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The Americans With Disabilities Act and The National Labor Relations Act: A Unionized Employer’s Road Map to Reasonable Accommodations

INTRODUCTION

The Americans with Disabilities Act (the “ADA”) was promulgated to rectify the discriminatory treatment an estimated 43,000,000 individuals face. According to the ADA, these individuals have historically been isolated and denied the opportunity to compete on an equal ground, costing the nation billions of dollars, due to unnecessary “dependency and nonproductivity.” As a result of Title I of the ADA, an otherwise qualified individual with a disability can no longer be denied employment opportunities solely because of that disability.

Yet, these individual rights secured by the ADA are inherently at odds with the collective rights of workers protected by the National Labor Relations Act (the “NLRA”), creating many possible conflicts. Further, because the ADA’s prohibition

2. 42 U.S.C. § 12101(a)(1). Congress has found that “some 43,000,000 Americans have one or more physical or mental disabilities, and that this number is increasing as the population as a whole is growing older.” Id.
3. 42 U.S.C. §§ 12101(a)(2) & (9).
6. NLRB General Counsel’s Memorandum to Field Personnel on Potential Conflicts Raised by The Americans with Disabilities Act, Jerry M. Hunter, General Counsel, Memorandum GC-92-9, 89 (August 7, 1992) [hereinafter NLRB Memo].

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against disability discrimination applies to "covered entities," a dilemma faces both employers and labor unions.  

Despite the concern that the ADA might undermine the collective bargaining process as established under the NLRA, only one of the respective regulatory agencies has addressed this matter. The General Counsel to the National Labor Relations Board (the "NLRB" or the "Board") has addressed a Memorandum (the "NLRB Memo") to NLRB field personnel highlighting potential conflicts. The NLRB Memo, however, does not answer many of the difficult questions it poses; instead, it simply requires that unfair labor practice charges, which raise issues concerning the ADA, be referred to the Board for review. The Equal Employment Opportunity Commission (the "EEOC") has yet to issue any guidance to its enforcement personnel on the interplay between the ADA and the NLRA, leaving its offices, as well as employers, in the dark.

It is the goal of this comment to provide guidance where others have failed. In particular, this comment first outlines the prohibitions and requirements of the ADA and the NLRA. Next, the comment addresses the interrelationship of both statutes, focusing on the duty of the unionized employer to reasonably accommodate a disabled employee. To this end, the Rehabilitation Act of 1973, the legislative history of the ADA, and federal case law is used to develop and describe the scope of the unionized employer's duty. Lastly, the comment sets forth the employer's bargaining obligation and the reasons why the employer should accommodate a disabled employee, even if such an accommodation is contrary to the provisions of the collective bargaining agreement.

THE AMERICANS WITH DISABILITIES ACT

Title I of the ADA prohibits employment discrimination against a "qualified individual with a disability" on the basis of the disability. In particular, it prohibits employers from dis-

9. NLRB Memo, cited at note 6, at 89.
10. Id.
12. 42 U.S.C. § 12112(a). A " 'qualified individual with a disability' means an
criminating in regard to items such as job application procedures, hiring, advancement, discharge, training or other terms, conditions, and privileges of employment. The failure to reasonably accommodate "known physical or mental limitations of an otherwise qualified individual" also constitutes discrimination under the ADA unless the "accommodation would impose an undue hardship" on the employer. According to the ADA and the EEOC's accompanying regulations, examples of common, anticipated accommodations include restructuring an existing job, implementing part-time or modified work schedules, or reassigning an employee to a vacant position. Such accommodations, however, present special problems for the unionized employer. Most often, the right of an employee within the bargaining unit to job restructuring, modification of work schedules, or job reassignment is specifically delineated in the collective bargaining agreement. The entitlements are based upon factors such as job seniority and have been collectively bargained for via the employees' exclusive representative. Further, the bargaining agreements commonly reserve the more desirable jobs, which are often the light duty jobs, for the employees with longer service, effectively limiting the unionized employer's discretion. This type of contractual arrangement, however, though prevalent in many employment relationships, may conflict with a disabled employee's need for light duty work or job reassignment.

This is only one of the possible conflicts a unionized employer will be forced to address. It is foreseeable that unionized employers will face many other issues in attempting to comply with the ADA. The goal of this comment is to develop a possible road map

individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The EEOC has defined disability as either: "(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. §§ 1630.2(g)(1)-(3) (1993).

16. 29 U.S.C. § 159(a) (1988).” Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .” Id.
17. Jules L. Smith, Accommodating the Americans with Disabilities Act to Collective Bargaining Obligations under the NLRA, 18 EMPLOYEE REL. L.J. 273, 273 (Autumn 1992). For example, “a ‘reasonable accommodation’ under the ADA might be assignment to a light-duty job, whereas the applicable collective bargaining agreement might require assignment of the job based on seniority.” Id.
to assist the unionized employer in navigating a clearer course, while limiting the risks of violating either the ADA or the NLRA. In the absence of more explicit indications from the regulatory agencies, Congress, and the courts, employers must proceed with caution when confronted with apparent conflicts.

**HYPOTHETICAL SCENARIO**

Employer X's business is unionized and the employer is a party to a collective bargaining agreement. At work, Employee A, the most senior employee, has retired from a light duty position which has been expressly reserved, via the collective bargaining agreement, for the employee with the most seniority. Employee B is now the most senior employee and is prepared to bid on the opening. However, Employee C, who is less senior than B, has returned to work after suffering a permanent, debilitating injury leaving him disabled under the ADA definitions. Employee C requests that he be placed in the now vacant position as a reasonable accommodation. How is Employer X to proceed? Who is actually entitled to the position? Can the employer make the decision unilaterally, without notifying the union? And if Employer X can proceed unilaterally, should it? The first step a unionized employer should take is to analyze the requested accommodation and decide whether the accommodation is a term of employment over which the employer is obligated to bargain with the union.

**THE ACCOMMODATION — IS IT A TERM AND CONDITION OF EMPLOYMENT OVER WHICH A UNIONIZED EMPLOYER MUST BARGAIN WITH THE UNION?**

The National Labor Relations Act creates an affirmative duty on the part of the employer to bargain collectively with the representatives of the employees. For purposes of the NLRA, collective bargaining "is the performance of the mutual obligation of the employer and the representative . . . to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." According to the NLRA, a unionized employer will be found to have committed an unfair labor practice if the employer refuses to collectively bargain over the terms and conditions of employment.

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19. 29 U.S.C. § 158(a)(5). "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a)." Id.
The first hurdle the unionized employer faces under the mandate of the ADA is determining whether a reasonable accommodation is a condition of employment over which the employer has a duty to bargain. The National Labor Relations Board has held that modifications to existing conditions constitute terms of employment over which the employer must bargain, only when the modification amounts to a "material, substantial and a significant" change in working conditions. For instance, in LaMousse, Inc., a case before the NLRB, the employer granted its employees a change in the length of breaks from ten to fifteen minutes without notifying or bargaining with the union. The Board held that an employer's duty to bargain did not extend to every modification of the terms and conditions of employment. Only if the change is material, substantial or significant must the employer bargain with the union. Therefore, a unionized employer will have a duty to bargain with the union prior to the implementation of a reasonable accommodation only if the accommodation is deemed to be material, substantial or significant.

Whether or not an accommodation is material turns upon the characteristics and the type of the requested accommodation. According to commentators, there exist two broad categories of accommodations: (1) "within-position accommodations" and (2) "outside-position accommodations." A within-position accommodation is an accommodation which permits a disabled employee to perform all of the essential functions of the position for which he is hired through a "change in the manner in which the job is done." An outside-position accommodation entails reassignment to a position where the employee can perform all of the essential functions because "the employee no longer may be able to perform all of the essential functions of the position for which he was hired." Most within-position accommodations will not amount to terms and conditions of employment obligating the employer to

22. LaMousse, 259 N.L.R.B. at 48.
23. Id.
24. Id. at 49.
27. Id.
bargain, as they are not likely to be material, substantial or significant alterations to the employment relationship. Such within-position accommodations may include providing a ramp for the disabled, placing a disabled individual's desk on blocks, or possibly adding Braille signs or an interpreter. None of the above changes should materially affect the collective rights and conditions of the other employees in the bargaining unit. A unionized employer may therefore unilaterally implement a non-substantial accommodation in compliance with the ADA and, at the same time, not violate the collective bargaining requirements of the NLRA.

Most outside-position accommodations, however, will generally be construed as substantial alterations to the conditions of employment. Outside-position accommodations are usually inconsistent with the express terms of the existing collective bargaining agreement. In the hypothetical, for example, disabled Employee C's request to be assigned to the vacant position is contrary to and inconsistent with the provisions of the existing agreement which would require that the more senior employee, Employee B, be given the position. A request for an inconsistent modification opens the door to a litany of conflicts between the requirements of the ADA and the NLRA which the unionized employer must resolve.

**THE INCONSISTENT REASONABLE ACCOMMODATION AS A TERM AND CONDITION OF EMPLOYMENT**

**The ADA, Unilateral Action and Direct Dealing**

The ADA requires an employer to reasonably accommodate an individual with a disability. As the EEOC's regulations indicate, however, the duty initially extends only to physical or mental limitations of the individual with a disability that is known to the employer. Therefore, it is generally the responsibility of the otherwise qualified disabled individual to inform the employ-

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28. NLRB Memo, cited at note 6, at 89. According to the General Counsel, accommodations "which allow disabled employees to perform the same job in a fashion different from other employees, generally would not be changes in terms and conditions of employment." *Id.*

29. *Id.*


31. 29 C.F.R. app. § 1630.9 (1993). "Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that is known to the employer." *Id.*
er that a reasonable accommodation may be required. The regulations then require a covered entity "to initiate an informal and interactive process with the individual in order to identify the individual's limitations and possible accommodations." The process entails analyzing the job, consulting with the individual, and considering the individual's preferences. It is readily apparent that the EEOC expects employers and employees to meet and consult with one another concerning the appropriate accommodation. This individual, interactive process, however, is contrary to the NLRA, presenting unique problems for unionized employers.

The NLRA specifically forbids an employer from changing the working conditions of union employees without first giving the union notice of the modification and an opportunity to bargain. If the employer fails to give notice and implements the inconsistent change unilaterally, it violates the collective bargaining requirements of the NLRA. Further, as previously indicated, the NLRA requires the employer to bargain exclusively with the union representatives regarding changes that are inconsistent with established terms and conditions of employment. The employer may not attempt to circumvent bargaining with the exclusive representative by attempting to deal directly with the employees. An employer who does change the terms of the employment relationship without involving the

32. Id.
33. 29 C.F.R. § 1630.2(o).
34. 29 C.F.R. pt. 1630, app. § 1630.9. The EEOC has set forth four steps to the employer's problem solving approach:
   (1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with the disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for the employer and the employee.
35. 29 U.S.C. §§ 158(a)(5), (d) (1988). Sections 158(d)(1) and (2) provide that "the duty to bargain collectively shall also mean that no party . . . shall terminate or modify such contract, unless the party desiring such modification . . . serves . . . notice upon the other party and . . . offers to meet and confer with the other party." 29 U.S.C. §§ 158(d)(1), (2).
36. See NLRB v. Katz, 369 U.S. 736 (1962). An employer that unilaterally granted employees increases in sick-leave and wages was found to have violated the duty to collectively bargain under sections 158(a)(5) and 158(d). Katz, 369 U.S. at 743.
union risks the possibility of being liable for direct dealing.\textsuperscript{38}

If the employer and the disabled employee meet and reach an accommodation that conflicts with the collective bargaining agreement, the accommodation would violate both the operative collective bargaining agreement and the employer's obligation under the NLRA to bargain only with the union.\textsuperscript{39} The employer must then decide how to resolve the inherent tension between the two statutes. In particular, does the ADA's requirement to reasonably accommodate through an individualized process supersede the contrary terms of a collective bargaining agreement and the NLRA's prohibitions against unilateral action and direct dealing?

\section*{The Duty to Reasonably Accommodate and Collective Bargaining Agreements Under the Rehabilitation Act}

\textit{The Rehabilitation Act of 1973}\textsuperscript{40}

Although it may appear that the provisions of the ADA requiring employers to make reasonable accommodations might override contrary terms of a collective bargaining agreement, they may not. As will be shown, some federal courts have held, under the Rehabilitation Act, that employers need not accommodate disabled employees where such accommodations may amount to violations of existing agreements.\textsuperscript{41} In addition, certain provisions of the ADA's regulations and legislative history defer to the terms of a collective bargaining agreement.

The ADA was predicated to a large extent on the Rehabilitation Act of 1973.\textsuperscript{42} A provision of the ADA requires agencies with enforcement authority to ensure that complaints filed under the ADA and the Rehabilitation Act are handled similarly so as to avoid the duplication of effort and to prevent the "imposition of inconsistent or conflicting standards."\textsuperscript{43} Further, the legislative history of the ADA indicates that the reasonable accommodation and undue hardship provisions of the Rehabilitation Act, and Section 504 of the Rehabilitation Act,\textsuperscript{44} are to

\begin{footnotesize}
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\item \textsuperscript{38} See Medo Photo Supply Corporation v. NLRB, 321 U.S. 678 (1944). "Bargaining carried on by the employer directly with the employees . . . who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining . . . ." Medo Photo, 321 U.S. at 684.
\item \textsuperscript{39} Smith, cited at note 19, at 277.
\item \textsuperscript{41} See notes 49-64 and accompanying text.
\item \textsuperscript{42} HENRY PERRITT, AMERICANS WITH DISABILITIES ACT HANDBOOK 117 (2d ed. 1991).
\item \textsuperscript{43} 42 U.S.C. § 12117(b) (Supp. 1993).
\item \textsuperscript{44} 29 U.S.C. § 794 (1988). This section provides that "[n]o otherwise qualified
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provide guidance in the enforcement of the ADA. Thus, it can be fairly argued that Congress did not intend the law under the ADA to diverge from the law under the Rehabilitation Act. Therefore, the case law as developed under the Rehabilitation Act may provide assistance in resolving the conflict between the ADA’s requirement to reasonably accommodate and the protected, collectively bargained rights of the employees under the NLRA.

According to the following cases decided under Section 504 of the Rehabilitation Act, the courts have uniformly held that it was a per se undue hardship for an employer to make a reasonable accommodation that violated the established terms and conditions of a collective bargaining agreement. A unionized employer therefore, was not required to assign a disabled employee to a vacant position in violation of a collective bargaining agreement. The courts have given deference to the agreements and have acknowledged their special status under federal labor law.

In *Daubert v. United States Postal Service*, the employee alleged that she had been discriminatorily discharged because of a degenerative spinal condition which rendered her incapable of performing the functions of her position. The United States Postal Service (the "USPS") did not permanently reassign her to a vacant light duty position however, as it was prohibited from reassigning any employee to light duty unless the employee seeking the reassignment had a minimum of five years postal service. The court found that the USPS could rely on its contractual obligations to its employees and the union under the collective bargaining agreement. Such reliance on the agreement constituted a clearly articulated and legitimate business reason for the discharge.

In a similar case in the Fourth Circuit, *Carter v. Tisch*, the

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individual with handicaps in the United States ... solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program ... receiving Federal financial assistance ... " Id.

46. PERRITT, cited at note 42, at 108.
47. Smith, cited at note 17, at 274.
48. 733 F.2d 1367 (10th Cir. 1984).
49. *Daubert*, 733 F.2d at 1369.
50. Id.
51. Id. at 1370.
52. Id.
53. 822 F.2d 465 (4th Cir. 1987).
court held that the postal service was not required to accommodate a disabled employee by reassigning him to permanent light duty in direct contravention of the seniority provisions of the collective bargaining agreement.\textsuperscript{54} According to the court, the duty to accommodate the employee would not supersede the collective bargaining agreement provided that the agreement was not discriminatory.\textsuperscript{55} Likewise, in \textit{Shea v. Tisch},\textsuperscript{56} an employee suffering from an anxiety disorder charged that the postal service had discriminatorily discharged the employee for failing to reasonably accommodate his disability via job reassignment.\textsuperscript{57} The postal service “argued that it could not have provided [the employee] with the job he desired because to do so would have violated the seniority provisions of the collective bargaining agreement.”\textsuperscript{58} The court held that the employer was not required to reassign the employee to a new position if such reassignment would violate the rights of other employees under the collective bargaining agreement.\textsuperscript{59}

Thus, as evidenced above, the courts have held that an employer cannot be required to reasonably accommodate an employee in a way that would usurp the substantive rights of other unionized employees in the bargaining unit.\textsuperscript{60} A contrary result would be considered “inequitable and would create chaos in the administration of collective bargaining agreements because unions and employers could no longer rely upon the terms of these agreements to govern their relationship.”\textsuperscript{61} It appears that these cases suggest that the conflict between the statutes should be resolved in favor of the collective rights of workers granted under the NLRA.\textsuperscript{62} Support for the collective rights may also be found in the EEOC’s regulations and the legislative history.

\begin{footnotes}
54. \textit{Carter}, 822 F.2d at 467. In \textit{Carter}, the employee had suffered from an increasingly severe case of asthma. \textit{Id.} at 466. Eventually, after three years of service, the employee requested permanent light duty to accommodate the debilitating condition. \textit{Id.} However, the collective bargaining agreement required an employee to have served five years before being eligible for permanent light duty assignment. \textit{Id.} The employee subsequently filed suit under section 504 of the Rehabilitation Act. \textit{Id.}
55. \textit{Id.} at 469.
56. 870 F.2d 786 (1st Cir. 1989).
57. \textit{Shea}, 870 F.2d at 786.
58. \textit{Id.} at 789.
59. \textit{Id.} at 790.
\end{footnotes}
EEOC Regulations and Legislative History

Unlike the regulations supporting the Rehabilitation Act, the ADA's regulations have considered, to a limited extent, the effect contrary terms of a collective bargaining agreement may have upon an employer's duty to accommodate. According to the EEOC, the terms of an existing collective bargaining agreement may be relevant in determining whether a particular accommodation amounts to an undue hardship for the employer.63 The EEOC's regulations provide that an employer may use the terms of a collective bargaining agreement to "demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees."64 Likewise, the legislative history of the ADA also indicates that provisions of a collective bargaining agreement can be a factor in determining whether a given accommodation is reasonable.65

A unionized employer's decision not to reassign a disabled employee to a vacant position because of the contrary terms of a collective bargaining agreement may be supported by EEOC regulations. For reasons addressed later, however, this approach is not recommended. First, the issue of whether the same result that has been obtained under cases decided under the Rehabilitation Act will be obtained in cases decided under the provisions of the ADA must be examined.

Reasonable Accommodations and Collective Bargaining Agreements Under the ADA

In determining whether an employer has complied with the provisions of the ADA, courts are directed to rely on the cases as developed under the Rehabilitation Act of 1973. In cases applying the Rehabilitation Act, the courts have held that it was a per se undue hardship for an employer to make a reasonable accom-

64. 29 C.F.R. pt. 1603, app. § 1630.15(d) (1993).
   For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue.  
moderation that violated the established terms and conditions of a collective bargaining agreement. The legislative history of the ADA and the regulations promulgated by the EEOC establish that a collective bargaining agreement is only a factor to be considered in determining whether the employer has complied with the ADA. Thus, unlike the per se determination of the Rehabilitation Act cases, the ADA provisions will not automatically afford the same deference to the collective bargaining process. The terms of the agreement will not operate as a complete defense under the ADA.

More importantly, the ADA, unlike its predecessor, prohibits employers and unions from discriminating against employees by contract, including a collective bargaining agreement. Likewise, the ADA's regulations echo the same prohibition against the use of collective bargaining agreements. Thus, it is clear that an employer may not accomplish, by way of a contractual arrangement, what it is otherwise prohibited from doing directly. The employer may not rely upon the contrary terms of a collective bargaining agreement in an effort to elude the direct obligations imposed by the explicit provisions of the statute.

Finally, the ADA does not contain a provision protecting a bona fide seniority system comparable to that contained in Title VII of the Civil Rights Act of 1964. The Civil Rights Act provides a specific exception for bona fide seniority and merit systems. It states:

68. 42 U.S.C. § 12112(b)(2) (Supp. 1993). This section specifically defines discrimination to include "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 subchapter (such relationship includes a relationship with . . . [a] labor union)." Id.
69. 29 C.F.R. § 1630.6(b). "The phrase contractual or other arrangement or relationship includes, but is not limited to, a relationship with . . . [a] labor union, including collective bargaining agreements . . . ." Id.
70. 29 C.F.R. pt. 1630, app. § 1630.6. "An employer or other covered entity may not do through a contractual or other relationship what it is prohibited from doing directly." Id. The House Report also stated that an employer could not accomplish through a collective bargaining agreement "what it otherwise would be prohibited from doing under this Act. For example, a collective bargaining agreement that contained physical criteria which caused a disparate impact on individuals with disabilities and were not job related and consistent with business necessity could be challenged under this Act." H.R. REP. No. 485 (II), 101st Cong., 2d Sess. 63 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 345.
It shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . . 72

Had Congress intended contrary terms of a collective bargaining agreement, such as seniority and other job skill requirements, to prevail over the ADA, it would have drafted a provision similar to that contained in the Civil Rights Act of 1964. If Congress had done so, our hypothetical scenario proposed earlier would be easily resolved. Employee B, the most senior employee, would be awarded the position in accordance with the established seniority provisions of the agreement and the employer would not have violated the ADA. The employer would not be required to reassign the disabled employee, Employee C, to the vacant position. But, Congress did not draft such a provision. Congress's failure to include a like provision, demonstrates that Congress did not intend seniority provisions of collective bargaining agreements to survive latent conflicts with the ADA. 73

BARGAIN AND THE UNION'S CONSENT

Assuming that the duty to accommodate prevails over the contrary and inconsistent terms of a collective bargaining agreement, what should the unionized employer do? As indicated, the employer is still obligated, under the ADA regulations, to meet individually with the disabled employee to discuss the appropriate accommodation. 74 And yet, as also indicated earlier, the NLRA prohibits a unionized employer from dealing directly with individual employees. 75 Therefore, the employer should bargain. To minimize the risks involved, the unionized employer should immediately involve the union when the accommodation is inconsistent with an existing agreement. The employer should work with the union to find the accommodation that satisfies not only the disabled employee, but also the non-disabled employees. In addition, because the ADA regulations require an employer to initiate an interactive process with the disabled employee, 76 the

72. Id.
73. Ervin, cited at note 25, at 961-62. "This bare omission . . . suggests that Congress intended different treatment . . . accorded to seniority system under Title VII . . . not [to be] fully applicable under the ADA." Id.
74. See notes 33-34 and accompanying text.
75. See notes 35-37 and accompanying text.
76. The EEOC regulations provide that to "determine the appropriate reason-
employer should insure that the disabled employee is involved in
the negotiations. Only by including the individual in the negotia-
tions can the unionized employer assure compliance with the
ADA's individualized process. At the same time, by involving the
union, the employer has at least initially limited the potential of
an unfair labor practice charge for direct dealing and unilateral
action.\textsuperscript{77}

Moreover, by including the union, the employer effectively
brings to the forefront the union's parallel duties to accommodate
and refrain from undertaking action that has a discriminatory
effect. Because the ADA's provision against disability discrimina-
tion applies to covered entities, which includes labor unions, the
duty to avoid discrimination is equally applicable to unions.\textsuperscript{78}
Therefore, an employer who includes the union in the accommo-
dation discussions shifts partial responsibility to the union.

Including the union in the discussions is only the first step for
the employer. The employer must implement the reasonable
accommodation. There is a conflict between the employer's duty
under the ADA and the NLRA, because the NLRA provides that
an employer may not alter the terms of the applicable agreement
without the union's consent.\textsuperscript{79} According to the NLRA, either
party is specifically authorized to refuse to "discuss or agree to
any modification of the terms and conditions contained in a con-
tract for a fixed period."\textsuperscript{80} For example, in \textit{Oak Cliff-Golman
Baking Co.},\textsuperscript{81} an NLRB decision, a unionized employer's busi-
ness was in financial jeopardy and the employer desired to re-
duce wages in an attempt to stay in business.\textsuperscript{82} Although the
union refused the requested modification, the employer nonethe-

\begin{footnotesize}
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\item[77.] See notes 35-39 and accompanying text.
\item[78.] See notes 35-39 and accompanying text.
\item[79.] See notes 35-39 and accompanying text.
\item[80.] See notes 35-39 and accompanying text.
\item[81.] See notes 35-39 and accompanying text.
\item[82.] See notes 35-39 and accompanying text.
\end{itemize}
\end{footnotesize}
less implemented the reduction. The Board acknowledged the union's privilege to refuse to grant its consent and held that the NLRA expressly prohibited the employer from modifying the contract's wage provisions midterm without the union's consent.

In the case of an ADA required modification that is inconsistent with the existing agreement, the union may very well refuse to consent. It may refuse on any number of grounds, including a claim that it will violate its duty of fair representation to its non-disabled members. Nevertheless, as a covered entity under the Act, a union faced with a proposed modification to accommodate may be found to violate the ADA if it withholds its consent. The ADA forbids covered entities, including labor organizations, from discriminating against disabled employees by not aiding in the reasonable accommodation. If the union was not required to accommodate, an employer who was unable to accommodate solely because of union opposition would be held liable under the ADA. Absent the union's consent to the reassignment, the employer could be found liable under the ADA for discriminating against disabled employees by way of the contractual agreement.

Further, just as an employer may not elude its obligations under the ADA by relying on the contrary terms of a contractual arrangement, neither may a union withhold its consent in reliance on the agreement.

However, the union may still refuse to grant its consent in deference to the collective rights of those within the bargaining unit, as it is legally entitled to do under the NLRA. If the union refuses to consent, the employer is again placed in a difficult situation. The employer may choose to implement the accommodation unilaterally, in spite of the union's lack of consent, or, the

83. Id.
84. Id. at 1084.
85. Ervin, cited at note 25, at 967. Although it is not the focus of this comment, the union's consent would not likely give rise to liability, as a bargaining representative is afforded a wide range of reasonableness in order to serve the unit it represents, so long as it exercises its discretion in complete good faith. See Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). The Board and the courts have found a union to violate its duty only when it discriminates against its members on invidious considerations, or its conduct was arbitrary or in bad faith. See Vaca v. Sipes, 386 U.S. 171, 190 (1967); Bell & Howell Co., 230 N.L.R.B. 420, 420-23 (1977). Therefore, when a bargaining representative carefully weighs, in good faith, the interests of all in the unit to arrive at a fair decision, it seems unlikely that the representative will be found to have breached its duty when it consents to the modification. Ervin, cited at note 25, at 969.
86. Ervin, cited at note 25, at 958. See notes 68-70 and accompanying text for a discussion of the ADA provisions prohibiting discrimination by contractual arrangement.
employer may abide by the union's wishes, fearful of being charged for an unfair labor practice. Although neither of these choices is ideal, the employer should proceed and unilaterally implement the accommodation for two reasons.

UNILATERALLY IMPLEMENT

Obligated to Comply With the ADA

If the union does not consent to a reasonable accommodation that is inconsistent with the terms of the current agreement, the employer should unilaterally implement the accommodation to avoid ADA liability. There is no explicit provision in the ADA which protects an employer from liability when the employer abides by the wishes of the union; the duty to accommodate still exists. The defense of lack of union consent does not exist. If the unionized employer is faced with an unfair labor practice charge, it should argue that its continued obligation to comply with the ADA requires it to act unilaterally when the union fails to consent.

In the past, the NLRB has held that an employer does not violate the NLRA by altering the working conditions, as established by a collective bargaining agreement, where the modification is mandated by changes in the law. For instance, the NLRB held that the unilateral implementation of wage increases mandated by the Fair Labor Standards Act did not constitute a violation of the collective bargaining requirement. Likewise, the Board permitted the employer to unilaterally prohibit the consumption of food or drink in areas exposed to toxic materials in order to comply with the Occupational Safety and Health Act. In both cases, the Board emphasized that where the changes in the law allowed the employer some discretion in complying, the employer may be found to violate the NLRA by unilateral changes. Therefore, absent discretion, compliance with the ADA effectively insulates the employer from an unfair labor practice charge.

88. According to the NLRB Memo, "the employer may argue that its obligation to comply with the ADA privileges it to act unilaterally." NLRB Memo, cited at note 6, at 90.
92. Standard Candy Co., 147 N.L.R.B. at 1073; Murphy Oil USA, 286 N.L.R.B. at 1042.
The Absence of the Right to Contribution or Indemnity

Another factor in favor of unilateral action is that the employer probably does not have a right to contribution or indemnity from the union if the employer is found liable under the ADA for failing to accommodate. The ADA relies upon the enforcement and remedial provisions of the Civil Rights Act of 1964. The remedial provisions of Title VII have been reformed by the Civil Rights Act of 1991 to permit the recovery of compensatory and punitive damages. Therefore, depending upon the size of the employer's business, the employer may be subjected to monetary damages up to $300,000 in a subsequent lawsuit for adhering to a union's wishes and refusing to accommodate. What is not as obvious however, and perhaps contrary to what some employers may have anticipated, is that the employer may not have the right to contribution or indemnity from the union based on the union's discriminatory withholding of consent.

The Supreme Court, in *Northwest Airlines, Inc., v. Transport Workers Union,* held that the right to contribution from the union, which allegedly bore at least partial responsibility for the statutory violations, did not exist under Title VII of the Civil Rights Act of 1964 or the Equal Pay Act of 1963 or at common law. In *Northwest,* the airline and the Transport Workers Union had continuously negotiated the wages of the male and female cabin attendants. Each successive agreement fixed the

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95. 42 U.S.C. § 1981a. The Civil Rights Act of 1991 specifically provides that in "an action brought by a complaining party ... against a respondent who ... committed a violation of section [12112(b)(5)] of the [ADA], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b)." *Id.*
96. 42 U.S.C. § 1981a(b)(3)(A)-(D). An employer with fewer than 101 (but more than 14) employees may be liable up to $50,000; 101-200 employees, liable up to $100,000; 201-500 employees, liable up to $200,000; and for 501 employees and above, liable up to $300,000. *Id.*
97. Generally the right to contribution arises "when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his share of the common liability." *Northwest Airlines, Inc., v. Transport Workers Union,* 451 U.S. 77, 87-88 (1981).
102. *Id.* at 81.
wages of the male attendants at rates higher than female attendants.\textsuperscript{103} As a result of these collectively bargaining wage differentials, the airline was found to have violated the Equal Pay Act and Title VII and was therefore subject to backpay liability.\textsuperscript{104}

Thereafter, the airline filed a separate action against the union seeking contribution; however, the Court held that there did not exist an express or implied right of contribution under the statutes or at common law.\textsuperscript{105}

The Court determined that the federal statutes did not implicitly create the right to contribution for four reasons. First, neither statute expressly created a right to contribution inuring in favor of employers.\textsuperscript{106} Second, the right should not be implied because employers were not members of the class for whose protection the acts were drafted.\textsuperscript{107} Third, the comprehensive remedial schemes of the statutes and the express provisions for private enforcement showed an intent by Congress not to authorize additional remedies.\textsuperscript{108} In the face of the detailed remedial provisions, the Court determined it was not within its power to add another private remedy. Finally, the Court concluded that the legislative histories did not support the airline's claim for recognition of a right to contribution.\textsuperscript{109}

Similarly, the Court refused to recognize the right to contribution at common law. It concluded that it was powerless to create flexible and equitable rights to contribution in a civil rights context.\textsuperscript{110} According to the Court, the federal judiciary could not fashion new common law remedies in areas covered by comprehensive legislative schemes.\textsuperscript{111}

Many federal courts have applied the rationale of \textit{Northwest} in other civil rights cases and have likewise denied contribution. In \textit{Anderson v. Local Union No. 3, International Brotherhood of Electrical Workers},\textsuperscript{112} a section 1981 case, the court denied the union's assertion that the \textit{Northwest} decision should be limited to actions under Title VII and the Equal Pay Act.\textsuperscript{113} Instead, the

\textsuperscript{103} \textit{Id.} at 80-81. From 1947 through 1974, the wages were consistently higher for the male employees resulting in backpay liability in excess of $20 million dollars. \textit{Id.} at 82.

\textsuperscript{104} \textit{Id.} at 79.

\textsuperscript{105} \textit{Id.} at 82.

\textsuperscript{106} \textit{Northwest}, 451 U.S. at 91.

\textsuperscript{107} \textit{Id.} at 92.

\textsuperscript{108} \textit{Id.} at 93-94.

\textsuperscript{109} \textit{Id.} at 94.

\textsuperscript{110} \textit{Id.} at 96.

\textsuperscript{111} \textit{Northwest}, 451 U.S. at 97.

\textsuperscript{112} \textit{Anderson}, 751 F.2d 546 (2d Cir. 1984).

\textsuperscript{113} \textit{Anderson}, 751 F.2d at 548.
court applied the rationale enunciated by *Northwest* and held the right to contribution was neither implicitly created nor recognized at common law.\(^{114}\)

Also, many federal courts have taken *Northwest* a step further and refused to recognize claims for indemnity. The court in *Anderson* asserted that the rationale of *Northwest* was equally applicable to indemnification claims.\(^{115}\) Just as with contribution, the right to indemnity could only arise either by implication in the statute or under common law principles. Again, because the right to indemnity was not expressly granted or recognized in the legislative history, and because the comprehensive structure of the remedial schemes strongly indicated Congress' intent not to allow additional remedies, the court did not imply or recognize the right to indemnification.\(^{116}\)

Courts faced with claims for contribution or indemnity by employers found liable under the ADA, another civil rights statute, will likely extend the rationale of *Northwest* and deny the employer's claim. First, there is no express right to contribution for the employer included in the statute or discussed in the legislative history. Nor is the employer a member of the class for whose benefit the ADA was enacted. Finally, the ADA contains a fairly comprehensive remedial scheme within the Act which also "strongly evidences an intent not to authorize additional remedies."\(^{117}\) Therefore, courts will not, in all likelihood, imply the rights to contribution or indemnification. Also, in light of the comprehensive scheme of the ADA, the courts will probably not fashion new common law rights to contribution and indemnification which "might upset carefully considered legislative programs."\(^{118}\)

An employer should stop the problem before it starts. The employer should implement the accommodation, over the union's refusal, and argue it is privileged to act unilaterally because of its obligation to comply with the ADA. The employer who abides by the union's refusal risks potential liability for failing to provide a reasonable accommodation, and is unlikely to obtain con-

\(^{114}\) *Id.* See also *Gray v. City of Kansas City, Kansas, 603 F. Supp. 872* (D. Kan. 1985) (holding that no right to contribution existed in favor of the employer from unions on an employee's sections 1981 and 1983 claims).

\(^{115}\) *Anderson, 751 F.2d* at 548.

\(^{116}\) *Id.* See also *American Federal of State, County, and Municipal Employees v. City of New York, 599 F. Supp. 916* (S.D.N.Y. 1984) (holding that the city/employer had no statutory or common law right to contribution or indemnification from the unions in Title VII litigation).

\(^{117}\) *Northwest, 451 U.S.* at 93-94.

\(^{118}\) *Id.* at 97.
tribution from the union even though the union bore some responsibility for the violation.

CONCLUSION

A unionized employer faced with the duty to accommodate a disabled employee should proceed slowly and cautiously due to the potential conflicts between the ADA and the NLRA. After the initial request for an accommodation from the employee, the employer should analyze the accommodation. Is it contrary to the terms of the existing agreement? If implemented, will it materially alter the collective working conditions of the other employees? If not, an employer may proceed and implement the accommodation without bargaining with the union. However, if the unionized employer determines that the request is inconsistent with the collective bargaining agreement, the employer should involve the union and bargain. The employer should not negotiate solely with the union; it should insure the presence of the disabled individual so as to comply with the ADA’s requirement of an individualized process.

In a best case scenario, the employer and the union will work together to specify an accommodation which satisfies both the disabled employee and the non-disabled employees. Should the union fail to consent however, the employer should unilaterally implement the accommodation nonetheless and risk an unfair labor practice charge as opposed to likely ADA litigation. When presented with a subsequent unfair labor practice charge, the employer can defend its unilateral action on the basis of its obligation to comply with the ADA.

Finally, because the ADA requires employers to offer equal employment opportunities to qualified individuals with disabilities, the unionized employer should insure that subsequently negotiated agreements contain a provision permitting the employer to take all actions necessary to comply with the ADA. According to the Senate’s legislative history, conflicts between the ADA and the NLRA can be avoided if collective bargaining agreements negotiated after the effective date of the ADA contain provisions which permit employers to take all necessary actions in order to comply with the ADA.\textsuperscript{119} A negotiated, reasonable accommodation provision grants the employer the necessary leverage to make reasonable accommodations in the future without violating the NLRA or the collective bargaining agreement.

As indicated earlier, the employer and the union have a mutu-
al obligation "to meet at reasonable times and confer in good
faith with respect to wages, hours, and other terms and condi-
tions of employment." Interpreted broadly, "other terms and
conditions" encompass a reasonable accommodation provision as
a mandatory subject of bargaining. Therefore, the parties should
negotiate the effect an accommodation will have on senior work-
ers who may have been entitled to the position. Does the employ-
er have the resources to create a similar position without affect-
ing the entitlements of the more senior employees? If the employ-
er does not have the resources now, will similar positions be
created in the future? And if so, will the most senior employees
have first rights to these openings? Will the disabled employee
retain the position only so long as the disability requires accom-
modation? The employer and the union must address these ques-
tions and specifically delineate within the reasonable accommo-
dation provision how such matters should be resolved.

While the specifics of a reasonable accommodation provision
may be inherently vague to start, it is clear that post-ADA collec-
tive bargaining contracts should at least agree in principle to
such a provision. As one commentator has remarked, "[d]isability
discrimination, like race and sex discrimination, should be non-
negotiable." The alternative would perpetuate discrimination
by permitting unions to control discrimination compliance
through insistence on the retention of discriminatory, unyielding
seniority provisions of collective bargaining agreements.

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