

motion because:

While it is well established, as SEPTA argues, that a union has the authority to make binding contractual agreements on behalf of the employees that it represents . . . it does not follow that these agreements can preclude a statutory claim. Even if the plaintiff's grievance had reached arbitration, the course SEPTA insists the plaintiff was required to pursue, Bruton is not precluded from judicial resolution of his statutory claims. This is especially so in the cases of collective bargaining agreements, as there is a potential disparity in the interests of a union and the interests of an individual employee. . . . Congress may well have had this in mind when it enacted the ADA provision which makes it illegal for employers to enter into contracts with labor unions which would discriminate against a disabled employee.<sup>358</sup>

Similar to the *Gardner-Denver* decision, the court held that SEPTA's arbitration agreement did not bar Bruton's suit since the arbitral forum was an improper one for the final adjudication of civil rights' violations.<sup>359</sup> As arbitration was the product of a collective bargaining unit's negotiation process, it was held to be inadequate to protect an individual unit member's statutory rights.<sup>360</sup> Plaintiff Bruton was determined to have an inviolate right to proceed with his federal suit despite his ability to seek arbitration.<sup>361</sup>

The position advanced in *Bruton* appears to be more palatable and is more in accord with the Supreme Court's edict in *Gilmer*, that a mandatory arbitration provision would cause a waiver of statutory rights in cases involving individual employment contracts but not in those cases where collective bargaining agreements with arbitration agreements exist.<sup>362</sup> This point is one which the *Austin* court seems to have entirely missed. It, therefore, would not be surprising if *Austin* is reversed on appeal.<sup>363</sup>

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358. *Id.* at \*5.

359. *Id.* at \*8.

360. *Id.* at \*7.

361. *Id.* at \*8-9.

362. See Wendy S. Tien, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443 (1993); see also *Block v. Art Iron, Inc.*, 866 F. Supp. 380 (N.D. Ind. 1994) (holding that a contractual arbitration clause does not waive an employee's right to initiate a federal claim under the ADA). In *Block*, the district court found *Gardner-Denver* controlling rather than *Gilmer*. *Block*, 866 F. Supp. at 383.

363. Counsel for Austin, Ms. Barbara Hudson, Esq., has advised the author that an appeal of this decision was filed in February 1994 and was argued before the United States Court of Appeals for the Fourth Circuit in February 1995. On appeal, appellant argued, *inter alia*,

## B. Arbitration Standards

A more controversial issue concerns what standards an arbitrator should follow when determining the merits of an ADA claim. There are two diametrically opposed schools of thought on this subject. Some arbitrators claim there should be a congruence between arbitral and statutory standards for ADA claims, advocating the application of external law to resolve arbitral disputes.<sup>364</sup> On the other hand, many arbitrators take a more traditional approach and base their decisions solely upon the terms of the applicable collective bargaining agreement; knowledge of the requirements of external laws — such as the ADA — is entirely irrelevant to their function as arbitrator.<sup>365</sup> Resolution of the ADA claims which they are called upon to decide will be based upon contractual terms only.

Frank and Edna Elkouri, authorities in the field of arbitration, note that the degree to which either view is adhered to by an arbitrator is dependent upon a multitude of factors including the arbitrator involved and the facts in dispute, as well as the particular statute implicated:

The reader will observe that many arbitrators do give consideration to "the law," but the extent of adherence thereto may vary considerably from case to case depending largely upon the service, form and status of the legal rule or principle before the arbitrator. . . . Clearly defined law will be given more consideration than unsettled and uncertain law or rules based upon controversial views as to what should be the public policy.

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Then, too, the extent to which an arbitrator will consider any factor outside the collective agreement may depend upon the degree to which the parties have restricted his authority to the

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that the holding in *Gilmer* only applies to cases litigated under the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (1988 & Supp. V 1993), and not to actions litigated under the Taft-Hartley Act. Telephone Interview with Barbara Hudson, Esq., counsel for Linda Austin in action against Owens-Brockway Glass Container, Inc. (Apr. 10, 1995).

364. See Susan T. MacKenzie, *Arbitration and the ADA: Is Avoidance of External Law in Grievance Arbitration Appropriate?*, 19 N.Y. ST. B.A. LAB. & EMPL. L. SECT. NEWSL. 12, 12 (1994). If external law becomes the ultimate guide for arbitrators presented with ADA claims, there would be little justification for the concern whether the arbitral forum was appropriate for the determination of civil rights violations. The problems raised by *Gardner-Denver* would become moot.

365. See, e.g., *id.* at 13.

interpretation and application of the agreement, and upon his view as the effect of that restriction insofar as consideration of "law" is concerned. It is also to be noted that many arbitrators have viewed the role of public enforcement agent to be beyond their authority and function; these arbitrators believe that the enforcement of statutes which impose affirmative duties or make conduct illegal in an affirmative way should be left to the courts or statutory agency which was established for that purpose.<sup>366</sup>

Elkouri proposes that arbitrators adopt a more moderate and flexible approach to the application of external law than they actually do in practice.<sup>367</sup> It is not unusual to encounter arbitration awards which concern similar factual patterns but which have opposite results because of the arbitrator's particular philosophical inclination regarding the weight, if any, to be accorded to external law. The arbitration decisions discussed below demonstrate this point.

In *Altoona Hospital*,<sup>368</sup> the arbitrator refused to apply the ADA to the dispute he was presented with because "the interpretation of [the ADA] is a function of the appropriate agency or commission, and ultimately the courts, not the arbitrator. The collective bargaining agreement is his charter, and the solution to the question presented must be found within its covers."<sup>369</sup> This is a quintessential example of the traditional approach, the cornerstone of which is the belief that the sole source of an arbitrator's authority is the collective bargaining agreement — hence provisions of the ADA may only be consulted by an arbitrator if the collective bargaining agreement so provides.<sup>370</sup>

In *Stone Container Corp.*,<sup>371</sup> the arbitrator also refused to adjudicate the grievance according to the dictates of the ADA, stating that

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366. FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* (BNA) 368-69 (4th ed. 1985).

367. *Id.* at 369.

368. 102 Lab. Arb. Rep. (BNA) 650 (1993) (Jones, Arb.).

369. *Id.* at 654. In *Altoona*, the contract arbitrator was presented with a grievance in which a disabled employee insisted that, upon her personal physician's recommendation, she be permitted to return to work under an abbreviated work schedule. Nevertheless, the employer refused the grievant's request for an accommodation claiming that there was no job vacancy available for her which would allow a shortened work schedule. *Id.* Additionally, grievant's employer deemed the requested accommodation entirely unnecessary because two independent physicians found her fit to return to duty without any work restriction whatsoever. *Id.*

370. The basis for this approach is the *Steelworkers Trilogy*, which mandates that in order for an arbitration award to be judicially confirmable it must have its foundation in the terms of the collective bargaining agreement under which the grievance was submitted. See *supra* notes 323-25 and accompanying text.

371. 101 Lab. Arb. Rep. (BNA) 943 (1993) (Feldman, Arb.).

he could not consider the ADA because the collective bargaining agreement did not grant him the authority to do so.<sup>372</sup> In that case, the arbitrator noted that there was "no clear language placing before the arbitrator the right to determine the answer to the grievance under the law of the land."<sup>373</sup>

On the other side of the spectrum, the arbitrator in *City of Dearborn Heights*<sup>374</sup> applied the ADA's reasonable accommodation requirement in contravention of the accepted terms of the collective bargaining agreement under consideration.<sup>375</sup> Not only was the award based on sources external to the collective bargaining agreement, it was actually contrary to it.<sup>376</sup> Thus, the award was rendered through a process which was the antithesis of that required by the *Steelworkers Trilogy* and the traditional approach.

The next logical question is whether the traditional (contractual) or the contemporary (statutory) approach is preferable in arbitration. The traditional view is the more attractive of the two so long as the arbitration process is viewed in purely contractual terms. Since the parties bargained for arbitration according to the terms of the collective bargaining agreement, any consideration of external sources is in violation of the agreement. Moreover, due to *Gardner-Denver*, plenary federal civil rights actions are not waived by the submission of the controversy to arbitration.<sup>377</sup> Thus, there is no inherent danger of an employer using a collective bargaining agreement as a shield to protect itself from ADA liability.<sup>378</sup> If an arbitration award is contrary to the requirements of the ADA, then vindication can ultimately be obtained in federal court.<sup>379</sup>

The contemporary approach is more attractive to individuals who see the arbitrator's role as an administrator of industrial justice, bound by considerations of public policy as well as the terms of a collective bargaining agreement. Any decision which runs afoul of civil rights laws should not be deemed fair or in accord with public policy. To proponents of this view, the arbitration process should play a larger role; one which is capable of redressing social infirmities such as

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372. *Id.* at 947.

373. *Id.* Nevertheless, in *Stone Container Corp.* the arbitrator did discuss, at least indirectly, the effect the ADA might have had upon his decision had it been relevant. *Id.*

374. 101 Lab. Arb. Rep. (BNA) 809 (1993) (Kanner, Arb.).

375. *Id.* at 816.

376. *Id.*

377. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 54-55 (1974).

378. See *id.* at 55.

379. See *id.* at 59.

discrimination and which includes the application of statutory law. The danger in this approach is the fact that arbitration awards are, in most respects, non-reviewable and nonappealable. What does a grievant do if an arbitrator fails to understand the law and comes to an incorrect result?<sup>380</sup> What protection does a grievant have against an improper and inconsistent interpretation of the ADA?<sup>381</sup>

Proponents of the contemporary approach point out that a recent trend among federal courts addresses these problems. Some courts have carved out another exception to the general precept that arbitration awards are final and non-reviewable by rescinding arbitration awards on the ground that they were violative of public policy.<sup>382</sup> Under the "public policy exception," commentators argue that an award which involves the misapplication of the ADA, or is contrary to its goals, must be vacated.<sup>383</sup>

Several courts have in fact utilized the public policy exception to vacate arbitration awards.<sup>384</sup> For example, in *Gulf Coast*, the Fifth Circuit affirmed a district court's vacatur of an award considered violative of public policy.<sup>385</sup> This decision is relevant because it considers the ramifications of the ADA in its conception of public policy.<sup>386</sup>

In *Gulf Coast*, the district court vacated an award in which an arbitrator had reinstated an employee who had used illegal drugs in the work-place, holding that the grievant's reinstatement was totally unjustified and contrary to the well-defined and dominant public policy which prompted the promulgation of the Drug Free Workplace Act.<sup>387</sup> The Fifth Circuit found that the lower court was justified in

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380. The holding in *Gardner-Denver* would no longer apply. That Court's decision was based on the arbitrator's unwillingness and incapability to consider external law such as Title VII. As a result, mandatory arbitration would be the sole recourse for a victim of discrimination based on a disability.

381. See ELKOURI & ELKOURI, *supra* note 366, at 419-36 (noting that the concept of *stare decisis* holds much less weight in arbitration than it does under common law).

382. See, e.g., *Gulf Coast Indus. Workers Union v. Exxon Co.*, 991 F.2d 244 (5th Cir. 1993); *Stroehmann Bakeries v. International Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992); *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990).

383. See MacKenzie, *supra* note 364, at 14.

384. See *Gulf Coast*, 991 F.2d at 245; see also *Stroehmann Bakeries*, 969 F.2d at 1438; *Newsday*, 915 F.2d at 841. In *Stroehmann Bakeries* and *Newsday*, appellate courts vacated arbitration awards which reinstated a discharged employee accused of sexual harassment on the grounds that such action violated the public policy against allowance of such conduct in the workplace. *Stroehmann Bakeries*, 969 F.2d at 1438; *Newsday*, 915 F.2d at 841.

385. *Gulf Coast*, 991 F.2d at 245.

386. *Id.* at 251.

387. *Id.* at 250; see 41 U.S.C. §§ 701-707 (1988).

determining the merits of the grievance de novo because:

Although the public policy exception to our usual deference is not to be invoked lightly, a court may exercise its judicial power to abrogate a private agreement when, for example, it gives short shrift to the public's important yet unrepresented interests. When such violations are alleged, we enjoy more latitude in reviewing the arbitrator's decision. As the Supreme Court held in *W.R. Grace*, the question of public policy is wholly independent from the collective bargaining agreement and "is ultimately one for resolution by the courts." In such instances, reviewing courts resolve the issue by "taking the facts as found by the arbitrator, but reviewing his conclusions de novo."<sup>388</sup>

The court further concluded that the grievant's reinstatement was not mandated by the ADA, because "[w]hile broadening employment opportunities for millions of disabled workers, the ADA affirmatively excludes from protection persons who are using drugs."<sup>389</sup> Thus the grievant — a current illegal drug abuser — was not a member of a protected class under the ADA, the reinstatement award was set aside, and Exxon's decision to terminate the grievant was allowed to stand.<sup>390</sup>

This decision, however, does not adequately address the concern that the arbitration forum is not a proper one to adjust civil rights violations. Although some courts have embraced this public policy exception, it has not been adopted on a uniform basis. Without universal recognition of this concept, a grievant would still be at the mercy of arbitrators whose decisions are subject to confirmation, despite the fact that they may have misapplied or erroneously applied legal concepts. This is entirely unacceptable where important civil rights are concerned. Additionally, plenary law suits must be available after grievance arbitration because, under the 1991 amendments, civil rights statutes now grant the right to jury trial and permit remedies such as compensatory and punitive damages, as well as attorneys fees which are not usually available in the arbitration context.<sup>391</sup>

In the final analysis, the traditional approach appears to be most capable of protecting rights created by federal statutes such as the

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388. *Gulf Coast*, 991 F.2d at 249 (citations omitted).

389. *Id.* at 251.

390. *Id.* at 257 (citing 42 U.S.C. § 12114 (Supp. V 1993)).

391. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (current version at 42 U.S.C. §§ 1981-1988 (Supp. V 1993)).

ADA. With this approach, even if a grievant's claim is denied after arbitration, he or she will still have access to federal court. The grievant may then utilize the federal court's disclosure and evidentiary rules to prove the existence of an ADA claim which may not have been apparent in the less formal arbitral context. Consequently, the best suited role for an arbitrator appears to be the traditional one, that of an interpreter of the contractual rights engendered in collective bargaining agreements.

## PART V

### CONCLUSION

This paper's primary goal has been to examine three areas in which Title I of the ADA has come into conflict with federal labor statutes and common law precepts. From an examination of these conflicts it is relatively easy to conclude that the ADA's primary objective is not inconsistent with the national labor policy reflected in ERISA and the Taft-Hartley Act. Reconciliation of these statutes with the ADA will not take a Herculean effort.

As demonstrated in Part II, the resolution of the conflict between the ADA and the Taft-Hartley Act can be effectively accomplished by the parties to a collective bargaining agreement while they are engaging in negotiations over the terms of a new agreement. It is at this time that they have the ability to implement agreement provisions which would require additional negotiation over possible reasonable accommodations when they are ultimately confronted with the special concerns of handicapped employees.

While resolution of the conflict between the ADA and the Taft-Hartley Act is yet to be seen, the NLRB and the EEOC have jointly promulgated a memorandum of understanding between their respective general counsel which provides for coordination when either addresses charges which implicate issues germane to both the ADA and the Taft-Hartley Act.<sup>392</sup> This memorandum requires coordinated deferral between the NLRB and EEOC if charges are filed at either administrative body which implicate possible violations of both the Taft-Hartley Act and the ADA.<sup>393</sup>

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392. See NLRB, *EEOC Memo of Understanding on Procedure for Coordinating ADA, NLRA*, 1 EMPL. DISCRIMINATION REP. 156 (Dec. 1, 1993).

393. *Id.*

This mutual understanding between the EEOC and the NLRB will do much to promote and harmonize the important concerns involved in both the ADA and the Taft-Hartley Act. The counsel's office of both the NLRB and the EEOC have advised this author that since the memorandum's issuance, there have been to date less than a dozen occasions when Board charges have implicated the ADA. This may be prima facie evidence that conflicts between the ADA and the Taft-Hartley Act are being resolved by good faith negotiation between the parties before charges are filed; negotiation which might be the product of a collective bargaining agreement's reasonable accommodation provision.

As discussed in Part III of this article, the tension between the ADA and ERISA is currently awaiting judicial resolution. However, even if *Donaghey* ultimately holds that the Mason Tenders Welfare Fund's elimination of welfare benefits was in fact a subterfuge with its ultimate purpose being the evasion of ADA Title I, it would not mean that receipt of welfare benefits would automatically become an employee's vested right. Under ERISA, which remains unaffected by the ADA, welfare benefits may still be causally terminated. Furthermore, an employer may modify its welfare plan to place a benefit cap on *all* high-cost medical conditions so that no one infirmity, such as AIDS, HIV infection or cancer, is singled out. In this situation no single group could protest that the modification is discriminatory. As long as an employer can prove that it has a sound actuarial basis for a plan modification, and that no subterfuge was intended, the ADA will not prohibit that employer's action.

Ultimately, if employees desire that their medical benefits become a vested entitlement, a vesting provision should be negotiated (or a legislative amendment to ERISA adopted). Additionally, the ADA should be amended so that the concept of subterfuge is made more definite. Such an amendment might provide that a plan modification will be presumed to be a subterfuge if the total cost of coverage for the excluded medical condition is less than that of other illnesses which are actually covered by the plan. In such an instance, it should be assumed that the only motive for the exclusion is a discriminatory one.

However, even an ERISA vesting provision will not eliminate the concern of employees that they be provided with adequate health insurance. Vesting would only occur if benefits were actually provided by their employer. As we have seen, there is no requirement in ERISA mandating that welfare benefits be part of an employee's compensation. In the final analysis, only a national health insurance

plan can guarantee that medical insurance is accessible to all who require it.

Finally, as explained in Part IV of this article, arbitration of ADA claims is not contrary to the goals of the statute so long as the grievant is allowed to commence a subsequent plenary action. This prospect seems quite likely, since the Supreme Court's holding in *Gardner-Denver* will apparently be applicable in the ADA context. Furthermore, as long as the arbitration mechanism covering ADA disputes is established through a collective bargaining agreement, there would be no waiver of an employee's statutory rights to bring an action under the ADA.

Hopefully, this article has provided the reader with greater insight into the ADA's goals, as well as indicated ways in which that statute's terms can be reconciled with the problematic areas adumbrated. If it has, it will have served a larger purpose, one which motivated Congress' decision to actually enact the ADA: the eradication of employment discrimination against handicapped individuals.