

"ADA Reasonable Accommodation in the Unionized Setting: Is the ADA Always Trumped?"

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in the Unionized Setting:
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I. INTRODUCTION AND BACKGROUND

The purpose of the Americans with Disabilities Act, 42 U.S.C. § 12101 (1990) (hereinafter "ADA") was to provide for the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(1).

In relevant part, the ADA prohibits covered entities, including employers and labor organizations, 42 U.S.C. § 12111(2), from discriminating against a qualified individual with a disability because of the disability in regard to employment matters. 42 U.S.C. § 12112(a).

A qualified individual with a disability means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires. 42 U.S.C. § 12111(8).

Reasonable accommodation may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position,... and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9).

It was anticipated that demands and attempts to accommodate individuals with disabilities would come in conflict with rights under collective bargaining agreements in a unionized setting. This paper will review the manner in which various courts and arbitrators have dealt with that conflict. For purposes of this paper, it will be assumed that the employee is a qualified individual with a disability and can perform the essential functions of the employment position that the individual holds or desires.

Part II of this paper will review the comprehensive manner in which contract rights have repeatedly trumped ADA accommodation. This has been the case regardless of whether the courts utilize a per se test, regardless of the types of contract rights at issue, regardless of the importance of the rights at issue, and regardless of the language of the contract. Part III will

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address published arbitration cases in which arbitrators have repeatedly reversed employer attempts to accommodate where the accommodation is done in violation of a contract right. Part IV will comment on attempts to accommodate in negotiations.

II. IT APPEARS THAT RIGHTS UNDER A COLLECTIVE BARGAINING AGREEMENT ALWAYS TRUMP ATTEMPTS AT ACCOMMODATION

Recently, a federal court of appeals summarized the relationship between ADA accommodation and contractual seniority rights as follows: "The federal courts of appeals that have reached the issue are unanimously of the view that the ADA does not require accommodations that contravene the seniority rights of employees." Lujan v. Pacific Maritime Association, __ F. 3d __ [9 AD Cases 59, 63] (9th Cir. 1999). While discussion of the cases is in order, that is exactly where ADA accommodation stands today in the unionized setting. In this section, the cases will be reviewed in chronological order.

ADA accommodation in the unionized setting when in conflict with contract provisions appeared to be doomed in the early cases in dicta. For example, in Wooten v. Farmland Foods, 58 F. 3d 382 [4 AD Cases 920] (8th Cir. 1995), the court had already concluded that the plaintiff was not disabled, but added in the latter part of its opinion:

Wooten offered evidence that Farmland Foods informed him it would not fire other employees in order to accommodate him. An employer is not required to make accommodations that would violate the rights of other employees.

58 F. 3d at 386. The court engaged in little analysis and cited to a case decided under the Rehabilitation Act without explaining why such cases were applicable. Mason v. Frank, 32 F. 2d 315 [3 AD Cases 835] (8th Cir. 1994).

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In any event, Wooten commenced a line of cases in which federal courts of appeals repeated the incantation that collective bargaining rights trump ADA accommodation. Milton v. Scrivner, 53 F. 3d 1118 [4 AD Cases 432] [149 LRRM 2065] (10th Cir. 1995) ("plaintiffs' collective bargaining agreement prohibits their transfer to any other job because plaintiffs lack the requisite seniority"); Daugherty v. City of El Paso, 56 F. 3d 695, 700 [4 AD Cases 993] (5th Cir. 1995), cert. denied, __ U.S. __ [5 AD Cases 1248] (1996) ("we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled.")

In Benson v. Northwest Airlines, Inc., 62 F. 3d 1108 [4 AD Cases 1234] (8th Cir. 1995), the district court had dismissed the plaintiff's ADA claim concluding that the plaintiff was not a "qualified individual with a disability." In reversing the district court on that issue, the court of appeals commented on reassignment as a possible accommodation. "The ADA does not require that Northwest take action inconsistent with the contractual rights of other workers under a collective bargaining agreement." 62 F. 3d at 1114. Again, there was little analysis. See also Kennedy v. Chemical Waste Management, Inc., 79 F. 3d 49, 52 [5 AD Cases 565] (7th Cir. 1996) (dicta) ("the notion of reasonable accommodation cannot be stretched to the point of requiring the provision of superseniority to disabled employees who lost their seniority on account of disability years").

In what may be one of the most significant cases on the matter of ADA accommodation in the unionized setting, in Eckles v. Consolidated Rail Corp., 94 F. 3d 1041 [5 AD Cases 1367] [155 LRRM 2653] (7th Cir. 1996), cert. denied, __ U.S. __ [6 AD Cases 928] [155 LRRM 2704]

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(1997), the court concluded that "the ADA does not require disabled individuals to be accommodated by sacrificing the collectively-bargained, bona fide seniority rights of other employees." 94 F. 3d at 1051.

In Eckles, a collective bargaining agreement had a provision which provided for the employee and the union, upon written agreement, to allow the bumping of a more senior employee in order to accommodate the disabled employee's job limitations. Initially, the parties agreed, but then rescinded the agreement. The Eckles court looked to the cases decided under the Rehabilitation Act for guidance, concluding that courts have unanimously rejected the claim that reasonable accommodation requires reassignment in violation of a bona fide seniority system. The Eckles court also relied on the United States Supreme Court's decision in Trans World Airlines v. Hardison, 432 U.S. 63 [14 FEP Cases 1697] (1997), in which the Supreme Court rejected the argument that the statutory requirement to accommodate necessarily superseded collectively bargained rights of other employees. While the Eckles court attempted to limit its decision, it clearly and conclusively provided for the subordination of ADA accommodation to collectively bargained rights.

One after another, the federal courts of appeals followed suit. Foreman v. Babcock & Wilcox Co., 117 F. 3d 800 [7 AD Cases 331] (5th Cir. 1997), cert. denied, __ U.S. __[7 AD cases 1440] (1998) ("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"); Kralik v. Durbin, 130 F. 3d 76 [7 AD Cases 1040] (3d Cir. 1997) ("an accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply

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is not reasonable"); Cassidy v. Detroit Edison Co., 138 F. 3d 629, 633 [8 AD Cases 326] (6th Cir. 1998) ("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"); Aldrich v. The Boeing Co., 146 F. 3d 1265 [8 AD Cases 424] (10th Cir. 1998) (ADA does not require a transfer which would violate the seniority provisions of the collective bargaining agreement); Barnett v. U.S. Air, Inc., 157 F. 3d 744 [8 AD Cases 1073] (9th Cir. 1998) (employer not required to create exception within seniority system as an accommodation).

A panel for the D.C. Circuit temporarily created a glimmer of hope for accommodation in the unionized setting in Aka v. Washington Hospital Center, 116 F. 3d 876 [6 AD Cases 1629] (DC Cir. 1997). While this case is somewhat different because the contract had a provision which provided for employer discretion in making an accommodation, the court's analysis is significant because it rejects the Eckles analysis, has an entirely different view of the legislative history of the ADA, and relies on EEOC regulations.

We think that the ADA's "reasonable accommodation" provisions require us to bear in mind that conflicts between accommodations to disabled employees and the terms of applicable collective bargaining agreements exist on a continuum, rather than functioning like an "on/off" switch.

116 F. 3d at ___. The glimmer of hope created by the panel decision was doused when the panel decision was vacated. Aka v. Washington Hospital Center, 124 F. 3d 1302 [7 AD Cases 1088] (DC Cir. 1997), *aff'd in part, vacated in part, rev'd in part*, 156 F. 3d 1284 [8 AD Cases 1093] (DC Cir. 1998).

The last federal court of appeals to consider the question concluded that an accommodation that would compel an employer to violate a collective bargaining agreement is

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per se unreasonable. Willis v. Pacific Maritime Association, __ F. 3d __ [8 AD Cases 1632] [160 LRRM 2053] (9th Cir. 1998).

We conclude where we started -- the federal courts of appeals that have reached the issues are unanimously of the view that the ADA does not require accommodations that contravene the seniority rights of other employees.

A. The Type of Right Involved Doesn't Seem to Matter

Most of the cases seem to address ADA accommodation juxtaposed against a bona fide seniority system. Willis (9th Cir. 1998) (valid seniority system); Aka (DC Cir. 1997) (seniority); Barnett (9th Cir. 1998) (decades-old seniority system not a product of collective bargaining); Aldrich (10th Cir. 1998) (seniority); Kralik (3d Cir. 1996) (forced overtime -- seniority); Eckles (7th Cir. 1996) (seniority); Kennedy (7th Cir. 1996) (seniority); Milton (10th Cir. 1995) (seniority). In fact, the Eckles court expressly limited its holding to matters pertaining to seniority:

Our conclusion is limited to individual seniority rights and should not be interpreted as a general finding that all provisions found in collective bargaining agreements are immune from limitation by the ADA.

94 F. 3d at 1051.

It really does not seem to matter whether the ADA accommodations are juxtaposed against seniority rights or some other rights provided for in the collective bargaining agreement. The contract right would appear to always trump ADA accommodation. Cassidy (6th Cir. 1998) ("a reassignment will not require...violating another employee's rights under a collective

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bargaining agreement"); Kralik (3d Cir. 1996) (forced overtime provision of contract); Foreman (5th Cir. 1997) ("ADA does not require an employer to take action inconsistent with the contractual rights of other workers"); Benson (8th Cir. 1995) (the ADA does not require action consistent with the contractual rights of other workers); Wooten (8th Cir. 1995) (not required to make accommodations that would violate the rights of other employees).

There does not seem to be any legally significant reason to distinguish between seniority rights and other contractual rights when trumping ADA accommodation.

B. The Significance of the Contractual Right Doesn't Appear to Matter

Notwithstanding the Aka panel decision's reference to a continuum of accommodation, no court has given consideration to the insignificance of the benefit involved. In fact, at least two of the decisions of the federal courts of appeals stated expressly that the significance of the contractual benefit should not alter the analysis.

In Eckles (7th Cir. 1996), the plaintiff argued for accommodation and pointed out that no employee would be fired; rather, one more senior employee would lose his position but could bid for another position. The court noted that all that would be lost was some of the value of their seniority, not employment. However, this did not matter.

In Kralik (3d Cir. 1996), the plaintiff only requested an exemption from the forced overtime provision. The court concluded that that did not matter because such an accommodation would require the employer to violate the agreement by forcing someone else to work overtime.

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There are no cases in which the court relied on the insignificance of the impact on the contractual rights of other employees to conclude that the accommodation in question was reasonable.

C. The Language of the Contract Doesn't Seem to Matter

In the discussion up to this point, ADA accommodation has been juxtaposed against seniority or other contractual rights. One would think that ADA accommodation would fare better in situations where the contract itself provides some type of ADA accommodation. However, for the most part, this has not been the case.

In Eckles (7th Cir. 1996), there were no suitable jobs available to the plaintiff through the exercise of his seniority. However, the plaintiff attempted to exercise his rights under a special provision of the contract which provided that the employer and union could agree to allow a disabled employee to bump a more senior employee. In Eckles, the employer and union agreed to do so, but then rescinded their agreement. The court viewed this contractual provision as simply discretionary and as not requiring an accommodation -- "we will not hold them to more than the Rule itself requires."

In Kralik (3d Cir. 1996), it was undisputed that the employer and the union could agree, and in the past had agreed, to waive the forced overtime provisions from which the plaintiff sought relief. The union could have but refused to grant a waiver from the forced overtime provision. Because the union would not grant a waiver, the court deemed the proposed

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accommodation unreasonable because it would infringe upon the seniority rights of other employees.

In Barnett (9th Cir.), the court refused to require an exception to the seniority system even though the seniority system was not contractual. In other words, a non-contractual seniority system trumped ADA accommodation.

An exception to the somewhat harsh decisions above appears to be brewing as a result of the decision in Aka (DC Cir. 1998) (en banc). In that case, the contract provided for the posting and filling of vacancies by seniority. However, the contract also gave the employer the sole discretion to reassign handicapped employees. In remanding the matter to the district court, the court commented as follows:

We assume that if the ADA requires WHC to reassign Aka, and WHC has the power to make this reassignment without violating the CBA rights of other employees, WHC must make the reassignment, and may not refuse to do so on the grounds that it subjectively judges the CBA's standard not to be satisfied.

156 F. 3d ___ at note 26. Nevertheless, in general, the courts have not looked with favor upon ADA accommodation in the context of conflicting contractual rights.

D. Is There Anything Left to Argue?

In light of the overwhelming statements and analyses in which ADA accommodation has been trumped by rights under a collective bargaining agreement, it seems unlikely that there is much left to litigate. However, certain issues have not been conclusively resolved.

First and foremost, although vacated by the D.C. Circuit (en banc), the panel decision in Aka sheds entirely new light on the legislative history of the ADA, the applicability of cases

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decided under the Rehabilitation Act, and the lack of analysis in certain decisions of the federal courts of appeals.

Second, it would appear to be feasible to continue to argue that the significance of the contractual right is relevant in determining whether the ADA accommodation is reasonable.

Third, it would appear that language in a collective bargaining agreement that provides for nondiscrimination or ADA accommodation can be utilized to argue that they should be balanced against other rights of the collective bargaining agreement.

These are some of the matters that may be open for challenge and litigation.

III. EVEN IF THE EMPLOYER ATTEMPTS TO ACCOMMODATE, THE ACCOMMODATION MAY BE LOST IN ARBITRATION

Obviously, the cases in the prior sections of this paper address situations where an employee has not been accommodated and resorts to the legal system to challenge the failure to accommodate. There are also numerous cases in which employers have provided ADA accommodation. In these cases, where there is a conflict between the ADA accommodation and rights provided for in the collective bargaining agreement, the union can challenge the ADA accommodation as violating those rights.

There have been a reasonable number of cases in which this has occurred. In the vast majority of reported cases, arbitrators have deemed the rights of employees under the collective bargaining agreement to trump ADA accommodation rights. A brief review of those cases is in order.

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In Mason & Hanger Corp., 111 LA 60 (Caraway 1998), the arbitrator concluded that the employer had violated the collective bargaining agreement when it assigned a more senior employee to a swing shift in order to accommodate a disabled employee with less seniority to work the day shift. Interestingly, the agreement had a provision which provided for reasonable accommodations. However, the arbitrator viewed Eckles as the controlling precedent and concluded that "...if an accommodation conflicts with seniority rights governed by a Collective Bargaining Agreement, the accommodation must be held unreasonable."

In Contracts, Metals, and Welding, Inc., 110 LA 673 (Klein 1998), an employer accommodated a junior employee by putting him on a shift instead of a senior employee who attempted to exercise his shift preference seniority right under the collective bargaining agreement and transfer to that shift. Arbitrator Klein concluded that the ADA does not require disabled employees to be accommodated by sacrificing seniority rights of other employees. The arbitrator engaged in a somewhat lengthy analysis of the court cases provided in this paper.

There are numerous reported cases in which arbitrators have basically concluded that seniority rights and/or contractual rights trump ADA accommodation. ALCOA Building Products, 104 LA 364 (Cerone 1995); Olin Corp., 103 LA 481 (Helburn 1994); Clark County Sheriff's Department, 102 LA 193 (Kindig 1994) (even though contract prohibits discrimination because of handicap, employer violated collective bargaining agreement when it placed diabetic deputy in shift position without following the required shift selection process); Stone Container Corp., 101 LA 943 (Feldman 1993).

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There are very few cases in which an arbitrator allowed for an ADA accommodation to trump contractual rights. However, this is exactly what happened in City of Dearborn Heights, 101 LA 809 (Kanner 1993). In that case, Arbitrator Kanner determined that the collective bargaining agreement was not determinative, but was merely a factor in determining whether there was a reasonable accommodation under the ADA. Arbitrator Kanner concluded that the seriousness of the disability and the ensuing reasonable accommodation outweighed the discomfort suffered by others as a result of the ADA accommodation.

As a whole, it would appear that arbitrators are not sympathetic to employers who attempt to accommodate without giving due consideration to all the provisions of the collective bargaining agreement that may come into play.

IV. RECENT DEVELOPMENTS IN THE UNION'S DUTY TO NEGOTIATE ACCOMMODATIONS

On March 1, 1999, the EEOC issued guidance regarding Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act. That guidance specifically references an employer's claim of undue hardship based on the violation of a collective bargaining agreement.

Can an employer claim that a reasonable accommodation imposes an undue hardship simply because it violates a collective bargaining agreement (CBA)?

No. First, an employer should determine if it could provide a reasonable accommodation that would remove the workplace barrier without violating the CBA. If no reasonable accommodation exists that avoids violating the CBA, then the ADA requires an employer and a union, as a collective bargaining representative, to negotiate in good faith a variance to the CBA so that the

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employer may provide a reasonable accommodation, except if the proposed accommodation unduly burdens the expectations of other workers (i.e., causes undue hardship). Undue hardship must be assessed on a case-by-case basis to determine the extent to which the proposed accommodation would affect the expectations of other employees. Among the relevant factors to assess would be the duration and severity of any adverse affects caused by granting a variance and the number of employees whose employment opportunities would be affected by the variance.

Question 45 [footnotes omitted].

This might provide fodder for the panel decision in Aka (DC Cir. 1997) and to the dissenting opinion in Kralik (3d Cir. 1997). However, while the EEOC references Eckles (7th Cir. 1996) and Kralik (3d Cir. 1997), it simply does not adequately deal with all the issues raised by those cases and the host of cases referenced throughout this paper.

Perhaps more importantly, again, the EEOC has failed to come to grips with the fact that, during the term of the collective bargaining agreement, a labor organization is under no obligation to negotiate modifications to a collective bargaining agreement. 29 U.S.C. § 158(d). Furthermore, the EEOC has failed to address the United States Supreme Court decision in Airline Pilots' Association, International v. O'Neill, 499 U.S. 65 [136 LRRM 2721] (1991). In that case, the Supreme Court applied the Vaca v. Sipes, 386 U.S. 171 [64 LRRM 2369] (1967), "arbitrability, discriminatory, or in bad faith" standard to all union activity including contract negotiations. The Supreme Court held that a union's actions in negotiations would have to be so far outside a wide range of reasonableness as to be irrational in order to breach the duty to fair representation. One would have to assume that this is the type of standard that would have to be addressed, or even applied, in analyzing a union's attempt to provide for accommodation in collective bargaining negotiations.

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Finally, the United States Supreme Court's recent decision in Wright v. Universal Maritime Service Corp., ___ U.S. ___ [159 LRRM 2769] (1998), suggests that there may be circumstances in which discrimination claims would have to be arbitrated under the terms of the collective bargaining agreement. This suggestion may cause labor organizations to exclude entirely from their collective bargaining agreements anti-discrimination provisions. There is not only a tremendous cost associated with having to litigate a discrimination claim in grievance-arbitration, but also inclusion of anti-discrimination provisions and reasonable accommodation provisions subject the bargaining process to increased scrutiny and conflicts resulting in even further litigation.

V. CONCLUSION

Notwithstanding the vacated panel decision in Aka (DC Cir.) and the most recent guidance issued by the EEOC, reasonable accommodation has not fared well in the collective bargaining setting when the accommodation conflicts with rights under collective bargaining. Neither courts nor arbitrators have been very kind to demands for reasonable accommodation that have any impact whatsoever on rights provided for in the collective bargaining agreement. There is little reason to expect this to change.

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BIOGRAPHICAL SKETCH

Matthew J. Mierzwa, Jr., graduated from Harvard College in 1977, cum laude, in Economics; did graduate work at Cornell University's New York State School of Industrial and Labor Relations; and received his Juris Doctor, magna cum laude, from the University of Miami. Matt was admitted to the Florida Bar on October 5, 1987, and is a member in good standing. He is also admitted to practice in the United States Court of Appeals for the Eleventh Circuit and for the Southern and Middle Districts of Florida. He is a member of the AFL-CIO Lawyers' Coordinating Committee, The Florida Bar's Labor and Employment Law Section, the International Foundation of Employee Benefit Plans, and the Florida Public Pension Trustees Association. He is a frequent speaker on employee benefits and labor-management issues and has taught college-level courses at Cornell University, Hobart & William Smith College, and Florida International University.

Matt was associated with the law firm of Kaplan & Bloom, P.A., for 18 years until the retirement of his mentor, Joseph H. Kaplan, from the practice of labor law. Matt is now the principal of Mierzwa & Associates, P.A., which has five attorneys representing labor organizations, employee benefit funds, and union members in the areas of labor law, employee benefit law, election law, and individual employment rights throughout the State of Florida. Matt represents both public and private sector labor organizations in negotiations, in grievance-arbitration, in administrative proceedings before PERC and the NLRB, and in state and federal court. Matt also represents public employee and ERISA benefit funds including pension, health and welfare, retiree insurance, and joint apprenticeship training funds.

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