

**ADA REASONABLE ACCOMMODATION
IN THE UNIONIZED SETTING**

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Equal Employment
Opportunity Committee
1999 Mid-Winter Meeting
March 27, 1999

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I. STATUTORY FRAMEWORK

A. Prohibition Against Discrimination

The Americans With Disabilities Act (ADA) prohibits an employer from discriminating against an employee with a disability:

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. 42 U. S. C. § 12112(a).

Under the ADA, prohibited discrimination includes:

Not making reasonable accommodations to the known physical or mental limitation of an otherwise qualified individual with a disability who is an . . . employee unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]. 42 U. S. C. § 12112(b)(5)(A).

B. Reasonable Accommodation

The ADA defines “reasonable accommodation” as including:

- (a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U. S. C. § 12111(a).

C. Undue Hardship

The ADA limits reasonable accommodations to those which do not impose an “undue hardship” on the employer. “The term “undue hardship” means “an action requiring significant difficulty or expense.” 42 U. S. C. § 12111(10) (A). According to the Senate Committee on Labor and Human Resources, an action requiring “significant difficulty or expense” is an action that is costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program.

The ADA lists the following as factors to be considered in an “undue hardship” analysis:

- (i) the nature and cost of the accommodation needed...
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. 42 U. S. C. § 12111(10)(B).

II. REGULATORY FRAMEWORK

A. Federal Regulations

The provisions of the Federal Regulations implementing the ADA relevant to accommodating disabled employees in a unionized setting are found at 29 C. F. R. § 1630.15.

- (d) *Charges of not making reasonable accommodation.* It may be a defense to a charge of discrimination that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity’s business.
- (e) *Conflict with other Federal laws.* It may be a defense to a charge of discrimination that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or

regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

B. EEOC Policy Guidance on Reasonable Accommodation Under the ADA (reprinted in BNA Daily Labor Report, March 2, 1999)

In the EEOC's Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA, issued on March 1, 1999, the EEOC rejects the position taken by a number of federal circuit courts that violating a collective bargaining agreement is *per se* unreasonable accommodation. According to the EEOC, if no reasonable accommodation exists that avoids violating a collective bargaining agreement between the employer and the union, then the ADA requires the employer and the union to negotiate in good faith a variance to the collective bargaining agreement so that the employer may provide a reasonable accommodation, except if the proposed accommodation unduly burdens the expectations of other workers (i.e. causes undue hardship). The EEOC posits that undue hardship must be assessed on a case-by-case basis taking into account relevant factors such as the duration and severity of any adverse effects caused by granting a variance and the number of employees whose employment opportunities would be affected by the variance.

Although the EEOC's guidelines are not controlling authority, they are considered "a body of experience and informed judgment" to which courts and litigants can, and do, look for guidance.

C. Memo from EEOC Commissioner Reginald Jones on Reasonable Accommodation Guidance (reprinted in BNA Daily Labor Report, March 2, 1999)

Commissioner Reginald Jones points out in his Memo on the EEOC's Reasonable Accommodation Guidance that, while the Guidance takes the view that the ADA may require employers to violate or seek a negotiated variance to the terms of a collective bargaining agreement in certain circumstances, the EEOC offers no guidance as to what those circumstances might be. Jones notes that the Guidance does not indicate how the EEOC will apply the "relevant factors" ("duration and severity of any adverse effects" and the "number of employees" [whose] opportunities would be affected by the variance"), or what standard the EEOC will use when assessing them. Nor does the EEOC offer any guidance on the scope of the obligation of employers and unions to negotiate a variance or what information the employer may give the union about the employee's disability, without running afoul of the ADA's confidentiality requirements, to enable the union to fully participate in such a negotiation.

III. JUDICIAL BACKGROUND

Both majority and minority views have emerged from the case law addressing the issue of reasonable accommodation in a unionized setting.

A. Majority View

The majority view (also known as the “per se” rule), initially set forth by the Seventh Circuit in Eckles v. Consolidated Rail Corp., is that a request for reassignment that violates collectively bargained seniority rights is not a reasonable accommodation under the ADA as a matter of law.

1. Eckles v. Consolidated Rail, 94 F. 3d 1041 (7th Cir. 1996).

In Eckles, a Conrail employee diagnosed with epilepsy requested an accommodation that would have “bumped” a more senior employee from the position Eckles sought and would also have protected Eckles from then being “bumped” out of that position. Conrail argued that this request was not a “reasonable accommodation” due to its effects on the legitimate seniority rights of other employees. The Seventh Circuit affirmed summary judgment for Conrail holding that, “the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees.”

2. Feliciano v. Rhode Island, 160 F. 3d 780 (1st Cir. 1998).

In Feliciano, the plaintiff, an institutional aide for the Rhode Island Department of Mental Health, Retardation and Hospitals (“MHRH”), injured her back rendering her unable to perform the essential functions of the position. She contended that MHRH failed to provide reasonable accommodation in violation of the ADA by, among other things, refusing to transfer her to vacant positions which she alleged she could have performed.

The First Circuit affirmed summary judgment for MHRH finding that the vacant positions sought by the plaintiff were filled based on seniority, bargaining unit membership, and current job classification, and holding that reassigning the plaintiff to vacant positions to which more senior employee-applicants were entitled under the collective bargaining agreement was not a reasonable accommodation because it “would violate the rights of those employees and would violate the provisions of the collective bargaining agreement, neither of which the ADA requires MHRH to do in making accommodations.” The First Circuit noted that, “Courts that recognize the duty to reassign also recognize the limitation on that duty: an employer is not required to violate the provisions of a

collective bargaining agreement or the rights of other employees in seeking such reassignment.”

3. Cassidy v. Detroit Edison Company, 138 F.3d 629 (6th Cir. 1998)

In Cassidy, the plaintiff was an assistant power plant operator who suffered from a breathing condition that caused her to have severe allergic reactions to substances to which she was exposed in the workplace. Detroit Edison Company provided the plaintiff several reasonable accommodations including transferring her to other work locations, scheduling cleaning and maintenance to occur when she was not present, allowing her to leave work when she might be exposed to allergens, testing her work area for allergens and providing several paid and unpaid leaves. After another leave of absence, when Detroit Edison could not find a position compatible with the plaintiff's medical restrictions, it terminated her employment, explaining that the only positions it had available for which she had the requisite skills were not compatible with her medical condition. The plaintiff sued claiming that Detroit Edison failed to reasonably accommodate her because it did not consider reassignment to a vacant position. The District Court granted summary judgment for Detroit Edison on the ground that the plaintiff had proposed only general and vague accommodations such as a transfer to a position in an allergen-free environment, which did not exist within the company. Agreeing with the District Court, the Sixth Circuit affirmed summary judgment.

Although this case did not involve a collective bargaining agreement, the Sixth Circuit noted in *dicta* that “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.” 138 F.3d at 633 (emphasis added).

4. Willis v. Pacific Maritime Ass'n, 162 F.3d 561 (9th Cir. 1998)

The plaintiffs, Willis and Gomez, were longshore workers who worked for the Pacific Maritime Association (“PMA”) and were members of the International Longshore and Warehouse Union (“ILWU”). PMA and ILWU were parties to a collective bargaining agreement. Both men claimed to be disabled after suffering injuries and requested placement on the “Dock Preference Board” (“DPB”), whose members are given priority for light duty assignments as they come in each day. The DPB is organized by seniority and its members cannot be “bumped” off. Willis and Gomez sued PMA, the ILWU and its locals, claiming that failure to place them on the DPB constituted failure to make reasonable accommodation for their disabilities. The district court granted summary judgment for all the defendants finding they were not required to accommodate the plaintiffs by placing them on the DPB (or by transferring Gomez to another

local) in violation of the seniority requirements set forth in the collective bargaining agreement. The Ninth Circuit affirmed.

The Ninth Circuit framed the issue before it as “whether [the ADA] requires an employer to provide an accommodation to a disabled employee that would directly violate a bona fide seniority system maintained by an employer and a union under the terms of a [collective bargaining agreement].” The Ninth Circuit further narrowed the issue to “whether the proposed accommodation is unreasonable *per se*, or whether [it] should employ a balancing test in which the existence of a seniority system is not conclusive, but is only a factor that must be weighed in deciding whether an accommodation is reasonable.” Announcing that it was siding with the majority and adopting the *per se* rule, the court held that the proposed accommodation was unreasonable because it conflicted with the seniority system established under the collective bargaining agreement.

The court acknowledged that some of the legislative history suggests that Congress intended a “balancing approach” whereby the collective bargaining agreement was considered a factor in the undue hardship analysis, but not determinative. The court did not countenance this approach, however, noting that Congress enacted the ADA fully cognizant of the well established precedent under the Rehabilitation Act which refused to require employers to violate a bona fide seniority system in a collective bargaining agreement, yet failed to include any provision to counter that precedent in the plain language of the ADA.

The court also opined that the balancing approach would leave employers too vulnerable to the possibility of guessing wrong when trying to weigh the relative benefits and burdens on disabled and non-disabled employees. According to the court, it would be improper to subject an employer to the “Hobson’s choice” of violating the ADA or the NLRA, or at least subjecting itself to the threat of litigation under either statute depending on the outcome of its balancing.

Finally, the court noted that the *per se* rule it adopted applies only where there is a direct conflict between the proposed accommodation and the collectively-bargained seniority rights of other employees, and that it was not deciding whether an accommodation is reasonable if the terms of the collective bargaining agreement are flexible enough to permit an accommodation for a less senior disabled person.

5. Aldrich v. Boeing Company, 146 F.3d 1265 (10th Cir. 1998)

In Aldrich, the Tenth Circuit held that the plaintiff’s proposed accommodation of reassignment was not required by the ADA where the transfer would have violated the seniority provisions of the collective bargaining agreement.

6. Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997)

Following Eckles, the Third Circuit held in Kralik that the plaintiff's proposed accommodation of being relieved of forced overtime was not reasonable accommodation under the ADA because an accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable, and would expose the employer to the potential risk of union grievances.

7. Foreman v. Babcock & Wilcox Company, 117 F.3d 800 (5th Cir. 1997)

The Fifth Circuit in Foreman followed the majority view and held that the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement.

8. Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995)

In Benson, the Eighth Circuit held that the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement.

9. Daigre v. Jefferson Parish School Bd., No. 96-0856 (E.D. La. Jan. 16, 1997)

In Daigre, the United States District Court for the Eastern District of Louisiana followed the majority view and held that reassignment was not a reasonable accommodation. According to the court, Congress did not intend for disabled individuals to "bump" more senior employees subject to a collective bargaining agreement so that their disabilities could be accommodated under the ADA.

B. Minority View

The terms of a collective bargaining agreement are a relevant factor to be considered in determining whether reassignment as an accommodation would impose an undue hardship on the employer, but not determinative of the issue.

1. Aka v. Washington Hosp. Ctr., 116 F. 3d 876 (D. C. Cir. 1997)

The minority view was set forth in Aka wherein the court held that the terms of a collective bargaining agreement are a relevant factor to be

considered in determining whether reassignment as an accommodation would impose an undue hardship on the employer, but not determinative of this issue. The Aka opinion subsequently was vacated and reheard en banc. There is no substantive discussion of the issue in the en banc opinion. See Aka v. Washington Hosp. Ctr., 156 F. 3d 1284 (D. C. Cir. 1998) (en banc).

2. Emrick v. Libbey Owens Ford Co., 875 F. Supp. 393 (E. D. Tex. 1995)

In Emrick, the court held that the presumption that requiring an employer to reassign an employee in violation of a collective bargaining agreement was unreasonable as adopted by cases applying the Rehabilitation Act did not apply to cases involving the ADA. Instead, the court applied the balancing approach and held that the conflict between the seniority provision of the collective bargaining agreement and reassignment of a disabled employee should be weighed by the fact finder in evaluating the reasonableness of such an accommodation under the ADA.

IV. LABOR ARBITRATION

A. Jurisdiction

When presented with a conflict between a collective bargaining agreement and the ADA, an arbitrator first must decide whether he/she has authority to even consider the ADA in the dispute at issue. Some collective bargaining agreements contain non-discrimination clauses which provide that neither the company or the union may discriminate against a person with a "disability," which the parties will usually stipulate means persons defined as "disabled" by the ADA. Other collective bargaining agreements contain non-discrimination provisions that expressly refer to the ADA, such as those stating that nothing in the agreement shall prohibit the company from complying with the requirements of the ADA.

Where the collective bargaining agreement does not contain a non-discrimination clause, arbitrators have differed over whether to consider external law such as the ADA and the case law interpreting it. Some take the view that because it is unlawful to discriminate against the disabled under the ADA, an arbitrator cannot compel an illegal result, even if the collective bargaining agreement indicates otherwise. Others take the view that their jurisdiction extends only to the provisions of the collective bargaining agreement and that they cannot consider external law. Still others take a more middle-of-the-road approach maintaining that it is unclear whether they should apply the ADA, but even if they did apply it, the requested accommodation would not be appropriate under the circumstances.

B. Cases – ADA v. Collective Bargaining Agreement

Most of the cases in which the arbitrator has determined that he/she must apply the ADA involve a conflict between the requested accommodation and the seniority rights of other employees, just as in the case law. And, like the case law, the majority view is that accommodations under the ADA should not violate seniority provisions of collective bargaining agreements.

1. In Mason & Hanger Corp., 111 Lab. Arb. 60 (Caraway, 1998)

In this case, the employer accommodated a less senior employee with diabetes by assigning him to the day shift, bypassing the rights of more senior employees in so doing. The arbitrator, rejecting the balancing approach of Aka and relying on the *per se* rule of Eckles, held that if an accommodation conflicts with seniority rights governed by a collective bargaining agreement, the accommodation must be held to be unreasonable.

2. In re Contracts, Metals and Welding, Inc., 110 Lab. Arb. 673 (Klein, 1998)

Rejecting the minority view set forth in Aka and following Eckles and the majority view, the arbitrator in this case ruled that the company improperly accommodated a junior employee suffering from depression when it placed him on the first shift rather than a senior employee who attempted to transfer to that shift under the shift preference seniority right in the collective bargaining agreement. The arbitrator held that the ADA does not require that disabled employees be accommodated by sacrificing the collectively bargained seniority rights of other employees.

3. In re Henkel Corporation/Chemicals Group, 110 Lab. Arb. 1121 (West, 1998)

In this case, the arbitrator noted that, “In cases involving the ADA, Arbitrators must engage in a balancing and weighing of the merits underlying each case.” The arbitrator then ruled that requiring the employer to reassign an employee with a heart condition to a job that she could do in violation of the seniority provisions of the collective bargaining agreement would be an “undue hardship.”

V. OTHER

Estella J. Schoen, *Note: Does the ADA Make Exceptions in a Unionized Workplace? The Conflict Between the Reassignment Provision of the ADA and Collectively Bargained Seniority Systems*, 82 Minn. L. Rev. 1391 (1998)

William J. McDevitt, *Seniority Systems and the Americans with Disabilities Act: The Fate of "Reasonable Accommodation" After Eckles*, 9 St. Thomas L. Rev. 359 (1997)

Robert A. DuBault, *Note, The ADA and the NLRA: Balancing Individual and Collective Rights*, 70 Ind. L.J. 1271 (1995)

Eric H.J. Stahlhut, *Playing the Trump Card: May an Employer Refuse to Reasonably Accommodate Under the ADA by Claiming a Collective Bargaining Obligation?*, 9 Lab. Law. 71 (1993)

Renee L. Cyr, *Note, The Americans with Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 Brook. L. Rev. 1237 (1992)