration Works, (Fifth Edition, 1997) at page 549.

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complex medical judgments concerning the nature and severity of an impairment. By incorporating the ADA into a collective bargaining agreement one necessarily vests the arbitrator with authority to decide these issues, a decision that neither party may find comforting. A review of various arbitration decisions concerning the interplay of the ADA and collective bargaining agreements, set forth below, reveals decision making similar to those normally expected in labor arbitration. Thus, the decisions tend to be short and conclusory and often fail to address the myriad of issues that normally arise in ADA cases. This is, no doubt caused by the expeditious nature of labor arbitration, cases being presented within a few months of the dispute and generally without any discovery being conducted. In addition, of course, arbitrators most often are constrained to decide cases based only upon the materials presented by the parties and rarely urge litigants to delve into issues they have ignored.

As noted above, an even more serious concern arises for unions when the collective bargaining agreement provides that the parties shall take whatever action is necessary to accommodate a disabled employee. In such circumstances the union may well have rendered itself liable for a refusal to accommodate a disabled member who seeks a job assignment in violation of contractual seniority provisions. At a minimum, the union may have vested an arbitrator with authority to decide whether violating seniority is necessary to accommodate the disabled employee. Since most courts have already rejected such a requirement the agreement to accommodate would be unnecessary and might result in remedies awarded beyond what a court would provide.

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Arbitrators, however, have generally refused to permit an employer to violate a collective bargaining agreement to accommodate a disabled employee. The most significant of the reported arbitration decisions are summarized below.

A. ADA AND SENIORITY IN ARBITRATION

In a variety of cases, unions and employers arbitrated over whether a disabled employee's accommodation could override contractual seniority provisions. As noted above, most arbitrators have held that seniority could not be violated in order to accommodate a disabled employee.

1. SENIORITY PREVAILED

In Contracts, Metals and Welding Inc., 110 LA 673 (Klein, 1998), the classic accommodation problem arose. The employer assigned a depressed junior employee to the first shift ahead of a senior employee with seniority rights.[13] The Company argued, among other things, that the anti-discrimination clause contained in the contract:

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[13] The seniority clause, Article 6, entitled "SHIFT PREFERENCE" provided in part that:

> Section 1. When an employee is permanently transferred, he may exercise his shift preference, in accordance with his seniority, when the department to which he is transferred. Employees exercising such shift preference must do so upon being transferred and shall exchange shifts with the least senior employee in the same job title on the shift he chooses.
>
> Section 2. The first two (2) weeks in March and August, per the Company's fiscal calendar, shall be open to employees for the purpose of exercising their shift preference within their respective job titles and department in accordance with their seniority. During this two (2) weeks period, the employee shall inform his supervisor in writing of his preference. Employees exercising such preference shall exchange shifts with the least senior employee in the same job title on the shift of their choice. Such shift choice may be exercised only twice in a calendar year and shall become effective on the last Monday of the month in which the change was requested.
>
> * * *
>
> Section 4. Except as provided in this Article 6, no employee shall be entitled to exercise shift preference [Id. at 675].

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> [P]uts all employees on notice that the Company will honor all federal discrimination laws. An employee with seniority rights knows, or should know, that those rights are subject to any conflicting requirements of federal law. In this case, the right being "sacrificed"--shift preference--is a relatively minor right when compared to the fact that if [the disabled employee] were to work days, it would likely jeopardize not only his ability to remain employed but also his total health.[Id. at 679].[14]

In upholding the grievance, the Arbitrator reviewed various court decisions rendered concerning the conflict between accommodation and collective bargaining agreements. He noted that the "clear precedent supports the Union's position in this case". The Arbitrator also observed that he would have denied the grievance in any event, as he found that the disabled employee had been offered a different reasonable accommodation by the Company, which he unreasonably rejected.

The decision in that case is remarkable, not because the Arbitrator determined that the collective bargaining agreement could not be violated to accommodate an employee. Rather, it is remarkable because its court-like analysis and reliance upon court precedence, and because, as will be seen by the review of other arbitration decisions, the Arbitrator analyzed whether the disabled employee was entitled to the accommodation he sought under the circumstances.

In Alcoa Building Products, supra, 104 LA 364 (Cerone, 1995) the Arbitrator also upheld the pending grievance over the Company's violation of the seniority clause of

[14] The anti-discrimination clause, Article 3, entitled ``UNION-MANAGEMENT AGREEMENT'' reads, in part, as follows:

> Both the Union and the Company agree to support the principles and spirit of equal employment opportunity and will obey all applicable laws and regulations regarding discrimination against any employee or applicant for employment because of such individual's race, color, sex, religion, national origin, ancestry, disabled veterans, Vietnam-era veterans, handicap (as defined by law) or on the basis of age for individuals whose age is between 40 and 70 years [Id. at 674].

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the collective bargaining agreement. The Arbitrator noted that two issues were presented, whether the company violated the agreement by replacing the grievant with a junior bidder, and if so, was the Company "compelled, or permitted to do so pursuant to the ADA?" [Id. at 367].

The Arbitrator looked at the clear language of the seniority clause[15] and determined that the Company had violated the agreement. The Company had placed a junior employee in a job that should have gone to a senior employee.

Turning to the second issue, whether the Company was "compelled, or permitted" to violate the agreement by the ADA[16], the Arbitrator relied upon the EEOC's Technical Advice Memorandum, which he quoted as follows:

> Reassignment should be made to a position equivalent to the one presently held in terms of pay and other job status, if the individual is qualified for the position, and if such a position is vacant or will be vacant within a reasonable amount of time.
>
> An employer is not required to create a new job or to bump another employee from a job in order to provide reassignment as a reasonable accommodation. Nor is an employer required to promote an individual with a disability to make such an accommodation. A Technical Assistance

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[15] The seniority clause provided that:

> Where the skill and ability of bidders are relatively equal, seniority shall prevail provided the employee is physically able to perform the work without endangering his health or safety [Id. at 365].

[16] The anti-discrimination clause provided that:

> Section 2. The Company and the Union agree that there shall be no discrimination in the application of the terms of this Agreement against any employee because of race, sex, religion, color or national origin. The application of this no discrimination provision will also apply to Vietnam era veterans, handicapped and age.
>
> Section 3. Should any provisions of this Agreement be held by proper authority to be in conflict with any state or federal law, it is agreed that such fact shall not operate to cause other provisions hereof, which do not conflict, to fail, but such conflicting provisions shall be revised by the parties as far as possible to conform to the law. In the event any benefit provided for herein is reduced by such applicable law, the affected provision shall be revised to provide the maximum allowable under such law." [Id. at 365]

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> Manual on The Employment Provisions of The Americans With Disabilities Act. (1992).

The Arbitrator, however, never addressed whether the disabled employee was actually protected by the ADA. His impairment only restricted his ability to lift in excess of 10 to 15 pounds and it was unclear whether the limitation was temporary or permanent. Numerous courts have held that such an impairment does not qualify for accommodation under the ADA.[17]

In Olin Corporation, 103 LA 481 (Helburn, 1994), it was held that the Company violated the seniority clause of the contract when it decided to delay eliminating a job to permit a disabled employee to continue working so she could qualify for early retirement. The job at issue, Tool Room Clerk, was required by the contract to be filled by seniority[18]. The Company had determined to eliminate various positions, including the one at issue. It also decided, however, to permit Ms. Seaman to hold the position temporarily until she could qualify for early retirement. She would not have been able to hold any other position in the Company due to her disability and low seniority. The Arbitrator nevertheless held that:

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[17] See, e.g., McKay v. Toyota Motor Mfg., 110 F.3d 369, 6 AD Cases 933 (6th Cir. 1997), where the plaintiff's impairment restricted her from frequent lifting of more than 10 pounds the Sixth Circuit, affirmed summary judgment "because we conclude that plaintiff's impairment disqualified her from only a narrow range of repetitive-motion positions and not from working in the broader class of manufacturing jobs. She was therefore not an individual with a disability who qualified for protection under the Act."; See, also, Williams v. Channel Master Satellite Systems, Inc., 101 F.3d 346 (4th Cir. 1996), cert. denied, 117 S. Ct. 1844 (1997); Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311 (8th Cir. 1996).

[18] The seniority clause provided that:

> All new, rehire or recalled employees will be within the Utility Pool. Promotions from the Utility Pool to a departmental line of progression will be on the basis of plant seniority and "qualifications" as defied herein and determined by the Company, except that any employee in the Utility Pool(employees on layoff with recall rights will be considered as members of the Utility Pool) may exercise department seniority to return to his former department [Id. at 481].

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> This is an unfortunate case where the Company's compassion and good intentions have resulted in a contract violation. The Agreement gives the Company the right to decide "the manning of all operations," and to "create new jobs, substantially change the job duties of existing jobs, or eliminate jobs. . ." The Company obviously made a decision to eliminate the Tool Room Clerk position as a permanent job. But, the Company also made a decision to continue to fill the job on a temporary basis. Both of these unilateral decisions were sanctioned by the Agreement.
>
> * * *
>
> The Company argues that but for the decision to accommodate Seaman, the Tool Room Clerk position would have no longer existed. This is undoubtedly true, but it is also true that the job continued to exist and was staffed. Furthermore, Ware's recall rights as set forth in Article V, Section 2 do not distinguish between permanent and temporary jobs. While I am sympathetic to the Company's intent to accommodate Seaman, there is no contractual support for the contention that simply because the job is a temporary one, the seniority provisions of Article V, Section 2 are inapplicable. The Company did not have to staff the Tool Room Clerk position, but it did. Having done so, even for the most laudable of reasons, the Company cannot carve out an exception to the Agreement [Id. at 483; emphasis added.]

In rejecting the Company's argument that it could avoid the contract because of its obligation to accommodate under the ADA, the Arbitrator, who rendered his decision in 1994, observed that:

> There appear to be no definitive decisions yet to indicate what direction the courts will take. For that reason alone, it would appear most appropriate to apply Rehabilitation Act precedent [Id. at 483].

As noted above, the Rehabilitation Act precedent uniformly rejected violation of collective bargaining agreements to accommodate disabled employees. Thus, the Arbitrator upheld the grievance.

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In Clark County Sheriff's Department, 102 LA 193 (Kindig, 1994), a case that arose in the public sector, a diabetic junior deputy sheriff was afforded first-shift assignment out of seniority as an accommodation.[19] The Arbitrator held that:

> The Employer cannot ignore the collective bargaining Agreement between the parties when decisions are made to provide reasonable accommodation for an otherwise qualified employee with a disability under the ADA . . . [Id. at 196].

Moreover, he observed that the Department was obligated to discuss any proposed accommodation with the Union:

> Although the ADA is not specified as such in the Agreement, the parties agreed in Article 5 "to provide equal opportunities to all employees and to prohibit any discrimination because of . . . handicap, . . ." Furthermore, in Article I, Section 1, ". . . the Employer recognizes the Union as the sole and exclusive representative for all employees" sworn in the listed classifications. Therefore, the Employer should have notified and discussed the September settlement agreement, even though the collective bargaining Agreement was followed and said notification requirement is now moot [Id. at 196].

Having decided the issue before him--whether the Department had violated the Agreement by ignoring contractual seniority--the Arbitrator then did something that frightens labor lawyers as much as wild cat strikes, he volunteered an opinion on something not before him. Thus, he suggested that if the it had negotiated with the Union to impasse, the Department could then unilaterally impose the accommodation, despite the Union's objection:

> The Employer simply cannot ignore the requirements of the Agreement without first attempting to find, through discussion with the Union, an agreed upon solution that is compatible with the Agreement and the law. If such a discussion were to reach an impasse, then the Employer

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[19] The contract provided that job assignments would be made by seniority: "employees, by seniority, will choose a specific slot on a particular shift and after the selection is made, the employee will be assigned on a permanent basis." [Id. at 193]

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certainly has the right to take whatever action it deems necessary to resolve the dilemma [Id. at 197; emphasis added.]

Such suggestion is of doubtful validity, at least under the National Labor Relations Act[20], since the collective bargaining agreement specifically governed the manner of shift selection, that is via seniority.[21] Moreover, rather than end the dispute between the parties, that decision would most likely exacerbate the controversy. It could well result in the parties battling in a new forum, before the State Employment Relations Board to determine whether the County committed an unfair labor practice under Ohio Law.[22]

2. SENIORITY DID NOT PREVAIL

In one case, City of Dearborn Heights, 101 LA 809 (Kanner, 1993), the arbitrator did hold that the ADA trumped seniority provisions of the collective bargaining agreement. In that case, also in the public sector, a police officer sought transfer from the midnight to the day shift as an accommodation due to his "brittle diabetes". The Arbitrator based his decision upon a strained interpretation of the nature of assignment to different shifts. Although the parties stipulated past practice, which the Arbitrator determined was the equivalent of a contractual clause, required shift assignments to be

[20] 29 USC 158.

[21] Section 8(d) of the NLRA provides in part that neither party can be required to "discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period" if the modification is to become effective before the contract expires or before the matter can be reopened under the provisions of the contract. See, Rangaire Acquisition Copr. & GSL Rangaire Corp., 309 NLRB 1115 (1992), aff'd, 9 F.3d 104, 156 LRRM 2864 (5th Cir. 1993); Zimmerman Painting & Decorating, 302 NLRB 856, 137 LRRM 1156 (1991); C&S Indus., 158 NLRB 454, 62 LRRM 1043 (1966); Jones Dairy Farm, 295 NLRB No. 20 , 131 LRRM 1497 (1989); Speedtrack, Inc., 293 NLRB 1054, 131 LRRM 1347 (1989).

[22] See, Ohio Revised Code 4117.11(A)(5), which provides that: "It is an unfair labor practice for a public employer, its agents, or representatives to: . . . (5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative or certified pursuant to Chapter 4117. of the Revised Code . . . .

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made by seniority, he held that a shift assignment constituted "job restructuring" and not "bumping". Nonetheless, he still determined that shift preference by seniority was substantive right.

The Arbitrator then decided the case by balancing the interests of the senior employee's desire for the day shift against the disabled junior employee's medical condition. Thus he analyzed the case as follows:

> Blaszczyk [the senior employee] testified that his working the afternoon shift has also had a significant impact on his life. He is divorced and was accustomed to seeing his son (who lives with his ex-wife) each afternoon after work. He can no longer do that as he reports to work while his son is still in school. His spouse is a teacher and reports to work in the early morning, and often cannot remain awake until he returns home. He has had to abandon most recreational activities, including boating and golf; he cannot find time for them. The stress is affecting his relationship with his wife and son [Id. at 816].

On the other hand, observed the Arbitrator:

> [W]eighing against such substantive contractual benefit is the also substantive fact of Gondek's medical condition. Notwithstanding a lack of particular medical evidence bearing upon his condition, I take judicial notice that "brittle diabetes" is a life-threatening disease. Gondek's doctor's statement denotes that:
>
> "(In spite of all efforts to regulate his brittle diabetes, the results are failing due to his midnight shift.)" [Id. at 816]

Thus, the Arbitrator concluded that:

> [T]his case resolves down to weighing the "factor" of the shift-preference of Blaszczyk and Massie, which favorably impacts upon their lifestyle, against the probability that Gondek's physical condition will continue to deteriorate unless transferred to a day shift. Included in the amalgam of such considerations is the fact that no other reasonable accommodation is available to Gondek.
>
> * * *
>
> His condition is not simply one leading to some discomfort, but is life-threatening. In my view when the seriousness of his disease, as affected

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> by being on the midnight shift, is measured against the discomfort of Blaszczyk and Massie relative to their adjustment to other shifts, the scales tip substantially in Gondek's favor and outweigh the collective bargaining agreement "factor." [Id. at 816]

B. ADA USED TO PREVENT TERMINATION

In some cases, the unions grieved termination of disabled employees arguing that the ADA prohibited the employer's actions. The unions were less successful in those efforts. However, in at least one case, the union affirmatively used the ADA to obtain an accommodation for a disabled teacher returning from sick leave.

In Flamingo Hilton-Laughlin, 108 LA 545 (Weckstein, 1997), the Union sought to void a discharge by seeking an accommodation under the ADA. In that case, the grievant had degenerative joint disease of the knee. The Arbitrator held that the grievant had refused a reasonable accommodation, a dispatcher's job at one-half his previous salary, and upheld the discharge.

In that case the Union argued that the Company did not have just cause to terminate the grievant for two reasons, to wit: (1) the Company failed to reasonably accommodate the grievant after he had become disabled; and (2) the Company's true motivation for discharging the grievant was anit-union animus [Id. at 551].

In deciding the case, the Arbitrator found some justification for both side's positions, as all good arbitrators strive to do. Thus, he stated that:

> Unfortunately, this is one of those cases in which there is some justice on both sides. There is credible evidence from which it could be concluded that the Grievant was not being fully cooperative in aiding the Employer to accommodate his stated medical limitations and resisted any attempt to assign him to jobs other than the Water Treatment position or tasks which he had performed when working as a Central Plant Maintenance Engineer. On the other hand, the Employer probably did not do everything it could have done to attempt to accommodate the Grievant's disability . . . [Id. at 553].

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The Arbitrator then stated that the issue at the core of the case was:

> [W]hether [the Company] did enough to satisfy its burden under the Labor Agreement and the Americans with Disabilities Act [Id.]

The Arbitrator then analyzed the available EEOC Guidance on the obligation to accommodate an injured employee with light duty positions and concluded that:

> Applying these principles to the instant matter, the Hotel would not be obligated to create a light-duty position for the Grievant by reassigning light-duty functions of other positions to constitute such a job, or otherwise. But if such a light-duty position had been created and was not then occupied, the Grievant would have been entitled to have been offered it as a reasonable accommodation. There is no evidence, however, of there being any such light-duty position created and unfilled, and the Employer's witnesses testified that their review of existing positions did not identify any positions in the Property Department which were vacant and which could be performed by the Grievant within his medical limitations, with the exception of the Dispatcher position which the Grievant refused to accept. [Id. at 558][23]

The Arbitrator thus concluded that the Company did not violate the agreement. He held that:

> In conclusion, the evidence does establish that the Employer did attempt to reasonably accommodate the Grievant's disability but either could not do

[23] The principles to which the Arbitrator referred were summarized by him as follows:

> To summarize this somewhat confusing EEOC Guidance, an employer is not required by the ADA to create light-duty positions either for employees injured on the job or for those whose injuries and disabilities are not job related. The employer may, however, have a policy of creating light-duty jobs for employees injured on the job, and would not violate the Act by refusing to similarly accommodate disabled employees whose injury was not occupationally caused. The employer would still have the usual obligation of reasonably accommodating that latter employer by restructuring that employee's job (i.e., reassigning the marginal functions of that job to another position) or by reassigning the employee to a vacant position, the essential functions of which the disabled employee could perform, with or without an additional reasonable accommodation. A light-duty position created to accommodate employees who are disabled by an on-the-job injury, if vacant, would have to be made available as a reasonable accommodation of a non-on-the-job disabled employee who was not otherwise reasonably accommodated. In other words, such light-duty positions, when created, cannot be reserved and held vacant for the possibility that an employee who is injured on the job will need such a position. [Id. at 557-58]

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> so or had its accommodation rejected by the Grievant. While it is true that the Employer could have voluntarily gone beyond the requirements of the Labor Agreement and the ADA by creating a new position for the Grievant or assigning him to a position that was already occupied by another employee in whole or part, there was no obligation on the part of the Employer to do so either under the Collective Agreement or the ADA. [Id.][24]

In Jefferson-Smurfit Corporation, 103 LA 1041 (Canestraight,1994), the Arbitrator held that a disabled employee had no right to be accommodated under the contract. The contract did not reference nor incorporate the ADA or the Rehabilitation Act and did not otherwise require the Company to, for instance, provide the grievant with a light duty job.

The Arbitrator found that the grievant was unable to perform all the duties associated with her job. He then observed that:

> It is well settled that an employee who is physically unable to perform all the duties of his or her job may be removed from said job, particularly where an employee has a physical disability which endangers his or her own safety or that of others. How Arbitration Works, 4th Edition, Elkouri & Elkouri, pages 722-724. Therefore, absent some right in the contract requiring the Company to find a place to put such an employee, it may be said that cause exists under these circumstances to remove or discharge such an employee. [Id. at 1048]

Since the contract contained nothing that required the Company to place the grievant in a light duty job and since he lacked seniority to bid on another suitable position, the grievance could not be upheld under the contract. And, since he could not construe from the contract any explicit language or intent to incorporate the ADA or Rehabilitation Act, he refused to require the Company to adhere to the strictures of those laws within the confines of the collective bargaining agreement. [Id.]

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[24] The Arbitrator also found no evidence to support the claim of anti-union animus.

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However, in a more recent case, Henkel Corporation/Chemicals Goup, 110 LA 1121 (West , 1998), the Arbitrator found that he could consider the spirit and letter of the ADA, even though the statute was not explicitly nor implicitly contained in the collective bargaining agreement. The Arbitrator observed that he need not wear blinders in addressing the issues before him. Nonetheless, the Arbitrator denied the grievance in which the union sought an accommodation for an employee disabled by a heart attack. He held that the grievant was not disabled because the employee's impairment only limited the grievant in heavy lifting.

In another case, San Francisco Unified School District 104 LA 215 (Bogue, 1995), the Union was successful in employing the ADA for a teacher returning from a sick leave. The grievant suffered from multiple sclerosis and on her return sought accommodation. The School District, however, did not respond to her request for a modified work schedule or a less than full-time schedule. Although positions were available that would have satisfied the grievant's needs, the District permitted those positions to be filled by others and then claimed that there existed no available positions to assist the grievant.

The Union argued that the contract incorporated within its terms the ADA and the California Fair Employment Housing Act. It based that argument on two clauses of the contract, the anti-discrimination provision contained in section 5.6, which prohibited discrimination based upon, among other things, "handicapping condition", and section 4.1, in which the District retained "all . . . duties conferred upon and vested in it by the Laws of the Constitutions of the United States and the State of California" [Id. at 217]. The Arbitrator agreed and held that the District had an obligation to make a "reasonable

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accommodation" for the grievant upon her return from her sick leave [Id. at 219]. The District failed to satisfy its obligation because it knew of the grievant's condition even though she had failed to specify the accommodation she needed [Id.]

The Arbitrator, relying upon the EEOC's Technical Assistance Manual found that the District violated its obligations by failing to ascertain whether it had an available position for grievant before permitting all of the relevant positions to be filled. Thus, he ruled that:

> The record in this case shows that the District failed to take those required steps until October, after the school year had begun and after all openings had been filled. Its failure to act in the Spring, when first advised by the Grievant of her desire to return, or at least prior to the August placement cycle, violated its duty under the agreement to grant the Grievant her contractual placement rights in a non-discriminatory fashion [Id. at 221].

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IV. UNIONS AS PUBLIC ACCOMMODATIONS

The ADA presents various questions for labor organizations in their capacity of the owner or lessor of real estate, such as whether they are required to make their halls accessible to the disabled; and whether they must accommodate member disabilities at union meetings by, for instance, providing sign interpreters for the hearing impaired.[25]

There are simple answers to these questions. Although it is not without doubt, it does appear that unions are not "public accommodations" under the ADA and, therefore, would not be required to make their halls accessible to members under Title III. Unions usually do, however, occupy "commercial facilities" and would, therefore, be obligated to make their halls accessible when making "alterations" as defined under Title III. However, because union activities are so intertwined with employment and employment opportunities, the simple answers are not particularly helpful.

As explained in more detail below, because of their impact on employment, unions must analyze union hall activities under the employment provisions of the ADA (Title I). First, however, this paper analyzes Title III of the ADA, and reviews its sparse legislative history which demonstrates that union halls are not "public accommodations" under the ADA. Then, various typical union functions are analyzed under Titles I and III that Act.

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[25] The ADA provides that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. [ADA Section 302(a)].

The Act also provides that new "commercial facilities" must be "readily accessible and useable by individuals with disabilities" [ADA Section 302(a)(1)]; and that altered "commercial facilities" must, under certain circumstances, be made "readily accessible and useable by individuals with disabilities, including individuals who use wheelchairs" [ADA Section 302(a)(2)].

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A. TITLE III OF THE ADA AND LABOR ORGANIZATIONS

Unions are not public accommodations within the meaning of the ADA.[26] Neither unions nor their halls/offices are specifically defined as places of "public accommodation" under Title III. Moreover, unions are very different from the other types of entities specifically defined as public accommodations under Title III.[27]

Section 301(7) of the Act defines places of public accommodation by catalogue. That catalogue is "exhaustive", but each category is also followed by phrases such as "other similar" entities to indicate that like or similar entities are also "public accommodations." No specific mention of unions is made in that section and, as described below, unions are not similar to any of the entities listed.

Section 301(7) of the ADA defines places of public accommodations as follows:

> The following private entities are considered public accommodations for purposes of this title, if the operations of such entities affect commerce-
>
> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
>
> (B) a restaurant, bar, or other establishment serving food or drink;
>
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

---

[26] An entity that is a "public accommodation" under Title III may be required to make substantial and expensive changes to its facilities; and may also be obligated to provide auxiliary aids to persons using the facility. Thus, if a union were a "public accommodation" it might be required to install a ramp at its hall for access by wheel chair using members. Such unions might also be required to provide sign interpreters at for hearing impaired members attending union meetings under Title III.

[27] Unions, however, do occupy "commercial facilities", which require, under certain circumstances, that their offices be built or made "readily accessible and useable by individuals with disabilities, including individuals who use wheelchairs." [ADA Sections 302(a)(1) and (2)].

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(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

The legislative history of this definition demonstrates that, as noted above, the list is "exhaustive". Thus, it was noted that:

> The twelve categories of entities included in the definition of the term "public accommodation" are exhaustive. However, within each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase "other similar" entities. The Committee intends that the "other similar" terminology should be construed liberally consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities.

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> For example, the legislation lists "golf course" as an example under the category "place of recreation." This does not mean that only driving ranges constitute "other similar establishments." Tennis courts, basketball courts, dance halls, playgrounds, and aerobics facilities, to name a few other entities are include in this category. Other entities covered under this category include video arcades, swimming pools, beaches, camping areas, fishing and boating facilities, and amusement parks.
>
> Similarly, although not expressly mentioned, bookstores, video stores, stationary stores, pet stores, computer stores, and other stores that offer merchandise for sale or rent are included as retail sales establishments.[28]

In another report contained in the Legislative History it was similarly observed that:

The definition of public accommodation differs from the bill as introduced. The bill as introduced provided a standard to be applied, rather than a list of covered accommodations. The new definition lists 12 categories of public accommodation.

The bill, as reported, provides examples of public accommodations, based on the following categories:

1. Places of lodging
2. Establishments serving food or drink
3. Places of exhibition or entertainment
4. Places of public gathering
5. Establishments selling or renting items
6. Establishments providing services
7. Stations used for public transportation
8. Places of public display or collection

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[28] Page 157; emphasis added. References in this form are to the pages of the legislative history of the ADA as reprinted in the Legislative History of Public Law 101-336, The Americans with Disabilities Act prepared for the Committee on Education and Labor, U.S. House of Representatives, One Hundred First Congress, Second Session, December 1990. The aforesaid quote appears in the Report of the Committee on Labor and Human Resources, Calendar No. 216, 101st Congress, 1st Session.

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9. Places of recreation

10. Places of education

11. Establishments providing social services

12. Places of exercise or recreation

> These 12 listed categories are exhaustive. However, within each category, the bill lists only a number of examples. For example, under category (5), the bill lists "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment." This list is only a representative sample of the types of entities covered under this category. Other retail or wholesale establishments selling or renting items, such as a book store, video-tape rental store, or pet store, would be a public accommodation under this category.
>
> A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category. For example, it is not necessary to show that a jewelry store is like a clothing store. It is sufficient that the jewelry store sells items to the public.
>
> Entities not falling under one of these categories, or not privately operated, or not affecting commerce, are not considered to be public accommodations. Entities that are not public accommodations may be commercial facilities and subject to the requirements of Section 303.[29]

Evidence before Congress demonstrates that the purpose of the bill was to achieve the fullest integration into American society:

> In the first ever nationwide poll of people with disabilities conducted in 1986, the Louis Harris organization asked a number of questions regarding the social integration and activities of Americans with disabilities. The pollsters discovered that people with disabilities are an extremely isolated segment of the population. As the National Council on Disability summarized the poll's results:
>
> > The survey results dealing with social life and leisure experiences paint a sobering picture of an isolated and

[29] Pages 493-494, Report of the Committee on the Judiciary, House of Representatives, Report 101-485, 101st Congress, 2nd Session, May 15, 1990; emphasis added.

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> secluded population of individuals with disabilities. The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue . . . The extent of non-participation of individuals with disabilities in social and recreational activities is alarming. (Implications for Federal Policy of the 1986 Harris Survey of Americans with Disabilities, p. 35 (1988))

Specific findings of the poll included the following:

> * Nearly two-thirds of all disabled Americans never went to a movie in the past year. In the full adult population, only 22% said that they had not gone to a movie in the past year.
>
> * Three-fourths of all disabled persons did not see live theater or a live music performance in the past year. Among all adults, about 4 out of 10 had not done so.
>
> * Disabled people are three times more likely than are non-disabled people to never eat in restaurants. Seventeen percent of disabled people never eat in restaurants, compared to 5% of non-disabled people. Only 34% of disabled people eat at a restaurant once a week or more compared to a 58% majority of non-disabled people.
>
> (Louis Harris and Associates, <u>The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream</u>, p. 3 (1986))

Another specific finding of the poll had to do with grocery shopping and similar activities:

> Disability also has a negative impact on vital daily activities, like shopping for food. A much higher proportion of disabled persons than nondisabled persons never shop in a grocery store, compared to only 2% of nondisabled person. About 6 out of 19 disabled persons visit a grocery store at least once a week, while 90% of nondisabled adults shop for food this often (Id., p. 3)

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> Why don't people with disabilities frequent places of public accommodation and stores as often as other Americans? The Harris poll sheds some light on the reasons for this isolation and nonparticipation by person with disabilities in the ordinary activities of life. Two of the major reasons have to do with not feeling welcome and inaccessibility.[30]

Thus, despite broad references that the intent of the law is that "people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities",[31] it is clear that the major concern under Title III was access to service establishments (restaurants, dry cleaners, grocery stores, etc.) and social and recreational facilities (movie theaters, golf courses, etc.).[32] Thus, it should come as no surprise, then, that unions were not directly mentioned in the definition of "public accommodation." Moreover, as discussed below, none of the listed categories in Title III are analogous to unions or union activities.

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30 Page 2154-55; Prepared statement of Robert L. Burgdorf, Jr., Associate Professor of Law, District of Columbia School of Law.

31 Page 157.

32 See, also, pages 1891-1892. Prepared statement of Chai R. Feldblum, Legislative Counsel, American Civil Liberties Union:

> Title IV includes a definition of "public accommodation" which is different from that which appears in Title II of the Civil Rights Act of 1964. The new definition of the ADA appropriately addresses the kinds of discrimination faced by people with disabilities. Title II of the Civil Rights Act defines public accommodations to include establishments which provide lodging, establishments which are engaged in selling food, and places of entertainment. These are the places which presented the most significant problems of racial segregation during the period in which the Civil Rights Act of 1964 was passed and therefore these were the places on which that law specifically focused. <u>By contrast, people with disabilities face discrimination in a range of other public accommodations--in supermarkets, barber shops, laundromats, and in other service providers.</u> It makes no sense to restrict the range of coverage of public accommodations to a definition that was developed at a different time, for a different purpose. Certainly, if we wish to build a truly accessible country in the future by requiring that all new buildings be constructed in an accessible fashion, it makes no sense to restrict artificially the definition of those buildings that should be covered. [Emphasis added; footnotes omitted].

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The statutory category defining entities most analagous to union activities is contained in subdivision (F), concerning places that are "service establishments":

> A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant, lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.[Emphasis added.]

Union activities, however, are not at all similar to those "service establishments" listed in subdivision (F). Unions simply do not provide at their halls any of the types of services provided by any of the other establishments listed.[33] Unions, of course, are specific entities unto themselves and Congress new as much. Congress specifically dealt with unions in the employment provisions of the ADA.[34] Thus, as noted above, it appears that unions are not "public accommodations" under Title III.

Of course, as also noted above, unions do occupy "commercial facilities". Thus, when a union alters its facility in a manner that affects usability, the altered areas must be made readily accessible to and useable by individuals with disabilities to the maximum extent possible.

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[33] The fact that some unions house their related jointly administered employee benefit funds, a function similar to an "insurance office", is discussed infra.

[34] Of most significance is the inclusion of unions in the definition of the term "covered entity" under Title I. Thus, Section 101(2) of the ADA provides that:

> The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee. [Emphasis added].

It is also noted that Title III does not include within its definition of a public accommodation an "employment agency" although such might well be considered a "service establishment." It may well be that the failure to mention "employment agency" in Title III was because of the intention to cover all employment related entities under Title I. In doing so, however, the drafters may have unwittingly permitted such entities to avoid Title III obligations.

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B. ANALYSIS OF TYPICAL LABOR ORGANIZATION ACTIVITIES

As noted above, the fact that labor organizations may not be "public accommodations" does not end the inquiry. This is because so much of a union's activities directly affect employment opportunities. And, as noted above, unions are specifically covered by Title I of the ADA.[35] Thus, it is necessary to examine various typical union activities under Title I of the ADA to determine the union's obligations under that Act. Set forth below is such an analysis.

1. VOTING ON COLLECTIVE BARGAINING AGREEMENTS

If a union were a "public accommodation" it clearly would be required to assure that its members could vote on collective bargaining agreements. Section 302(b)(2)(A) provides that the term "discrimination" with respect to a public accommodation includes: (iv) a failure to remove architectural barriers, and communication barriers that are structural in nature in existing facilities . . . where such removal is readily achievable . . . . (v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily

[35] Section 101(2) of the ADA defines "covered entity" to include: "an employer, employment agency, labor organization, or joint labor-management committee." Moreover, ADA Section 102(a) provides that:

> No covered entity 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.

For an analysis of Title I of the ADA and its application to unions, particularly in light of potential conflict with the National Labor Relations Act, see, Smith, Jules L., 18 Employee Relations Journal, No. 2/Autumn 1992, p. 273 ff.

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achievable. Thus, such a union would need to assure that wheelchair using members could enter the union hall to vote on contracts.[36]

However, regardless of the "public accommodation" provisions of the ADA, unions retain obligations to accommodate under the employment provisions of Title I of the Act. Unions, of course, are "covered entities" under Title I. Section 101(2) of the ADA defines covered entity to mean:

> [A]n employer, employment agency, labor organization, or joint labor management committee.

Moreover, Section 102 of the ADA provides that:

> (a) No covered entity 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.
>
> (b) Construction.--As used in subsection (a), the term "discriminate" includes--
>
> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.
>
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment agency or referral agency, labor union, an organization providing fringe benefits to an employees of the covered entity, or an organization providing training and apprenticeship programs;)

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[36] It is noted that unions do not fit within the "private club" exemption contained in ADA Section 307. That Section provides that: "The provisions of this title shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) or to religious organizations or entities controlled by religious organizations, including places of worship." Unions are not exempt under 42 U.S.C. 2000-a(e).

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As can be seen, the obligations imposed on unions by Title I may be even greater than those contained under the public accommodations provisions of Title III. For instance, Section 102(b)(1) of the ADA prohibits:

> limiting, segregating, or classifying a job applicant or employee in away that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.

A good argument could be made that hearing impaired members must be accommodated in efforts to vote on collective bargaining agreements. Surely, collective bargaining agreements affect job opportunities, and the ability to vote on such an agreement may adversely affect such job opportunities. Such an accommodation might well include the provision of a sign interpreter at debates over new agreements.[37] The failure to provide such an accommodation might well mean that members would not understand the true meaning of the contract proposal being debated.

2. VOTING ON CHANGES IN BY-LAWS

Similarly, changes to union by-laws may also implicate employment opportunities or benefits. For instance, a change in by-laws concerning the payment of dues might well affect a member's ability to remain employed by a particular employer.

3. ATTENDING REGULAR UNION MEETINGS

It does not appear that the fact that regular union meetings are held at the union hall renders the facility a "public accommodation." However, unions are, as noted above,

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[37] Cf. Zamora v. International Hotel and Restaurant Employees Union, Local 11, 817 F.2d 566 (9th Cir. 1987) where the court held that a union violated the rights of its Spanish Speaking members by refusing to provide simultaneous translations of its monthly meetings where nearly one-half of the members were not fluent in English.

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"covered entities" under Title I. Thus, they are prohibited from discriminating against persons with disabilities in connection with, among other things, job opportunities. In so far as what occurs at regular union meetings affects job opportunities, the union might be required to accommodate the members' disabilities, so long as such did not constitute an undue hardship.[38]

4. GRIEVANCE PROCESSING

Clearly, members involved in grievance processing must be accommodated under Title I. The grievance process certainly could affect such a member's job opportunities.[39]

5. JOB REFERRALS

Perhaps the clearest example where Title I of the ADA, regardless of Title III, requires union accommodation of member disabilities concerns the job referral process. That process directly affects job opportunities. Moreover, Section 102(b)(2) of the ADA makes specific reference to discrimination by an "employment or referral agency". See, also, subsection (3) of ADA Section 102(b), which provides that the term discrimination includes:

> [U]tilizing standards, criteria, or methods of administration--
>
> (A) that have the effect of discrimination on the basis of disability; or

[38] Another of the categories that must be noted is subdivision (D) as follows: "an auditorium, convention center, lecture hall, or other place of public gathering". Originally, the bill did not include the phrase "other place of public gathering" [page 221; H.R. 2273]. Although many construction trade unions maintain facilities that constitute auditoriums and lecture halls, they are not, generally, "places of public gathering."

[39] Cf. Lebron v. IBEW, Local 1505, ___ F.Supp. ___, 123 LC (CCH) 22,751 (D.Mass. 1992), where it was held that the union did not violate its duty of fair representation when it did not provide an interpreter to an employee at an arbitration. The employee had difficulty understanding English. The court found that both the company and the union understood the employee. At most, said the court, the union acted negligently, but such did not constitute a violation of the duty of fair representation.

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(B) that perpetuate the discrimination of others who are subject to common administrative control . . .

It is suggested, therefore, that a construction trade union with a referral process of any kind must make that process available to all who wish to use it. Thus, a union that requires applicants for referral to sign an out of work list in person must make certain that the list is maintained in a location accessible to wheelchair using applicants. In the alternative, the union could achieve compliance by bringing the list to the applicant at the street, assuming that entry into the union hall is not possible.

It is relevant to note that under the ADA, construction trade unions may find it necessary to review any requirements of physical fitness for entry into the union or use of the referral system. No longer may an applicant be summarily rejected because, for example, he or she is visually impaired or because he or she uses a wheelchair. It will be necessary to determine whether it is possible to accommodate such individuals in performing the essential functions of the available jobs. For instance, an applicant who cannot climb ladders because of a disability may be able to perform the essential functions of the electrical trade at ground level. The inquiry would be, assuming that actually performing the job on a ladder is not an essential function, whether such an accommodation is reasonable and whether it would impose an undue hardship to split the job in that fashion.[40] In any event, the point is that previous presumptions of necessary job qualifications are all presently suspect.

[40] It is noted that the legislative history made it clear that construction projects are not "places of public accommodation" within the meaning of Title III. See, pages 244-245; Report of the Committee on Public Works and Transportation, Report 101-485, 101st Congress, 2nd Session, May 14, 1990.

Section 301(7) of the legislation sets forth the definition of the term "public accommodation" and lists examples of entities to be included under this definition. The list includes restaurants, hotels, movie theaters,

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6. CONCERTED ACTIVITIES

Construction trade unions often engage in concerted activities such as picketing and handbilling. It is difficult to see how, at first blush, such activities affect job opportunities for individuals and, therefore, it does not seem likely that a union will be required to provide accommodations under Title I for members to engage in those activities.

However, if the union employs more than 15 employees and members are paid for their participation in picketing and handbilling activities, then it will be necessary for the union to engage in the full review of obligations under Title I. Similarly, such a full review under Title I will be necessary if obtaining paid positions within the union is based upon previous involvement in picketing and handbilling.

7. EMPLOYEE BENEFIT FUNDS

Jointly administered employee benefit funds provide a variety of benefits to participants, including pensions and annuities, health and welfare and supplemental unemployment benefits ("SUB"), and apprenticeship and journeymen training. It seems that pension, annuity, health and welfare and SUB benefits fund offices constitute public accommodations under Section 301(7)(F) of the ADA. That Sub-section provides that a public accommodation includes:

> a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office

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stadiums, grocery stores, professional offices, terminals used for public transportation, museums, zoos, homeless shelters and recreation facilities. An example of an entity excluded from this list, nd therefore not considered a public accommodation, would be a construction job site--which is often in constant state of transition--such as one used in the construction of a new public transportation facility. Religious institutions or entities controlled by religious institutions are also not covered by the legislation. [Emphasis added.]

Nonetheless, unions and employers would still be covered by Title I of the ADA on construction projects.

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> of a health care provider, hospital, or other service establishment [emphasis added].

Pension, annuity, health and welfare and SUB offices are analogous to "insurance offices", where insurance coverage may be purchased and provided. Thus, access to such benefit fringe offices would be governed by Title III.

Whether the benefits provided by such employee benefit funds--health insurance, retirement income, etc.--are governed by Title III, as opposed to the physical office itself, raises different issues, over which the courts are divided. For instance, in Carparts Distributions Center, Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 3 AD Cases 1237(1st Cir. 1994), the First Circuit opined that:

> By including "travel service" among the list of services considered "public accommodations," Congress clearly contemplated that "service establishments" include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result. [Id. at __, 3 AD Cases at 1242-43; emphasis added.]

Then, in somewhat broader language, the court observed that since many purchase goods and services over the telephone or by mail (and we would now have to add, via the internet), to limit the coverage of Title III to physical locations would undercut an important purpose of the ADA:

> Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. To

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> exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public. [Id. at __, 3 AD Cases at 1243.]

The court, however, remanded the action to permit the plaintiff to educe more proof on the public accommodations issues, as well as on claims under Title I. The court stated that:

> We think that at this stage it is unwise to go beyond the possibility that the plaintiff may be able to develop some kind of claim under Title III even though this may be a less promising vehicle in the present case than Title I. Not only the facts but, as we have already noted, even the factual allegations are quite sparse. In addition, because of our resolution of the Title I claims, this case must be remanded and is subject to further proceedings regardless of whether Title III remains in the case. While it is tempting to seek to provide further guidance, the nature of the record and the way the issues are addressed in the appellate briefs make it imprudent to do so. [Id.]

See, also, Doukas v. Metropolitan Life Ins. Co., 950 F.Supp. 422, 6 AD Cases 262 (DNH 1996) where it was held that Title III applied to the plaintiff's claim that she was denied mortgage liability insurance because of her disability. The plaintiff was diagnosed as suffering from bipolar disorder; Kotev V. First Colony Life Ins. Co., 927 F.Supp. 1316, 6 AD Cases 121 (DC CD Calif. 1996) where it was held that Title III applied to the denial of life insurance based upon the spouse's status as HIV-positive; Baker v. Hartford Life Ins. Col, 6 AD Cases 135 (ND Ill. 1995), where it was held that Title III protected an individual denied health insurance coverage because of a history of seizures.

On the other hand, in Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 6 AD Cases 1865 (6th Cir. 1997), the Sixth Circuit U.S. Court of Appeals held that Title III covered only physical places and did not regulate the content of goods and services offered

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by a public accommodation. In that case a Group benefit plan that was offered by the employer to its employees was involved. See, also, Leonard F. v. Israel Discount Bank of New York, 967 F.Supp. 802, 804-05 (SDNY 1997).

Finally, with respect to apprentice and journeyman training funds, coverage under Title III may be found in ADA Section 301(7)(J): "a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education". Moreover, such funds clearly are covered entities under Title I. See, ADA Section 101(2), which provides that a covered entity includes: "employment agency, labor organization, or joint labor-management committee."

8. SOCIAL EVENTS

Unions sometimes hold social events, such as picnics, dinner dances, retirement dinners, etc., at their halls. Such social events rarely affect employment opportunities and, therefore, will usually not implicate Title I concerns. Whether the use of the union hall for such social functions renders them a place of public accommodation is more complex. Clearly, if the union rents its facility to other entities, the hall then becomes, at least during the rental period, a public accommodation. See, ADA Sections 301(7)(B) and (D), which includes within the definition of a public accommodation:

(B) a restaurant, bar, or other establishment serving food or drink;

* * *

(D) an auditorium, convention center, lecture hall, stadium, or other place of public gathering.

However, when the union holds functions of its own in its facility, it does not appear that such renders the hall a place of public accommodation. Although food and drink may

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be served at such functions, it would be erroneous to classify the use as that of a restaurant or bar. Similarly, although the union hall has all of the attributes of an auditorium, convention center or lecture hall, when the union uses it for its own functions, it is not a "place of public gathering"; rather, it is a place of private gathering.[41]

9. SERVING FOOD AT UNION HALL

As noted above, Section 301(7)(B) includes within the definition of a "public accommodation": "a restaurant, bar, or other establishment serving food or drink". However, since unions generally serve food and drink only in connection with their own meetings and to their own members or guests, it does not appear that such activities, standing alone, would render the union a public accommodation.

C. CONCLUSION

The best approach to analyzing the Title III problem is to examine the request for accommodation in a hierarchical fashion. That is, first determine if lack of accommodation will directly or indirectly affect employment opportunities either within the company or within the union. Then determine whether an accommodation may be achieved without undue hardship. This should eliminate most questions that arise. However, if one is still left with the basic question, to wit, whether the union hall is a "public accommodation" because of a particular activity, it still may be possible to avoid difficulty because barrier removal may not be "readily achievable" and, therefore, unnecessary under the ADA.

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[41] Early versions of the bill did not contain the phrase "or other place of public gathering". See page 221 (H.R. 2273). The addition of that phrase makes it clear that during those times that the hall is not open to the public it is not a "public accommodation" under Sub-section D, auditoriums, etc.

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