



The Taft-Hartley Act, since its inception, has provided labor and management with the legal mechanism to peaceably resolve industrial conflict with minimal governmental intervention.¹ Through the process of collective bargaining, an integral component of the Taft-Hartley Act, employers and employees have been given the ability to jointly and mutually determine working conditions and the terms and conditions of employment.² However, several statutes, such as the Equal Pay Act, Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act, have placed progressive limitations upon labor and management's ability to bargain. Each statute has established a statutory minimum benefit, either in terms of wage rates or equality of employment opportunities, which may not be abrogated by a collective bargaining agreement.³

In 1990 the Americans with Disabilities Act (ADA) was signed into law. Title I of the ADA specifically prohibits private employers from discriminating against qualified handicapped or disabled individuals in terms of employment opportunities.⁴ This statute, additionally, provides that employers, if necessary, must reasonably accommodate unless they can establish that such accommodation would create an undue hardship disabled employees who are capable of performing the essential functions of a job in order to allow them to continue working.⁵ In this respect and several others, the ADA has come into direct conflict with labor management obligations under the Taft-Hartley Act. The ADA has created a statutory obligation to reasonably accommodate disabled employees which is independent and potentially contrary to labor-management collective bargaining obligations. Hence, the ADA varies from the progressive federal statutes listed above which simply provide certain minimum statutory entitlements which collective bargaining agreements may not vary.

In this article I intend to explore both the nature of this potential conflict and its possible resolution. In so doing, I will examine several decisions under the ADA's predecessor statute, the Rehabilitation Act of 1973,⁶ to ascertain whether this conflict was successfully resolved under that statute. The legisla-

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tive history of the ADA will also be considered to determine whether this issue was adequately addressed by Congress. Finally, the practical application of the statute will be focused upon with an emphasis on recent arbitration decisions and a recent administrative guideline promulgated by the National Labor Relations Board.

I. ANALYSIS

An analysis of the potential conflicts between the Taft-Hartley Act and the ADA must have as its point of departure a review of the requirements of both statutes. The Taft-Hartley Act, §§ 8(a)5 and 8(d), require that collective negotiation first take place between an employee representative and the employer who has exclusively recognized that representative before the terms and conditions of employment may be modified (assuming, of course, wages, hours or other mandatory bargaining items are concerned). Additionally, under Taft-Hartley, the provisions of a collective bargaining agreement may not be

² Title 29 U.S.C. § 157, Right of employees as to organization and collective bargaining provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining...and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. (July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.)

³ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which provides that statutory rights and remedies under Title VII exist independently from the provisions of a collective bargaining agreement. See also, *Barrentine v. Arkansas Best Freight System Inc.*, 615 F.2d 1192 (8th Cir. 1980). From the decisions in these cases it is obvious that collective bargaining agreements may not abrogate or modify employer obligations created by these external laws.

⁴ Title I of the ADA, 42 U.S.C. § 12112(a) provides that:

No employer, employment agency, labor organization or joint labor-management committee shall discriminate against a qualified individual with a disability ... 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.

⁵ EEOC regulations provide that:

The ADA requires reasonable accommodations to the known physical or mental limitations of a qualified applicant as a means of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities, unless it can show that the accommodations would impose an undue hardship on the business, 42 U.S.C. § 12112(b)(5)(A). [EEOC § 3.1].

⁶ Title 29 U.S.C. §§ 701-794.

¹ Title 29 U.S.C. § 151, Declaration of Policy for the Taft-Hartley Act provides:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.



changed without the explicit consent of both parties to the agreement.⁷ On the other hand, the ADA requires covered employers to make reasonable accommodations to the known physical or mental limitations of otherwise qualified employees or applicants for employment, unless it can be proven that such an accommodation would impose an undue hardship upon the employer.

In order to effectuate an accommodation, the ADA may be interpreted to require an employer to unilaterally modify the terms and conditions of the employment situation without first consulting the employees' exclusive bargaining representative.⁸ Such a unilateral change may subject the employer to the filing of unfair labor practice charges. An unfair labor practice charge may also be filed or a breach of contract action under Taft-Hartley § 301 initiated if the employer, by implementing an accommodation, ignores the provisions of a written collective bargaining agreement. For example, an accommodation may involve shifting a handicapped employee to "lighter work" duties in violation of collectively established seniority rights. It is this situation that a potential conflict between Taft-Hartley and the ADA is most probable.

II. REHABILITATION ACT OF 1973

The ADA's reasonable accommodation requirement is contained within its predecessor statute, the Rehabilitation Act of 1973.⁹ An examination of this piece of legislation and relevant interpretive case law may provide insight into the possible harmonization of the ADA with the Taft-Hartley Act.

The Rehabilitation Act was promulgated by Congress in order to provide greater vocational training and rehabilitation for handicapped individuals. Its primary focus was on increasing federal support for vocational rehabilitation for such individuals. However, the Rehabilitation Act's provisions only apply to the federal government or to employers who receive federal funding. Hence, it was not until the ADA was enacted that employment discrimination against handicapped individuals was prohibited generally in the private sector.

A review of several cases decided under the Rehabilitation Act reveals that



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federal courts have been extremely reluctant to allow a reasonable accommodation which would abridge the rights of employees under a collective bargaining agreement. It can be concluded with some degree of confidence that the terms of a collective bargaining agreement take precedence over an employer's obligation to reasonably accommodate a disabled employee who is covered by the Rehabilitation Act.

For example, in *Daubert v. U.S. Postal Service*, 733 F.2d 1367 (10th Cir. 1984), a disabled employee requested that the responsibilities of her job be altered so that she would only be required to perform "light duty." (Ms. Daubert suffered from a degenerative spinal disease which prevented her from lifting heavy objects.) Under the seniority provisions of the collective bargaining agreement Ms. Daubert was covered by, only employees with five years or more experience were allowed to be

transferred to light duty. Unfortunately, Ms. Daubert had been employed with the Postal Service for less than two years. Thus, rather than granting her request for an accommodation, the Postal Service terminated her since she was no longer capable of handling the responsibilities of her position.

The Tenth Circuit affirmed the dismissal of Daubert's complaint since compliance with the terms of the Postal Service's national agreement was considered a legitimate business reason justifying plaintiff's discharge. Furthermore, since plaintiff could no longer perform the heavy lifting required by her prior position, she could no longer be considered adequately qualified for her original job assignment. Clearly, the circuit court viewed the employer's obligations under its collective bargaining agreement to be paramount to the reasonable accommodation requirement of the Rehabilitation Act.

The Fourth Circuit decided similarly in *Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987). In *Carter*, an employee who had developed asthma and was no longer capable of performing his regular duties as custodian sought a permanent light duty custodial position. The employer refused to permit plaintiff to engage in light duty since he had failed to meet the prerequisite seniority requirements. Suit was initiated when the employer refused to accommodate the plaintiff by granting his request for light duty.

The court agreed with the employer's position and held that the employer's obligation to provide a disabled employee with a reasonable accommodation would not be permitted to override the provisions of a collective

⁷ Title 29 U.S.C. § 158(d).

⁸ If the employer negotiates a reasonable accommodation with the handicapped individual directly rather than with the employee's certified bargaining representative, this may also violate Taft-Hartley's prohibition on direct negotiation between employer and employee where the employee is represented by an exclusive bargaining agent. Taft-Hartley § 9(a), 29 U.S.C. § 159(a).

⁹ When drafting the ADA, Congress incorporated into it many of its standards of discrimination contained within the Rehabilitation Act including the employer's responsibility to provide a reasonable accommodation. In fact, the EEOC interpretive Guideline on Title I of the ADA indicates that case law developed under the Rehabilitation Act will be generally applicable under the ADA. 29 C.F.R. § 1030.



bargaining agreement itself unless it could be conclusively demonstrated that the agreement had as its objective discrimination against the disabled. In this respect, so long as the seniority agreement at issue could be shown to be *bona fide*, a handicapped employee would not have an actionable right against an employer who refused to reasonably accommodate him or her in a manner which violated the seniority agreement.¹⁰ Since the collective bargaining agreement's seniority provision was determined to be *bona fide* in *Carter*, the circuit court affirmed the dismissal of the complaint.

Nevertheless, the Supreme Court has held that the Rehabilitation Act in fact does affirmatively require an employer to reasonably accommodate an "otherwise qualified" employee with a handicap.¹¹ *School Board of Nassau County v. Arline*, 480 U.S. 273. In this regard, the Supreme Court has held that "although employers are not required to find another job for an employee who is not qualified for the job he or she was [originally] doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." *Id.* at 289 n. 19.¹²

From our review of decisions rendered under the Rehabilitation Act, it may be concluded that though an employer has an affirmative obligation to effect a reasonable accommodation, where such accommodation would conflict with the established terms of a collective bargaining agreement the reasonable accommodation requirement will be pre-empted. Furthermore, if case law under the Rehabilitation Act is used as precedent for determinations under the ADA, it is apparent that the ADA's reasonable accommodation provision would also be pre-empted by Taft-Hartley bargaining obligations. In order to determine whether such a pre-emption is what Congress actually intended, we now turn our attention to the legislative history of the ADA.

III. ADA'S LEGISLATIVE HISTORY

Initially, it should be noted that the legislative history of the ADA provides that the law under the Rehabilitation Act should be used as a model for enforcing the ADA. This is revealed in a portion

of the ADA's legislative history which states that:

In the compromise bill, the applicable Section 504 regulations [Rehabilitation Act], 42 C.F.R. 84.12, has been incorporated almost in fully in the statute, to ensure the factors that have been used in these and other Section 504 cases continue to apply. ***

[I]n the employment section, the ADA basically extends the provisions of section 504, of the Rehabilitation Act to private entities... Section 504 is a very brief provision, which has been explicated by regulations and case law over the past years. The sponsors of the ADA wished to create a clear and comprehensive statute that would set forth all of the relevant non-discrimination provisions in one place. The intent is still to track Section 504—but, at the same time, to create a statute that can stand on its own and not be dependent on incorporation by reference to regulations issued under section 504.¹³

Hence, this portion of the ADA's legislative history would tend to support the argument that the reasonable accommodation requirement should yield to the "more important" concerns of the Taft-Hartley Act since this is what case law provides under the Rehabilitation Act.

However, the Senate Report, in a discussion regarding the resolution of the conflicting demands of the Taft-Hartley Act and the ADA, indicates that the duty of an employer or a covered entity to abide by ADA Title I should not be affected by any inconsistent term of a collective bargaining agreement to which it is a party.¹⁴ Thus, as general rule, a covered entity will not be permitted to use a collective bargaining agreement as a sword to allow it to do what the ADA would otherwise prohibit it from doing. The House Report further indicates that though the terms of a collective bargaining agreement may be considered to determine whether or not an accommodation is reasonable the agreement would

not be conclusive. The House Report states:

The collective bargaining agreement could be relevant ... in determining whether a given accommodation is reasonable. 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.¹⁵ [Emphasis added].

The Senate Report also indicates that the seniority provisions of a collective bargaining agreement would not necessarily be determinative of whether an accommodation which violates seniority would be considered unreasonable.

As shown, though some portions of the ADA's legislative history seem to suggest that, as with the Rehabilitation Act, the terms of a collective bargaining agreement would be considered sacrosanct, other portions of its legislative history indicate that in some instances the provisions of a collective bargaining agreement might be subordinated to the important policy concerns of the ADA. Hence, the ambiguous legislative history of the ADA provides little guidance for the resolution of this dilemma.

¹⁰ Thus, the Rehabilitation Act is similar to Title VII in the respect that the provisions of a *bona fide* seniority plans are exempt from this statute's requirements. 42 U.S.C. § 2000(e)(2)(h). It may be anticipated that the ADA will be interpreted to have this exemption as well even though it is silent on this matter.

¹¹ See 29 C.F.R. § 1613-704 for the content of the Rehabilitation Act's reasonable accommodation requirement.

¹² It must be admitted that an alternative employment opportunity might not be considered reasonably available to an employee as a reasonable accommodation if it would violate the specific terms of a collective bargaining agreement.

¹³ Legislative History of Public Law 101-336, The Americans with Disabilities Act, Volume 3 of 3, 101st Cong., 2nd Sess., Serial No. 102-C, at pp. 2219-2220, 2332.

¹⁴ Senate Report No. 116, 101st Cong., 1st Session 32 (1989).

¹⁵ H.R. Rep. No. 485, 101 Cong. 2d Session, pt 2 at 63.

Ultimately, it must be recognized that the legislature envisioned that the conflict between Taft-Hartley and the ADA would be averted by mutual negotiation between labor and management for a reasonable accommodation provision in their collective bargaining agreement. In this regard a recent commentator on the House Report¹⁶ has remarked:

A second period anticipated by Congress follows the expiration of the old (pre-Act) agreement and begins with the negotiation of a new agreement which would [contain a reasonable accommodation provision]. With such a provision in place, the employer would face no conflict and thus would have no need for reliance on a contrary term in an agreement to avoid the duty to undertake reasonable accommodation. The union also would have no need for reliance on the provision to avoid reasonable accommodation because the term was bargained for and presumably, the union gained something in return. The negotiation of an accommodation provision can be thought of as the ideal, in that it permits both the employer and the union to effectuate their responsibilities under the ADA without undermining collective rights under the agreement.¹⁷

In actual practice, the possibility that reasonable accommodation provisions will actually be agreed to between labor and management in order to address the concerns of the Taft-Hartley Act and the ADA remains to be seen.

IV. ARBITRATION DECISIONS

Since the legislative history of the ADA is ambiguous, the ultimate resolution of the tension between the demands of the ADA and the Taft-Hartley Act will be left up to the courts. However, since the ADA is a relatively new statute, no discernible trend can as of yet be determined from a review of court decisions.¹⁸ Therefore, we are relegated to a review of several arbitration opinions,

which have taken the requirements of the ADA into consideration, in order to speculate how this statute will actually be applied in practice.¹⁹

The first arbitration case considered is *Wateraus Company v. International Association of Machinists and Aerospace Workers, District Lodge 77*, 100 LA (BNA) 278, Jan. 4, 1993. In the Wateraus Company arbitration, an employee grieved his employer's refusal to allow him to return to work after his recovery from carpal tunnel syndrome and spinal surgery. After the grievant had recovered from his injuries, a qualified rehabilitation consultant (QRC) was retained to determine the prospect of grievant returning to full employment as a "Hydrant Assembler II." The QRC determined that grievant was capable of returning to work but would only be able to perform limited job functions. The employer refused to reinstate the grievant since it required an employee who was able to perform all the duties associated with the Hydrant Assembler II position.

The arbitrator ordered the reinstatement of the grievant and required that he be returned to work at a position consistent with the work restrictions outlined by the QRC. Furthermore, the parties were directed to negotiate the specific job functions that the grievant would perform and the pay he would receive. Finally, the arbitrator awarded the grievant full back pay, seniority rights, and benefits.

This decision had as its basis two provisions within the collective bargaining agreement at issue. These provisions, in turn, had their roots in the requirements of the ADA. The first provision, directly modeled on the ADA, provided that there be no discrimination in the administration of the contract because of an employee's physical impairment. The effect of this clause was a direct prohibition on disparate treatment between physically and non-physically impaired employees. The second clause was a modified reasonable accommodation provision.²⁰ It mandated that the parties negotiate in regard to any employee who is or becomes handicapped and is unable to perform the work duties assigned in the usual manner.

Though the ADA was not mentioned or considered by the arbitrator, it is clear that this law had a pronounced

effect upon the parties to the collective bargaining agreement as shown by the two contractual clauses reviewed above. This decision is noteworthy because the existence of these contractual clauses demonstrate a possible means by which obligations under the Taft-Hartley Act and the ADA may be simultaneously satisfied. However, if the contract had not had these provisions, it would be fair to assume that the decision's outcome might have been different. The arbitrator most likely would have considered only the existing terms of the contract and not the ADA.

Another noteworthy arbitration decision is *Cleveland Electric Illuminating Company v. Utility Workers of America, Local 270*, 100 LA (BNA) 1039. This arbitration concerned a mechanic who was discharged from employment after he sustained a self-inflicted gunshot wound to his head.

¹⁶ Senate Report No. 116, 101st Cong., 1st Session 32 (1989).

¹⁷ Such a provision in a collective bargaining agreement might be one that "allows an employer to take all actions necessary to comply with this legislation." See, Senate Report No. 116, 101st Cong., 1st Session 32 (1989). H.R. Rep. No. 485, 101st Cong., 2d Session, pt 2, at 63. However, such a clause might justify an employer to ignore with impunity any of a collective bargaining agreement's provisions so long as this was done for the sake of providing a disabled employee with a reasonable accommodation. However, it does not appear realistic to believe that a union would make such a large concession in order to promote the policy advanced by the ADA. Furthermore, to do so might violate the union's duty of fair representation owed to its members. See, Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990; 1991 Det. C. Law Review 925.

¹⁸ However, *dicta* in a recent federal court decision has already recognized that the ADA may not provide a remedy which would require an employer to reassign a handicapped employee if such reassignment would contravene the terms of a collective bargaining agreement. *Aldrich v. Sullivan, M.D.*, 800 F. Supp. 1197, 1203 n.7 (D.Vt. 1992).

¹⁹ Utilization of arbitration awards to determine the practical application of the ADA may not be sufficient for this purpose since arbitrators are only bound by the requirements of the collective bargaining agreement itself and not by the requirements of external law. The true application of the ADA in practice will only be shown once federal case law is created.

²⁰ The reasonable accommodation provision was "modified" in the sense that it only required the parties to negotiate over the terms of a possible reasonable accommodation. It did not authorize the employer to unilaterally implement one.



Though he had completely recovered from his injury he had sustained a neurological injury which rendered him incapable of satisfying the position's poll-climbing requirements. The employer discharged this grievant after a summary investigation had revealed that "no reasonable accommodation could be made" to allow grievant to overcome his limitations.

The collective bargaining agreement which covered the terms and conditions of grievant's employment provided that "an employee who is incapacitated for his regular work as a result of a non-work related compensable injury, shall be placed at any work he can do." Apparently, the employer contended that since there was no suitable work available for this employee, the only option it had, rather than allow him to remain in a position that clearly placed him in danger, was to discharge him.

The arbitrator, in granting the grievant relief, relied upon both the terms of the collective bargaining agreement and the demands of the ADA. The arbitrator concluded that the employer had not made its job search with the good faith objective of making an accommodation to the

grievant as it had severely limited the available positions considered. Therefore, the arbitrator mandated that the employer engage in a good faith search for a suitable position for the grievant and medically evaluate him further to ascertain his current ability to handle available work assignments.

It should be noted that the arbitrator addressed the seniority issue by holding that his decision was not meant to override or jeopardize the seniority rights of other employees. Hence, though a true good faith effort to reasonably accommodate grievant was required, the ultimate accommodation chosen could not be one which violated the parameters of the collective bargaining agreement.

The final arbitration award considered, *Burge Corp. v. United Paperworkers International Union Local 1568*, 96 LA (BNA) 105 December 7, 1990, is a pre-ADA decision. It involved a grain elevator operator who has sustained a severe hearing loss. Since his impaired hearing no longer allowed him to safely conduct his duties, the grievant was bumped into a lower labor utility classification. A grievance was filed by the union since it believed that the grievant had a level of seniority that required he remain in his current position.

The union, in arguing its position, relied upon the prohibition against employee discrimination contained in the ADA. The employer countered that the ADA was irrelevant because its effective date had not yet occurred and, more importantly, that the labor arbitrator could only base his decision upon the terms of the collective bargaining agreement and not external law.

The arbitrator denied the grievance based upon the employer's arguments and the fact that grievant's hearing loss rendered him totally incapable of operating a grain elevator. This decision may be distinguished from the prior case, however, for two reasons. The decision was rendered before the ADA's effective date and the grievant was actually placed in a more suitable position. In effect, he had been reasonably accommodated.

From these decisions, it is obvious that an arbitrator will limit the scope of inquiry when dealing with the discharge and reinstatement of a handicapped employee to the exact terms of the collective bargaining agreement at issue. The ADA will only be considered when it buttresses the actual provisions of the agreement.

CONCLUSION

It is clear from this discussion that an effective resolution to the conflict be-

tween the ADA and the Taft-Hartley Act can only be accomplished by the parties to a collective bargaining agreement during the course of their negotiations for a new agreement. It is at this time that they have the ability to insert into the agreement provisions which would require additional negotiation and accommodation when confronting the special concerns of handicapped employees.

Finally, it should be noted that though the actual implementation of the ADA still remains to be seen, the NLRB has recently promulgated a memorandum of understanding between the general counsel of the NLRB and the EEOC which provides for coordination between these two administrative bodies when addressing conflicts between the ADA and the Taft-Hartley Act.²¹ This memorandum, in short, requires joint 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. 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.

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²¹ See BNA's Employment Discrimination Report, page 156, Vol. 1, December 1, 1993.

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