AN OVERVIEW OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT AND ITS IMPACT UPON FEDERAL LABOR LAW

Harvey S. Mars[*]

INTRODUCTION

Heralded as one of the most important pieces of civil rights legislation since the Civil Rights Act of 1964, the Americans With Disabilities Act ("ADA") was signed into law by President Bush on July 26, 1990.[1] The law, which consists of four sections, aims to eliminate discrimination against disabled individuals in the areas of employment (Title I), social services (Title II), public accommodations offered by private entities (Title III) and telecommunications (Title IV).[2] Despite the ADA's profound and far-reaching impact, it was passed by both houses of Congress in a relatively short period of time with little public debate or controversy.[3]

---

* Member New York and District of Columbia Bars. B.A., Oberlin College; J.D., Albany Law School of Union University; M.S.I.L.R. Cornell University/Baruch College. Mr. Mars is an associate attorney with Gleason & Mathews, P.C., a law firm specializing in labor and employment law located in New York, NY. The author wishes to thank David Frey, Esq., Paul Hugel, Esq., Ann Berezowski, Linda Perez, Debbie Kubic and Judith Kronenberg for their invaluable assistance preparing this article.

1. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (Supp. V 1993)).

2. *See* S. REP. NO. 116, 101st Cong., 1st Sess. 2 (1989) [hereinafter S. REP. NO. 116] ("The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into economic and social mainstream of American life . . . .").

3. The ADA was introduced to the Senate on May 9, 1989, and to the House of Representatives on May 13, 1989. 136 CONG. REC. 59,686 (daily ed. July 13, 1990). It was unanimously approved by the Senate Committee on Labor and Human Resources the same year it was introduced. *Id.* The alacrity with which this legislation passed both houses of Congress should be contrasted with the length of time it took the legislature to pass the North American Free Trade Agreement ("NAFTA"), Pub. L. No. 103-182, 107 Stat. 2057 (1993), the Violent Crime Control and Law Enforcement Act of 1994 ("Crime Bill"), Pub. L. No. 103-322, 108 Stat. 1796, or the Family and Medical Leave Act of 1993 ("FMLA"), Pub.

However, the lack of public debate may not be as beneficial to the disabled as one might think. In many respects, the public remains ignorant of the ramifications and scope of this statute. Public debate such as that surrounding Professor Anita Hill's sexual harassment allegations against Clarence Thomas would probably serve to further sensitize the public to the particular issues involving employment discrimination and the handicapped.[4]

This article is divided into four sections. The first section provides a brief overview of the requirements of ADA Title I through a review of statutory definitions, legislative history and Equal Employment Opportunity Commission ("EEOC") guidelines, as well as recent case law interpreting the Act. In addition, the first section addresses the ADA's predecessor statute, the Rehabilitation Act of 1973.[5] The second section explores the tension between the demands of the Taft-Hartley Act[6] and the ADA's reasonable accommodation requirement.[7] Section three comments on employees' welfare benefit entitlements and the ADA's non-discrimination mandate.[8] The fourth and final portion addresses alternative dispute resolution methods, arbitration, and employment discrimination claims under the ADA.

The goal of this article is to explore three areas where Title I of the ADA potentially conflicts with established precepts of federal labor law.[9] In so doing, I hope to shed more light on the specific

---

L. No. 103-3, 107 Stat. 6, legislation which can hardly be considered as progressive as the ADA.

4. As the Senate Committee on Labor and Human Resources noted, recognition of the deeply hidden issues concerning discrimination and the handicapped requires a particularly high level of sensitivity:

> Discrimination results from actions or inactions that discriminate by effect as well as by intent or design. Discrimination also includes harms resulting from the construction of transportation, architectural, and communication barriers and the adoption or application of standards and criteria and practices and procedures based on thoughtlessness or indifference — of benign neglect.

S. REP. NO. 116, *supra* note 2, at 6.

5. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357 (current version at 29 U.S.C. §§ 701-794 (1988 & Supp. V 1993)).

6. Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, 61 Stat. 136 (current version at 29 U.S.C. §§ 141-197 (1988 & Supp. V 1993)).

7. *See* 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993).

8. *See id.* § 12101(b)(1).

9. It has been recently determined that the concept of federal preemption does not apply to the ADA. *See* Anderson v. Martin Brower Co., No. 93-2333, 1994 U.S. Dist. LEXIS 10682 (D. Kan. July 22, 1994). Hence, there is no tension between the ADA and state law. Many states, such as New York, have anti-discrimination laws which protect the handicapped. These statutes now supplement the protection accorded by the ADA. *See, e.g.*, N.Y. HUMAN RIGHTS LAW § 296 (McKinney 1993); N.Y. CITY ADMIN. CODE & CHARTER

obligations created by the ADA so that Title I's ultimate goal, the excise of employment discrimination against the handicapped,[10] can be more readily accomplished. Additionally, I intend to point out those unsettled aspects of the law which necessitate a remedial judicial or legislative response. Finally, I will propose practical solutions to those problematic areas which would allow for the harmonization of the ADA's requirements with the demands of federal common law decisions and other labor statutes.

PART I

THE ADA, TITLE I: SCOPE AND COVERAGE

The main provision within Title I prohibiting employment discrimination against handicapped individuals is in section 12112(a) of the ADA, which provides that:

> No covered entity 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.[11]

Under section 12111(2), the "covered entities" which must comply with the ADA include private employers, state and local governments, unions, and jointly-administered labor-management committees.[12]

The definition of employer under the ADA was meant to be consistent with the definition of employer contained within Title VII

---

tit. 8, ch. 1 (1994).

Furthermore, the ADA specifically provides that the Act shall not be "construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." 42 U.S.C. § 12201(b) (Supp. V 1993). Thus, it clearly was the intent of Congress that the ADA would enhance, rather than replace, already existent state and federal law.

10. *See* 42 U.S.C. § 12112 (Supp. V 1993).

11. *Id.* § 12112(a).

12. *See* EEOC TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT I-1 (1992) [hereinafter EEOC MANUAL]. Prior to July 26, 1994, only employers with 25 or more full time employees were covered by the ADA. Subsequent to July 26, 1994, the threshold was lowered to employers with 15 or more full time employees. 42 U.S.C. § 12111(5)(A) (Supp. V 1993). The EEOC Manual provides that the threshold number of employees includes "part-time employees, working for [a covered entity] for 20 or more calendar weeks in the current or preceding calendar year." EEOC MANUAL, *supra*, at I-1.

of the Civil Rights Act of 1964.[13] Accordingly, the ADA embraces persons who are agents of an employer as well as "any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an employer of an aggrieved individual as that term has generally been defined at common law."[14] The definition of employer under the ADA is so broad that it has even been held to apply to multi-employer trust funds which simply provide employee benefits to employees pursuant to the terms of a collective bargaining agreement.[15]

Title I of the ADA protects only "qualified individual[s] with a disability."[16] In order for an individual with a disability to be considered qualified, he must demonstrate that he is able, with or without a reasonable accommodation, to perform the essential functions of the job he seeks or currently holds.[17] Under the ADA, if an individual fails to satisfy the requisite skill, experience, education, or other job related requirements of a particular position, he or she may not be considered qualified for that position and, therefore, may not be entitled to statutory protection.[18] Furthermore, an individual seeking relief under the ADA must show that, despite a handicap, he is capable of performing the essential functions of the employment position he either seeks or holds.[19] The statute, however, provides little guidance as to how an employer is to determine what the essential functions of a position are.[20] Despite this fact, it seems quite clear that a handi-

---

13. *See* S. REP. NO. 116, *supra* note 2, at 25. As in Title VII of the Civil Rights Act, the ADA provides that corporations fully owned by the U.S. Government or Indian tribes, and bona fide private clubs which are exempt from taxation under the Internal Revenue Code (and which are not labor organizations), are exempt from coverage. These entities are not defined as employers under either statute. *See* 42 U.S.C. § 12111(5)(B) (Supp. V 1993).

14. Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1063 (2d Cir. 1982).

15. *See* Transcript of Oral Argument at 3, Mason Tenders Dist. Council Welfare Fund v. Donaghey, 93 Civ. 1154 (S. Dist. Rep.) (S.D.N.Y. Nov. 19, 1993) (Transcript of plaintiff's oral argument on motion for summary judgment, Nov. 19, 1993); *see also* Memorandum Decision on Plaintiffs' and Defendants' Motion for Summary Judgment, EEOC v. Monroe Foods, Inc., 93 Civ. 2925 (D. Md. May 16, 1994).

16. 42 U.S.C. § 12111(8) (Supp. V 1993).

17. *Id.*

18. EEOC MANUAL, *supra* note 12, at II-11.

19. *See* 42 U.S.C. § 12111(8) (Supp. V 1993).

20. *Id.* Section 12111(8) provides that

> "[f]or the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a *written description* before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

capped person may not be denied an employment opportunity simply because he or she is incapable of performing non-essential or marginal aspects of a specific job.[21]

To qualify for protection under the ADA, an individual must be considered disabled. The definition of "disability" under the ADA is incredibly broad. It includes:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of the individual;
> (B) a prior record of such an impairment; or
> (C) being regarded as having such an impairment.[22]

It is interesting to note that under section 12102(2)(c), even if an individual is simply believed to have a disability, that individual is entitled to protection under the ADA whether or not he or she actually has the perceived disability.[23] Employers, therefore, must behave cautiously before glibly labeling an employee "handicapped"; to do so may raise the specter of statutory rights (and their co-requisite obligations) which the employee might not have originally had but for the employer's mistaken perception.

Under the first prong of section 12102(2), a physical impairment

---

Id. (emphasis added). Thus, it would seem best for an employer to prepare a comprehensive written job description outlining the essential functions of a position before seeking applicants for that position. This would give the employer a quantifiable and objective basis for determining whether a handicapped individual can indeed be considered "qualified."

21. EEOC MANUAL, *supra* note 12, at II-12.

22. 42 U.S.C. § 12102(2) (Supp. V 1993). The ADA's definition of disability tracks the definition of "person with a handicap" contained within the Rehabilitation Act of 1973. *See* 29 U.S.C. § 706(8)(a) (1988); *see also* 29 U.S.C. § 706(8)(A) (Supp. V 1993) (altering the statute's original terminology by referring to an "individual with a disability"). Thus, practitioners who commence actions under ADA Title I will have the benefit of interpretative case law under the Rehabilitation Act to establish which afflictions are considered disabilities. Recently, the EEOC promulgated new guidelines defining the term "disability" under the ADA. While the guidelines do not change the conception of what are qualified disabilities, they provide a greater depth to this term and add concrete examples of covered disabilities. *See* EEOC Compliance Manual Directive No. 915.002, § 902 (Mar. 14, 1995).

23. The Senate Committee, when it considered the rationale behind § 12102(2)(c), noted that this section was based upon the Supreme Court's decision in School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987), a case decided under the Rehabilitation Act. *See* S. REP. NO. 116, *supra* note 2, at 24. In *Arline*, the Court wrote:

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.

Arline, 480 U.S. at 284.

is considered to be:

> any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory including speech organs; cardiovascular; reproductive; digestive; gastro-urinary; hemic and lymphatic; skin; and endocrine.[24]

A mental disorder is defined as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[25] Because the ADA's definition of mental[26] and physical impairment is so generic, it is almost impossible to develop a specific list of covered ailments. Apparently, Congress intended to keep the definition of disability fluid so that individuals with diseases which become pervasive at a future date (as did AIDS beginning fifteen years ago) may also be entitled to protection.[27]

Since the ADA's legislative history largely parallels the Rehabilitation Act,[28] one may assume that the specific handicaps covered by the Rehabilitation Act are also covered by the ADA.[29] Additional ailments potentially covered under the ADA include: obesity;[30] stress and job related depression where a psychological basis is estab-

---

24. 45 C.F.R. § 84.3(j)(2)(i) (1989); *see* 42 U.S.C. § 12102(2) (Supp. V 1993).

25. *See* EEOC MANUAL, *supra* note 12, at II-2.

26. The Senate, when it considered the parameters of "mental impairment," noted that the ADA, with some limited exceptions, covered the gamut of mental illnesses listed within the Diagnostic and Statistical Manual of Mental Disorders used by psychiatric and mental health professionals, just as the Rehabilitation Act did. *See* 135 CONG. REC. S11,173, S11,174 (daily ed. Sept. 14, 1989). The ADA's coverage of mental disabilities pose interesting questions for both employer and employee alike. *See* Louis Pechman, *Mental Disabilities in the Workplace*, N.Y. L.J., Mar. 2, 1994, at 1.

27. *See* 54 Fed. Reg. 3245 (1989); Chai R. Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7 LAB. LAW. 11, 20 (1991).

28. *See* S. REP. NO. 116, *supra* note 2, at 21.

29. For example, vision and hearing impairments; emotional disturbance and mental illness; seizure disorders; orthopedic and neuromotor disabilities; speech impairments; learning disabilities; cancer; HIV; and infectious and cystic fibrosis, among others, are considered protected conditions under both the Rehabilitation Act and the ADA. *See* Robert L. Burgdorf Jr., *The American With Disabilities Act: A Practical and Legal Guide to Impact, Enforcement and Compliance*, BNA Special Report (1990) at 82-83.

30. *See* Cook v. Rhode Island Dep't of Mental Health, 783 F. Supp. 1569 (D.R.I. 1992), *aff'd*, 10 F.3d 17 (1st Cir. 1993); Cassista v. Community Foods, Inc., 856 P.2d 1143 (Cal. 1993).

lished;[31] and full-blown AIDS.[32]

Furthermore, the ADA specifically excludes current alcohol and illegal drug users from its definition of "qualified individual[s] with a disability."[33] However, individuals are not excluded from coverage if they are recovering drug abusers or alcoholics who have either previously been or are currently enrolled in a supervised drug rehabilitation program.[34] In this respect, a significant distinction between the ADA and the Rehabilitation Act exists. While an alcoholic is absolutely protected by the Rehabilitation Act,[35] under the ADA an individual must prove that he has recovered and actually able to adequately perform all of the essential functions of his position.[36]

The ADA specifically removes from its scope individuals with such alleged "disorders" as homosexuality, transsexualism, sexual behavior disorders, compulsive gambling, kleptomania or pyromania.[37] This limitation on the ADA's scope was apparently added as a compromise to an even more exclusive amendment which would have permitted discriminatory actions against disabled individuals if such conduct were the product of the discriminator's religious or moral convictions.[38] A compromise was achieved because the provision, as originally suggested, would have rendered the protection afforded by the ADA nugatory.

The ADA does, however, protect one type of individual not otherwise covered by the Rehabilitation Act because it prohibits discrimination against qualified employees and job applicants who do not have a disability, but who associate with a disabled individual covered by the Act.[39] Thus, an employer may not discriminate against an employee or a job applicant whose wife has Alzheimer's disease or whose life partner has AIDS without running afoul of the ADA.[40]

---

31. *See* Guice-Mills v. Derwinski, 772 F. Supp. 188 (S.D.N.Y. 1991), *aff'd*, 967 F.2d 794 (2d Cir. 1992).

32. *See* Phelps v. Field Real Estate Co., 991 F.2d 645 (10th Cir. 1993).

33. 42 U.S.C. § 12114(a) (Supp. V 1993).

34. *See id.* § 12114(b).

35. *See* 29 U.S.C. § 706(8)(B) (1988 & Supp. V 1993).

36. *See* 42 U.S.C. § 12114(c)(4) (Supp. V 1993).

37. *Id.* § 12211. In contrast, the Rehabilitation Act does not mention any of these disorders. *See* 29 U.S.C. § 706(13) (1988 & Supp. V 1993).

38. *See* Feldblum, *supra* note 27, at 25.

39. 42 U.S.C. § 12112(b)(4) (Supp. V 1993). Section 12112(b)(4) defines this form of prohibited discrimination to mean "excluding or otherwise denying equal job benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." *Id.*

40. *See* Chai R. Feldblum, *The Americans with Disabilities Act Definition of Disability*, 7

There is no provision comparable to this in the Rehabilitation Act. Of course, since such an employee is not otherwise covered by the ADA, this individual would have to prove that he or she was in fact discriminated against solely due to his or her relationship with a disabled individual.[41] In practice, this form of discrimination may be extremely difficult to prove.

As mentioned previously, in order for a disabled individual to be entitled to ADA protection under section 12111(8), he must demonstrate that he is capable of performing the essential functions of his position.[42] Hence, even if an employee has a disability specifically covered by the ADA, he is unable to take advantage of the ADA's provisions if he is incapable of performing the essential functions of his job.[43] For example, a limousine driver who suffers from frequent anxiety attacks which substantially inhibit his ability to drive would most likely not be a qualified person under the ADA.

Finally, a disabled individual must be able to demonstrate that the effect of his disability substantially limits his ability to perform what is categorized as a "major life activity."[44] The ADA's regulations provide a three pronged inquiry to determine whether a disability has created a substantial impairment of an individual's major life activity: (1) the nature and severity of the impairment; (2) the expected duration of the impairment; and (3) its permanent long-term or expected impact.[45] Hence, the ADA is not meant to immunize individuals with a trivial impairment (e.g., infected finger or mild allergies) from disability-based employment discrimination.[46] Nevertheless, because of the possibility that a diabetic may lapse into a coma without insulin, a person who simply requires regular injections of insulin would be considered substantially impaired since his insulin-dependent condition inhibits the manner in which he is able to perform several major life activities.[47]

LAB. LAW. 11, 25-26 (1991). Although Congress originally attempted to limit the statute's concept of "association with a covered disabled individual" to those individuals related by blood, marriage, adoption or judicial decree, the actual terms of the ADA were not limited in that fashion. *Id.* at 25.

41. *See id.*

42. *See supra* notes 16-19 and accompanying text.

43. *See* 42 U.S.C. § 12111(8) (Supp. V 1993).

44. *Id.* § 12102(2)(A); EEOC MANUAL, *supra* note 12, at II-3; S. REP. NO. 116, *supra* note 2, at 23 (noting examples such as walking, speaking, seeing, hearing, breathing, learning and working).

45. EEOC MANUAL, *supra* note 12, app. B § 1630.2(j) at B-9.

46. S. REP. NO. 116, *supra* note 2, at 23.

47. EEOC MANUAL, *supra* note 12, at B-10.

A. Reasonable Accommodation

Title I of the ADA and the Rehabilitation Act are unique among civil rights legislation in that both acts place dual obligations upon employers. First, the statutes require that employers not discriminate against a qualified disabled employee or prospective employee who can perform the essential functions of an available employment position.[48] Additionally, both mandate that an employer provide reasonable accommodation to an otherwise qualified employee who is not capable of performing necessary employment functions without that accommodation.[49]

For example, an otherwise qualified visually impaired individual may be entitled to a device that enhances visual images, if such a device would enable that individual to satisfactorily perform essential functions of his or her job.[50] In fact, the ADA specifically provides that a covered entity would engage in discriminatory behavior by failing to reasonably accommodate an individual who is capable of performing the essential job functions once they are aided by such a reasonable accommodation.[51]

The exact nature of the reasonable accommodation required in a particular situation is not elaborated on in the ADA. Nonetheless, the ADA provides some guidelines as to the general types of reasonable accommodations that an employer might provide to qualified employees.[52] Section 12111(9) provides that the term "reasonable accommodation" may include:

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

48. *See* 42 U.S.C. § 12112 (Supp. V 1993); 29 C.F.R. § 794 (1988).

49. *See* 42 U.S.C. § 12111 (Supp. V 1993); 29 C.F.R. § 1613.703 (1994).

50. As will be discussed in Part II of this article, *infra*, the reasonable accommodation provision of the ADA potentially comes into conflict in several respects with an employer's statutory obligation to negotiate in good faith over the terms and conditions of employment.

51. *See* 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993).

52. *See id.* § 12111(9).

viduals with disabilities.[53]

This definition, of course, is by no means meant to be exhaustive. It certainly can be anticipated that innumerable possible accommodations may be available to address the many possible afflictions covered by the statute.

Once again, consideration of the Rehabilitation Act would be instructive to anyone attempting to ascertain the scope of the ADA's reasonable accommodation requirement, since the Rehabilitation Act also contains reasonable accommodation provisions.[54] Nevertheless, while the ADA was under consideration, the legislature recognized that "the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case."[55] Ultimately, a review of the particular accommodations found permissible or necessary under the Rehabilitation Act would reveal that a "fact-specific case-by-case approach"[56] was utilized by employers and the courts in assessing the accommodation's propriety.

Besides including suggested parameters for developing reasonable accommodations within the statute, the legislature also included in the ADA's legislative history several examples of how specific disabilities might be reasonably accommodated to provide employers with additional guidance.[57] For instance, the ADA's legislative history suggests that shift rotation might be appropriate for disabled individuals, such as those who suffer from epilepsy, who are incapable of working a standard work schedule.[58] A person who has impaired mobility and who is reliant on public transportation that is not fully accessible might also require a modified work schedule.[59] Of course, blind or visually impaired individuals require specific computer software or hardware to accommodate their disability.[60] Similarly, the hearing impaired may require telephone handset amplifiers, telephones which are compatible with hearing aids and/or special telecommunications devices.[61] Individuals with impaired physical dexterity may require

---

53. *Id.*
54. *See* 29 U.S.C. §§ 791, 794 (1988 & Supp. V 1993).
55. *See* S. REP. NO. 116, *supra* note 2, at 31; *see also* H.R. REP. NO. 485, 101st Cong., 1st Sess., pt. 2, at 62 (1990) [hereinafter H.R. REP. NO. 485].
56. S. REP. NO. 116, 101st Cong., 1st Sess. 31 (1989).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 32.
61. *Id.*

other types of mechanical devices, such as a mechanical page turner, raised or lowered office furniture, or telephone headsets.[62] Finally, part-time or modified work schedules may be required for people with chronic disabilities which require regularly scheduled medical attention and treatment.[63] It must be stressed, however, that the Act's legislative history makes it clear that the ADA "does not entitle an individual with a disability to more paid leave time than non-disabled employees."[64]

In order for an employee or job applicant to become entitled to reasonable accommodation, he must first specifically request accommodation from his employer since the ADA only requires that reasonable accommodation be made to the *known* physical or mental limitations of an otherwise qualified individual.[65] In fact, the legislative history of the Act indicates that it is patently improper for an employer to unilaterally impose an accommodation upon a handicapped employee since this might actually have an adverse effect upon him or her.[66]

This prohibition could potentially cause a dilemma for an employer who recognizes that a qualified employee's job performance is, or has become, impaired because of a disability. If the impaired employee has either failed or refused to request an accommodation the employer may not act unilaterally. One commentator has suggested that this problem may not be a critical one since "the general problem-solving tenor of the ADA suggests that employers should be proactive in generating dialogue regarding [employees'] apparent needs for accommodation."[67] This prediction, however, awaits empirical verification.

The ADA makes it clear that an employer is not required to reasonably accommodate every disabled employee or job applicant who seeks employment. An employer may reject or even dismiss a disabled employee who is rendered unqualified or unable to perform the essential functions of his job, even if he were reasonably accommodated.[68] For instance, a person whose handicap prohibits him from obtaining a driver's license, such as a person who suffers from un-

---

62. *Id.*
63. *Id.* at 31.
64. *Id.*
65. *See* EEOC MANUAL, *supra* note 12, at III-7; S. REP. NO. 116, *supra* note 56, at 34.
66. *See* S. REP. NO. 116, *supra* note 56, at 34.
67. C. Geoffrey Weirich, *Reasonable Accommodation Under the Americans With Disabilities Act*, 7 LAB. LAW. 27, 32 (1991).
68. *Id.* at 28.

controllable grand mal seizures, can be rejected from employment as a city bus driver because driving is an essential element of this job, an element which he or she is incapable of performing. Even with a reasonable accommodation this individual would still be incapable of driving. Another example might be a teacher who suffers from cerebral palsy but who has failed to obtain the requisite specialized license for the teaching position he or she seeks. No reasonable accommodation is possible here since the teacher lacks the necessary qualifications to perform the position sought.

B. Undue Hardship

Where it can be proved that the requested reasonable accommodation would cause "undue hardship" to the employer's business, the employer is provided with a specific statutory defense to a discrimination claim under the ADA.[69] This is true even if the handicapped individual could perform the essential functions of his or her job with the aid of an accommodation. In this respect, the ADA provides that a reasonable accommodation is required unless "such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. . . ."[70]

Undue hardship is defined under the ADA as a significant expense or considerable difficulty in implementation of reasonable accommodations.[71] The ADA lists several factors to be considered by an employer in determining whether or not a reasonable accommodation could be considered unduly burdensome.[72] These factors include the nature of the accommodation sought, the financial resources of the employer who is requested to provide the accommodation, the effect of the accommodation upon the functioning and operation of the covered entity, the size of the operation, the number of the employees at the facility where the accommodation is proposed to be implemented and the type of operation involved.[73] Hence, if the fundamental

---

69. 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993).

70. *Id.*

71. *Id.* § 12111(10)(A).

72. *Id.* § 12111(10)(B)(i)-(iv).

73. *See* Russell H. Gardner & Carolyn J. Campanella, *The Undue Hardship Defense to the Reasonable Accommodation Requirement of the Americans With Disabilities Act of 1990*, 7 LAB. LAW. 37, 38 (1991). As with the list of factors to be considered in determining the existence of a disability and possible reasonable accommodations under the ADA, the parameters set forth by the Act for establishing that a particular reasonable accommodation would be

processes by which the employer operates would be completely changed by a proposed accommodation, or if its cost would be excessive, the employer would not violate the ADA by refusing to implement it since the accommodation could not be considered reasonable.[74]

As with the ADA's reasonable accommodation requirement, the undue hardship defense had its genesis in the Rehabilitation Act.[75] One might assume that a review of the legal decisions under the Rehabilitation Act would be of assistance to anyone seeking to obtain a better understanding of the ADA's undue hardship concept. Unfortunately, this is not the case. While there is a wealth of Rehabilitation Act case law dealing with the undue hardship defense, it is unclear if these cases concern the issue of whether the accommodation is unreasonable or whether it is unduly burdensome.[76] Clear parameters do not exist and courts have often used these concepts interchangeably. This distinction is critical since under the Rehabilitation Act (and most likely the ADA) the unduly burdensome concept is an affirmative defense to a discrimination action.[77] On the other hand, a determination of whether an accommodation is reasonable is part of the prima facie case under both acts.[78] Thus, the reasonableness of the

---

unduly burdensome were not meant to be exhaustive. These guidelines were merely meant to provide guidance to employers concerning the nature of their obligation to reasonably accommodate a disabled employee. *Id.*

74. *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(3) (1994).

75. *See* 29 U.S.C. §§ 794, 794(c) (1988 & Supp. V 1993). To a lesser extent, the concept of undue hardship under the ADA is analogous to the concept of undue hardship found in a section of the Civil Rights Act of 1964, providing that an employer is required to reasonably accommodate an employee's religious beliefs and practices unless the employer is able to demonstrate that such an accommodation would cause undue hardship to the employer's business. *See* 42 U.S.C. § 2000e(j) (1988 & Supp. V 1993). The legislative history of the ADA makes it clear, however, that the *de minimis* requirement for religious accommodation first formulated in *TWA v. Hardison*, 432 U.S. 63 (1977), does not apply to reasonable accommodation as defined by the ADA. S. REP. NO. 116, *supra* note 56, at 36. The Senate noted that in *Hardison* the Supreme Court held that "an employer need not accommodate persons with religious beliefs if the accommodation would require more than a *de minimis* cost for the employer." S. REP. NO. 116, *supra* note 56, at 36. Under the ADA, much more must be shown in order to establish the undue hardship defense.

76. *See* Gardner & Campanella, *supra* note 73, at 38-39.

77. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). As with any discrimination action, the plaintiff must first prove that a legally sufficient prima facie discrimination claim exists. Only after a prima facie case has been put forth by the plaintiff is the defendant required to demonstrate that the accommodation requested would prove to be unduly burdensome. *Id.* at 802.

78. 29 U.S.C. § 791 (1988 & Supp. V 1993); 42 U.S.C. § 12112 (Supp. V 1993).

accommodation in the first instance must be shown by the plaintiff. The major distinction between the concepts of reasonable accommodation and undue hardship is, therefore, who has the ultimate burden of proof on the issue.[79]

That the courts have occasionally confused these concepts is amply demonstrated in several appellate level decisions. For example, in *Pushkin v. Regents of University of Colorado*,[80] the Tenth Circuit held that the defendant had the burden of proving that an employee's disability could not be reasonably accommodated (rather than the employee proving that she could be reasonably accommodated as part of her prima facie case).[81] The Ninth Circuit has held that when presenting evidence to demonstrate an accommodation is unreasonable, the burden rests on the employer to show:

> sufficient information from the [disabled employee or] applicant and from qualified experts as needed to determine what accommodations are *necessary* to enable the [employee or] applicant to perform the job safely. The application of this standard requires a strong factual foundation in order to establish that an applicant's handicap precludes safe employment. After marshaling the facts, the employer must make a decision as to the reasonableness of the accommodation.[82]

Furthermore, in *Prewitt v. United States Postal Service*,[83] the Fifth Circuit held that "the burden of proving inability to accommodate is upon the employer" because:

> [t]he employer has a greater knowledge of the essentials of the job than does the handicapped applicant. The employer can look at its own experience, or, if that is not helpful, to that of other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question.[84]

---

79. As in many areas of litigation, the outcome of a discrimination action may often be predicted by ascertaining which party ultimately bears the burden of proof. *See, e.g.*, Saint Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993).

80. 658 F.2d 1372 (10th Cir. 1981).

81. *Id.* at 1387 ("defendants have the burden of going forward and proving that plaintiff is not . . . one who is able to meet all of the program's requirements *in spite* of his handicap") (emphasis in original).

82. Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985) (emphasis in original).

83. 662 F.2d 292 (Former 5th Cir. Unit A Nov. 1981).

84. *Id.* at 308; *cf.* Doe v. New York Univ., 666 F.2d 761, 776-77 (2d Cir. 1981) (holding that the employer's burden of proof is solely limited to proof of undue hardship). The decision in *Doe* appears more in line with the Rehabilitation Act and the ADA's intended

It remains to be seen whether case law interpreting the ADA will clarify whether it is the employer or the employee who bears the ultimate burden of proof on this issue. This should not be a difficult decision, since the statute indicates that the burden of showing that an accommodation would pose an undue hardship rests upon the employer.[85]

The most important factor used to consider whether an accommodation poses an undue hardship upon an employer is its cost. If an accommodation would potentially bankrupt the employer, it is clear that a disabled employee may not insist upon it. For this reason, a large employer with greater financial resources would be expected to provide more costly accommodations than an employer whose resources were not as great.

Cost is not the only factor considered. If the accommodation requested would disrupt the employer's ability to prepare work schedules, such as where a disabled employee desires to take unlimited leave without complying with employer's notice policy, undue hardship may be also demonstrated.[86] If the accommodation would be dangerous to the disabled employee or other employees in the plant, it also may be prohibited. This is so even though the ADA does not specifically list safety as a relevant consideration.[87]

Under the Rehabilitation Act, courts have held that an employer is not required to modify an existing job or create a new job category simply to accommodate a handicapped employee.[88] Nor is an employer required to modify job requirements to eliminate a specific essential element which a disabled employee is unable to perform.[89] Additionally, employers are not required to hire an additional employee to help a disabled person perform a position for which only one employee was originally intended.[90]

Finally, the ADA's legislative history provides that even if an accommodation may be considered too burdensome for an employer to implement, if the disabled employee is capable of either providing

---

distribution of burdens between plaintiff and defendant.

85. *See* 42 U.S.C. §§ 12112(b)(5)(A), 12113(a) (Supp V. 1993); Schmidt v. Safeway Inc., 864 F. Supp. 991 (D. Or. 1994).

86. *See* Kimbro v. Atlantic Richfield Co., 889 F.2d 869 (9th Cir. 1989), *cert. denied*, 498 U.S. 814 (1990) (decided under Washington handicap anti-discrimination law which has objectives similar to those of the ADA).

87.. *See* 42 U.S.C. § 12213(b) (Supp. V 1993).

88. *See* Fowler v. Frank, 702 F. Supp. 143 (E.D. Mich. 1988).

89. *See* Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985).

90. *See* Arneson v. Heckler, 879 F.2d 393, 397-98 (8th Cir. 1989).

the accommodation on his own or eliminating the burdensome part of it, he may not be denied employment if the sole reason for the denial would have been the hardship caused by the accommodation.[91] The EEOC Technical Assistance Manual also lists other examples where an employer may not refuse to provide a reasonable accommodation which is allegedly unduly burdensome.[92]

PART II

THE ADA'S EFFECT UPON LABOR-MANAGEMENT COLLECTIVE BARGAINING OBLIGATIONS

In addition to prohibiting private employers from discriminating against qualified handicapped or disabled individuals with respect to available employment opportunities, the ADA provides that employers must reasonably accommodate disabled employees who are capable of performing the essential functions of their job or a job sought, unless the employer establishes that such accommodation would create an undue hardship.[93] Also, the ADA specifically provides that employers may consider job reassignment as an available reasonable accommodation.[94]

Nonetheless, if an employment situation is covered by a collective bargaining agreement, job reassignment may only be available to a disabled employee if the agreement's terms are complied with or if good faith negotiations occur between the parties to the agreement. In this respect, the ADA potentially comes into direct conflict with labor and management's obligations under the Taft-Hartley Act.[95] The ADA has created a statutory obligation to reasonably accommodate disabled employees which is independent of, and potentially contrary to, labor and management's collective bargaining obligations.[96]

---

91. S. REP. NO. 116, *supra* note 56, at 37.

92. *See* EEOC MANUAL, *supra* note 12, at III-12 to III-16.

93. *See* 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993). 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 an employer can show that the accommodations would impose an undue hardship on the business. *See id.*

94. *Id.* § 12111(9)(B).

95. *See* 29 U.S.C. §§ 141-197 (1988 & Supp. V 1993).

96. *See* 29 U.S.C. § 151 (1988). The declaration of policy for the Taft-Hartley Act provides that:

> It is declared hereby 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

Hence, the ADA varies from several other progressive federal statutes such as the Fair Labor Standards Act,[97] the Equal Pay Act[98] and Title VII of the Civil Rights Act of 1964,[99] since these statutes simply define the minimum statutory entitlements which collective bargaining agreements may not abrogate.

A. Basic Analysis

Before the terms and conditions of employment can be unilaterally modified by an employer, the Taft-Hartley Act requires that good faith collective bargaining must occur between an employee representative and the employer who has exclusively recognized that representative. This is true only if wages, hours or other mandatory bargaining items are concerned.[100]

Additionally, the provisions of a collective bargaining agreement may not be changed without the explicit consent of both parties to the agreement.[101] The ADA, however, 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.[102]

In order to effectuate an accommodation, the ADA might be interpreted to require an employer to unilaterally modify the terms and conditions of a handicapped employee's position without first

---

> 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.

Id.; *see also id.* § 157. Section 157 sets forth the rights of employees as to organization and collective bargaining, specifically providing that:

> 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.

Id.

97. 29 U.S.C. §§ 201-219 (1988 & Supp. V 1993).
98. 29 U.S.C. § 206(d) (1988).
99. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993).
100. *See* 29 U.S.C. §§ 158(a)(5), 158(b) (1988).
101. *Id.* § 158(d).
102. 42 U.S.C. § 12112 (Supp. V 1993).

consulting the employees' exclusive bargaining representative.[103] Such a unilateral change in employment conditions may subject the employer to unfair labor practice charges.[104] An unfair labor practice charge may also be filed, or a breach of contract action initiated,[105] if the employer, by implementing an accommodation, fails to honor 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 an established seniority rights provision within the collective bargaining agreement. This could result in the filing of a National Labor Relations Board ("NLRB") charge by the union or the employees whose seniority were ignored. On the other hand, if the employer failed to provide such an accommodation, it may be subjected to a claim before the Equal Employment Opportunity Commission ("EEOC") under the ADA. Under these circumstances, a Catch-22 conflict between the Taft-Hartley Act and the ADA is most probable.

B. Analysis in Line with the Rehabilitation Act of 1973

The reasonable accommodation requirement in the ADA is also contained within its predecessor statute, the Rehabilitation Act of 1973.[106] An examination of the Rehabilitation Act and relevant interpretative case law provides insight into the possible harmonization of the ADA with the Taft-Hartley Act.

Similar to the ADA, the Rehabilitation Act was promulgated by Congress in order to provide greater job training and employment opportunities for handicapped individuals.[107] Its primary focus was on increasing federal economic aid and providing vocational rehabili-

---

103. 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 the Taft-Hartley Act's prohibition against direct negotiation between an employer and an individual who is represented by a union which has been recognized as his exclusive bargaining agent. *See* 29 U.S.C. § 159(a) (1988).

104. *See* 29 U.S.C. §§ 158 (a)(1), (a)(5) (1988).

105. *Id.* § 185.

106. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 357 (current version at 29 U.S.C. §§ 701-794 (1988 & Supp. V 1993)). As was previously discussed in Part I of this article, *supra*, when Congress drafted the ADA it incorporated many standards of discrimination contained within the Rehabilitation Act, including an 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 should be considered generally applicable to the ADA as well. *See* 29 C.F.R. § 1630.1(c) (1994).

107. *See* 29 U.S.C. § 701 (1988 & Supp. V 1993).

tation for such individuals.[108] However, the Rehabilitation Act, including its anti-discrimination provision, only applies to employees of the federal government or to employers who receive federal funding.[109] It was not until the ADA was enacted that employment discrimination against handicapped individuals working in the private sector, as well as for the state and local government, was actually prohibited.

In reviewing the Rehabilitation Act, the federal courts have been extremely reluctant to require a reasonable accommodation which would abridge the rights of employees covered by a collective bargaining agreement. The Supreme Court has, nevertheless, held that the Rehabilitation Act does in fact affirmatively require an employer to reasonably accommodate an "otherwise qualified" employee with a handicap.[110] In *Arline*, an employer was required to reassign a disabled employee (who was susceptible to tuberculosis) to an alternative position which the employee was capable of performing if that employee was otherwise qualified.[111] The Supreme Court 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."[112] Nevertheless, under case law following the *Arline* decision, it appears that reasonable accommodations which contravene the terms of a collective bargaining agreement will be prohibited under the Rehabilitation Act.[113]

In *Daubert v. United States Postal Service*,[114] a disabled employee requested that the responsibilities of her job as a postal worker be altered so that she would only be required to perform "light duties."[115] Under the seniority provisions of the collective bargaining

---

108. *Id.* §§ 720-752.

109. *Id.* §§ 791, 794.

110. *See* School Bd. of Nassau County v. Arline, 480 U.S. 273, 285 (1987) (leaving open the question of whether an alternative employment opportunity might be deemed inherently unreasonable if it would violate the specific terms of a collective bargaining agreement).

111. *See id.* at 289.

112. *Id.* at 289 n.19.

113. *See* Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989); Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985); Davis v. United States Postal Serv., 675 F. Supp. 225 (M.D. Pa. 1987); Hurst v. United States Postal Serv., 653 F. Supp. 259 (N.D. Ga. 1986); Wimbley v. Bolger, 642 F. Supp. 481 (W.D. Tenn. 1986); Carty v. Carlin, 623 F. Supp. 1181 (D. Md. 1985).

114. 733 F.2d 1367 (10th Cir. 1984).

115. *Id.* at 1368. In *Daubert*, the plaintiff suffered from a degenerative spinal disease

agreement covering Ms. Daubert, only employees with five years or more experience were allowed to be transferred to light duty.[116] Unfortunately, Ms. Daubert had only been employed with the Postal Service for less than two years.[117] The Postal Service terminated her because she was no longer capable of handling the essential responsibilities of her position, rather than granting her request for an accommodation.[118]

The Tenth Circuit affirmed the dismissal of Daubert's claim alleging a violation of the Rehabilitation Act, holding that compliance with the terms of the Postal Service's national agreement was in fact a legitimate business reason justifying the plaintiff's discharge.[119] Furthermore, as Daubert could no longer perform the heavy lifting required by her original position, she was no longer "otherwise qualified" to perform the essential functions of her job assignment.[120] It can be reasoned that the circuit court viewed the employer's obligations under its collective bargaining agreement as superior to the reasonable accommodation requirement of the Rehabilitation Act.

The Fourth Circuit came to the same conclusion in *Carter v. Tisch*.[121] In *Carter*, an employee who had developed asthma — and was no longer capable of performing his regular duties as a custodian — sought a permanent light duty custodial position.[122] The plaintiff's employer refused to permit him to engage in light duty work since he had failed to meet the prerequisite seniority requirements under the applicable collective bargaining agreement.[123] The court agreed with the employer's position and held that its obligation to provide a disabled employee with a reasonable accommodation does not override the provisions of a valid collective bargaining agreement unless it could be conclusively demonstrated that the agreement's primary objective was to discriminate against the disabled.[124] In this respect, so long as the seniority provisions were bona fide, a handicapped employee did not have an actionable right under the Rehabilitation Act if an employer refused to reasonably accommodate him in

---

which prevented her from lifting heavy objects. *Id.* at 1369.

116. *Id.*
117. *Id.* at 1368-69.
118. *Id.* at 1369.
119. *Id.* at 1370.
120. *Id.* at 1372.
121. 822 F.2d 465 (4th Cir. 1987).
122. *Id.* at 466.
123. *Id.*
124. *Id.* at 469.

a manner which violated the agreement's seniority terms.[125] 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.[126] Thus, although under the Rehabilitation Act an employer has an affirmative obligation to effect a reasonable accommodation, it may be concluded with some confidence that the reasonable accommodation requirement is preempted where such accommodation comes into conflict with the established terms of a collective bargaining agreement. Consequently, if case law under the Rehabilitation Act is used as precedent for determinations under the ADA, its "reasonable accommodation" provision would also be superseded by labor and management's Taft-Hartley bargaining obligations. In order to determine whether Congress truly intended such preemption for the ADA, the Act's legislative history must be explored.

C. ADA's Legislative History

Portions of the ADA's legislative history seem to suggest that, as with the Rehabilitation Act, the terms of a collective bargaining agreement should be considered sacrosanct.[127] Other portions of its legislative history, however, indicate that — at least in some instances — the provisions of a collective bargaining agreement might be subordinated to the important policy concerns of the ADA.[128]

It should be noted that the legislative history of the ADA provides that case law and EEOC interpretive guidelines under the Rehabilitation Act are intended to be used as a guide for enforcing the ADA. This is revealed in a portion of the ADA's legislative history which states:

> In the compromise bill, the applicable regulations [Rehabilitation Act, section 504], 45 C.F.R. 84.12, has been incorporated almost 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

125. *Id.* at 467. Thus, case law has established the Rehabilitation Act to be similar to Title VII in that the provisions of a bona fide seniority plan are exempt from Title VII's requirements. *See* 42 U.S.C. § 2000(e)(2)(h) (1988 & Supp. V 1993). It may be anticipated that the ADA will be interpreted as containing this exemption as well, even though its provisions are silent on this matter.

126. *Carter*, 822 F.2d at 467.

127. S. REP. NO. 116, *supra* note 56, at 32.

128. S. REP. NO. 116, *supra* note 56, at 32.

> 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.[129]

This portion of the ADA's legislative history supports the argument that its reasonable accommodation requirement should yield to the "more important" goals of the Taft-Hartley Act because this is what case law established under the Rehabilitation Act.[130]

Nevertheless, it also plainly indicates that the ADA has an existence independent from the Rehabilitation Act. In a discussion regarding the resolution of the conflicting demands of the Taft-Hartley Act and the ADA, the Senate Report indicates that the duty of an employer to abide by ADA Title I should not be affected by any inconsistent term contained in a collective bargaining agreement to which it is a party.[131] Thus, according to this report, a covered entity would not be permitted to use a collective bargaining agreement's terms as a shield to allow it to do what the ADA would otherwise prohibit.[132]

The House Report further indicates that although the terms of a collective bargaining agreement may be considered when determining whether or not an accommodation is reasonable, the agreement's terms should not necessarily be conclusive.[133] The House Report states:

> An employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this [legislation]. 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 [legislation]. . . . The collective bargaining agreement could be relevant . . . in determining whether a given accommodation is reasonable. For

129. STAFF OF HOUSE COMM. ON EDUC. AND LAB., 101ST CONG., 2d SESS., REPORT ON THE AMERICANS WITH DISABILITIES ACT 2219 (Comm. Print 1990).

130. *See supra* note 113 and accompanying text.

131. S. REP. NO. 116, *supra* note 56, at 32.

132. S. REP. NO. 116, *supra* note 56, at 32.

133. H.R. REP. NO. 485, *supra* note 55, at 62.

> 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.*[134]

Thus, the House Report also indicates that the seniority portion of a collective bargaining agreement would not be solely determinative in considering whether an accommodation which violates seniority should be deemed unreasonable.[135]

Ultimately, it appears that the legislature envisioned that the inherent conflict between the Taft-Hartley Act and the ADA could be averted by mutual negotiation between labor and management for inclusion of a reasonable accommodation provision in their collective bargaining agreements.[136] A recent commentator on the House ADA Report, while noting the sensibility of the legislature's proposal, 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.[137]

---

134. H.R. REP. NO. 485, *supra* note 55, at 62 (emphasis added).

135. H.R. REP. NO. 485, *supra* note 55, at 62.

136. S. REP. NO. 116, *supra* note 56, at 32.

137. Joanne J. Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, 3 DET. C.L. REV. 925, 966 (1991). Such a provision in a collective bargaining agreement might be one which "allows an employer to take all actions necessary to comply with this legislation." *See* S. REP. NO. 116, *supra* note 56, at 32; H.R. REP. NO. 485, *supra* note 55, at 63. The Senate Report provides that "[c]onflicts between provisions of a collective bargaining agreement and an employer's duty to provide a reasonable accommodation may be avoided by ensuring that agreements negotiated after the effective date of [the ADA] contain a provision permitting the employer to take all actions necessary to comply with this legislation." S. REP. NO. 116, *supra* note 56, at 32. Such a clause might, however, justify an employer to ignore with impunity any of a collec-

Whether reasonable accommodation clauses will actually be agreed to between labor and management in order to address the concerns of the Taft-Hartley Act and the ADA still remains to be seen.

D. 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 to the judiciary. Because the ADA is a relatively new statute, no trend is discernible from the reported decisions.[138] Several arbitration opinions, however, have taken the requirements of the ADA into consideration and speculate as to how this statute may be applied in practice.[139]

A recent arbitration decision which considers the conflict between the ADA and the Taft-Hartley Act is *Waterous Co. v. International Ass'n of Machinists & Aerospace Workers*.[140] In the Waterous Company arbitration, the employee's grievance was based on his employer's refusal to allow him to return to work after he had recovered from carpal tunnel syndrome and spinal surgery.[141] After the employee had recovered from his injuries, a qualified rehabilitation consultant ("QRC") was retained to determine whether the employee should return to full employment as a "Hydrant Assembler II."[142] The QRC determined that the employee was capable of returning to

---

tive bargaining agreement's provisions so long as it was done for the sake of providing a disabled employee with a reasonable accommodation. It does not appear realistic to believe that a union would actually make this large concession to promote the public policy advanced by the ADA. Such a concession might even be violative of a union's duty of fair representation owed to its members.

138. *See* Emrick v. Libby-Owens-Ford Co., 875 F. Supp. 393, 395 (E.D. Tex. 1995) (whether or not a collective bargaining agreement's bona fide seniority system can be ignored in order to reasonably accommodate a handicapped employee depends upon the facts of the case and is not dependant upon case law under the Rehabilitation Act); *cf.* Aldrich v. Sullivan, 800 F. Supp. 1197, 1203 n.7 (D. Vt. 1992) (recognizing that the ADA may not provide a judicial remedy which would require an employer to reassign a handicapped employee if such reassignment would contravene the terms of a collective bargaining agreement).

139. The utilization of arbitration awards to determine the practical application of the ADA may not be sufficient for this purpose, however, since arbitrators historically have been bound only by the requirements of the collective bargaining agreement under which the dispute is submitted and not by the requirements of external law. *See, e.g.*, Stone Container Corp., 101 Lab. Arb. Rep. (BNA) 943 (1993) (Feldman, Arb.).

140. 100 Lab. Arb. Rep. (BNA) 278 (1993) (Reynolds, Arb.).

141. *Id.* at 281.

142. *Id.*

work, but could only perform limited elements of his prior job.[143] The employer refused to reinstate the employee, asserting that the position required an employee who was able to perform all the duties associated with the Hydrant Assembler II position.[144] The arbitrator ordered that the employee be reinstated and required that he be returned to work at a position consistent with the work restrictions outlined by the QRC.[145] The parties were directed to negotiate the specific job functions that the employee would perform and the pay he would receive.[146] Finally, the arbitrator awarded the grievant full back pay, seniority rights, and benefits.[147]

This decision had its basis in two provisions contained within the collective bargaining agreement at issue, which, in turn, had their roots in the requirements of the ADA. The first provision, modeled on the ADA directly, provided that there be no discrimination in the administration of the agreement with regard to an employee's handicap.[148] The effect of this clause was a direct prohibition on disparate treatment of physically and mentally impaired employees.[149] The second clause was a "modified" reasonable accommodation provision,[150] which mandated that the parties negotiate in regard to any qualified employee who is or becomes handicapped and thus unable to perform the work duties assigned to him or her in the usual manner.[151]

Although the ADA was not mentioned by the arbitrator, it is clear that this law had a pronounced effect upon the parties to the collective bargaining agreement as demonstrated by the formulation of the two contractual clauses in the agreement. The existence of these clauses makes this decision noteworthy because they demonstrate a possible means by which conflicting obligations under the Taft-Hartley Act and the ADA may be simultaneously satisfied. If the contract had not contained these provisions, it would be fair to as-

143. *Id.*
144. *Id.* at 282.
145. *Id.* at 284.
146. *Id.*
147. *Id.*
148. *Id.* at 283.
149. *Id.*
150. *Id.* at 284. 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 implement one unilaterally. *See supra* text accompanying notes 100-27.
151. *Waterous Co.*, 100 Lab. Arb. Rep. at 284.

sume that the decision might have been substantially different. The arbitrator most likely would have considered only the existing terms of the contract and not the ADA-modeled clauses.

Another noteworthy arbitration decision is *Cleveland Electric Illuminating Co. v. Utility Workers of America*,[152] which concerned a mechanic who was discharged from employment after he sustained a self-inflicted gunshot wound to his head.[153] Although he had substantially recovered from the gunshot wound, he sustained a permanent neurological injury which rendered him incapable of satisfying his position's pole-climbing requirements.[154] The employer discharged the mechanic after a summary investigation revealed that "no reasonable accommodation could be made" to allow him to overcome his physical limitations.[155]

The collective bargaining agreement covering the terms and conditions of the 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."[156] Apparently the employer contended that because there was no suitable work available for this employee, the only option it had — rather than allow him to remain in a position which clearly placed him in danger — was to discharge him.[157]

In granting the grievant relief, the arbitrator in that case relied upon both the terms of the collective bargaining agreement and the requirements of the ADA. The arbitrator concluded that the employer did not execute its position review with a good faith objective of making an accommodation to the grievant since it had severely limited the positions actually considered available.[158] Furthermore, 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.[159]

It should be noted that the arbitrator addressed the seniority issue by explicitly stating that his decision was not meant to override or

---

152. 100 Lab. Arb. Rep. (BNA) 1039 (1993) (Lipson, Arb.).
153. *Id.* at 1040.
154. *Id.* at 1041.
155. *Id.* The employer informed the employee that it attempted to place him in any job he could perform, but that none were available at the time. *Id.* at 1040.
156. *Id.* at 1044.
157. *Id.* at 1043-44.
158. *Id.* at 1045.
159. *Id.*

jeopardize the seniority rights of other employees.[160] Though a true good faith effort to reasonably accommodate the grievant was required by the award, it also made clear that the ultimate accommodation chosen could not be one which violated the parameters of the collective bargaining agreement.[161]

More recent arbitration decisions provide an even clearer indication that, usually, the ADA's reasonable accommodation requirement will not be permitted to override the written provisions of a collective bargaining agreement, even when the requirements of the ADA are actually considered by the arbitrator. In *Stone Container Corp.*,[162] the grievants were several employees (and their union) who had their shifts changed in order to accommodate an individual who suffered from post-traumatic stress syndrome and depression.[163] Apparently, the employer had permitted the disabled employee to work on a preferential shift as a reasonable accommodation, even though she did not have the level of seniority required by the collective bargaining agreement to work this shift.[164] Consequently, the grievants — who had the requisite seniority — were removed from the preferential shift.[165]

The arbitrator noted that if the ADA was not the law of the land, the union and the grievant would obviously prevail.[166] Nevertheless, he refused to consider the effect of the ADA upon the grievance because the collective bargaining agreement did not grant him that prerogative.[167] The arbitrator wrote:

> if the contract of collective bargaining allows the arbitrator to determine the answers of the grievance under the law of the land then the contract needs to say so. In the instant matter, there is no clear language placing before the arbitrator the right to determine the answer to the grievance under the law of the land.[168]

The arbitrator, who ultimately granted the relief sought by the grievants, did in fact discuss the terms of the ADA even though he wrote that he was not permitted to consider the Act in reaching his conclusion. First, it was held that there was insufficient evidence

160. *Id.*
161. *Id.*
162. 101 Lab. Arb. Rep. (BNA) 943 (1993) (Feldman, Arb.).
163. *Id.* at 944.
164. *Id.*
165. *Id.* at 945.
166. *Id.* at 946.
167. *Id.* at 947.
168. *Id.*

presented at the arbitration to conclusively show that the employee who was given the preferential shift was actually disabled.[169] Thus, it was questionable whether she was actually a qualified employee covered by the ADA. Next, it was determined that the accommodation granted to the allegedly disabled employee was not reasonable since it operated to the substantial detriment of several of the employer's most senior employees. Hence, the arbitrator concluded that the grievant had received "special treatment" totally unwarranted by the ADA.[170] The arbitrator noted that even if the terms of the ADA were considered, which was impermissible under the relevant collective bargaining agreement, the grievance would still have been granted.[171]

The same result occurred in *Clark County Sheriff's Department*.[172] This arbitration also dealt with a grievance filed by a union which claimed that an employer had violated the seniority provisions of its collective bargaining agreement by permitting a diabetic employee, who did not have the appropriate level of seniority, to work on the employer's first shift.[173] Apparently, the disabled employee had been permitted to work the preferential shift as part of a settlement arranged between herself and her employer, which was entered into without the consent of the union.[174]

Rather than discussing the demands of the ADA, in granting the grievance the arbitrator focused on the fact that the union was not a party to the settlement agreement and had not been permitted to participate in the negotiation of its terms.[175] Such a unilateral change in working conditions was held by the arbitrator to be violative of both the collective bargaining agreement and the Taft-Hartley Act.[176] The arbitrator noted, however, that had the employer and union negotiated to impasse over the scope of a reasonable accommodation for this employee, the employer would have then been permitted to implement a unilateral change in the agreement.[177]

---

169. *Id.*
170. *Id.*
171. *Id.*
172. 102 Lab. Arb. Rep. (BNA) 193 (1994) (Kindig, Arb.).
173. *Id.* at 194.
174. *Id.* at 194-95.
175. *Id.* at 197.
176. *Id.*
177. *Id.* Also, had the collective bargaining agreement contained a provision explicitly requiring negotiation over the terms of a disabled employee's reasonable accommodation, it would have then been clear to the employer what its obligations were, and that a unilateral

At least one arbitrator has come to an opposite conclusion when presented with a reasonable accommodation which allegedly violated a binding past-practice between the parties to a collective bargaining agreement.[178] In *Dearborn Heights*, arbitration was utilized to determine if a modified shift accommodation, granted by an employer to an employee who suffered from life threatening "brittle diabetes," violated a past practice between the parties to a collective bargaining agreement.[179] This past practice, the existence of which was stipulated to at the arbitration, consisted of the employer assigning shifts by seniority for three month durations.[180] The disabled employee, as in the other arbitration cases cited, lacked sufficient seniority to warrant the shift he was ultimately granted by his employer as a reasonable accommodation.[181] However, unlike the other arbitration decisions, the arbitrator in *Dearborn Heights* found that the grievance was without merit and permitted the reasonable accommodation.[182]

Rather than denying that external law, such as the ADA, could be considered without specific language in the agreement permitting such reference, the arbitrator agreed with a minority position and found that — in certain instances — an arbitrator could decide cases based on sources external to the agreement.[183] Based on the ADA's legislative history, the arbitrator determined that while the terms of a collective bargaining agreement are relevant to whether an accommodation is reasonable, such terms are not strictly determinative of this issue.[184] The arbitrator held that, given the level of seniority of the disabled employee and the fact that without the accommodation his

---

implementation of an accommodation was unacceptable. *Id.*

178. *See* City of Dearborn Heights, 101 Lab. Arb. Rep. (BNA) 809 (1993) (Kanner, Arb.).

179. *Id.*

180. *Id.*

181. *Id.* at 810.

182. *Id.* at 816. It is significant to note that the accommodation at issue did not actually violate the written terms of the collective bargaining agreement since the agreement did not actually contain a seniority provision. Seniority, however, was considered a controlling factor in determining shift assignments because of the past acknowledged practice between the parties. *Id.* at 809-10. This past practice between the parties was deemed incorporated into the collective bargaining agreement and found legally binding on the parties. However, even though the accommodation violated the agreement's implicit terms, the employer's accommodation was permitted. *See id.* at 810.

183. *Id.* at 811. This issue, whether arbitrators are bound strictly by the terms of a collective bargaining agreement or permitted to consider sources external to it when rendering awards, is considered in depth in Part IV of this article, *infra*, which examines the ADA and Arbitration.

184. *Id.* at 814; *see also supra* note 133 and accompanying text.

life would be in jeopardy if he worked his previously assigned shift, he was "persuaded that the collective bargaining agreement 'factor', [sic] while of import, [was] not 'determinative' of the right of [the disabled party] to a 'reasonable accommodation' under the ADA,"[185] i.e., the needs of the disabled employee outweighed the needs of the grievants, who would be required to adjust their schedules to accommodate him.

This final arbitration award takes issue with the rather utilitarian position adhered to by the majority of arbitrators — that the preservation of the bargaining unit's collective bargaining agreement outweighs the needs of a disabled individual to be reasonably accommodated. This was, however, by no means an unjustified award; there is ample authority for it in the ADA's legislative history.[186] Nevertheless, it is the only arbitration award to date which took the position that an accommodation may abrogate the terms of a collective bargaining agreement.

From these decisions, it is easy to conclude that an arbitrator will often limit the scope of his inquiry to the exact terms of the collective bargaining agreement at issue when dealing with either the discharge, reinstatement or accommodation of a disabled employee. The ADA will only be considered when it buttresses the actual provisions of the agreement. Moreover, when a proposed reasonable accommodation conflicts with the unambiguous terms of a collective bargaining agreement, the accommodation will usually not be permitted unless the agreement as a whole was actually meant to violate the ADA or unless the need for the accommodation is so overwhelming that abrogation of the agreement is justified.

E. Other Areas of Statutory Conflict: Direct Dealing and Employees' Right to Privacy

Two related areas where the ADA also potentially conflicts with the Taft-Hartley Act are (1) direct negotiation for an accommodation between an employer and an employee represented by a union, and (2) breach of the ADA's confidentiality requirement. Though not as worrisome as the other conflicts elaborated in this article, these prob-

185. *Dearborn Heights*, 101 Lab. Arb. Rep. at 816.
186. *See* S. REP. NO. 116, *supra* note 56, at 32.

lems present some issues of interest to the practitioner.

Under sections 8(a)(5) and 9(a) of the Taft-Hartley Act, a certified union is the sole and exclusive bargaining representative of all bargaining unit members.[187] The ADA, however, requires that an employer keep confidential all medical information acquired about a disabled employee during either pre- or post-employment medical examinations.[188] If an employer negotiates a reasonable accommodation with a represented employee without union intercession, the employer may be violating Section 8(a)(5) of the Taft-Hartley Act.[189] If the union is present while confidential information is being discussed, the employer may be violating the ADA if confidential information is disclosed either by accident or intentionally.

Prior case law has demonstrated that a union's obligation to negotiate in accordance with Section 8(a)(5) must be carefully balanced with an employee's right to privacy. For example, in *Oil, Chemical & Atomic Workers v. NLRB (Minnesota Mining)*,[190] the court found that all medical information retained by an employer or union must be redacted and/or kept sealed in order to protect an employee's right to privacy.[191] Therefore, ample legal authority already exists to allow the reconciliation of this potential conflict. Under NLRB precedent, a union representative must be present while a reasonable accommodation is negotiated with a handicapped employee.[192] Because the ADA mandates that an employee's privacy rights be adequately protected by all parties, reasonable steps must be taken to ensure that privacy is maintained. This issue is not one that is expected to create a great deal of case law. Any potential conflict is resolved once the parties' respective obligations are recognized and followed.

---

187. *See* 29 U.S.C. §§ 158(a)(5), 159(a) (1988).

188. *See* 29 C.F.R. § 1630.14(1) (1994).

189. *See* 29 U.S.C. § 158(a)(5) (1988) which provides:

> 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) of this title.

Id.

190. 711 F.2d 348 (D.C. Cir. 1983).

191. *Id.* at 363; *see also* Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) (holding that an employee's interest in test secrecy justified the withholding of test-related information).

192. *See, e.g.*, Waddell Eng'g Co., 305 N.L.R.B. 279, 281 (1991).

PART III

EMPLOYEE WELFARE BENEFIT ENTITLEMENT AND THE AMERICANS WITH DISABILITIES ACT, TITLE I

It is difficult to imagine a more publicized work-related issue concerning contemporary employees than the maintenance and scope of their employer-provided health insurance.[193] While the cost of medical insurance continues to escalate, employees are either finding their welfare benefits contracting as their insurance coverage is narrowed, or their paychecks are smaller as they are required to make larger contributions to offset increased medical insurance costs. As the acceptability of National Health Insurance legislation proposed by the Clinton administration is no longer an issue before Congress, it seems as though the nation's health insurance crisis may get even worse.

In the midst of this crisis, some commentators have argued that Title I of the ADA has created a statutory basis through which employees can prohibit their employers from altering or decreasing health benefits.[194] As discussed in Part I of this article, the ADA prohibits employment discrimination on the basis of an employee or job applicant's handicap. Proponents of the view that employers should be prohibited from altering employee health benefits provided due to a disability argue that any diminishment of employer-provided health benefits would necessarily have an adverse effect upon disabled employees and would presumptively violate the ADA.[195]

Other legal commentators have taken the opposite view. They claim that the ADA does not limit an employer's right to modify employee health insurance benefits and, furthermore, that the only provision which governs health plan modifications is the Employee Retirement Income Security Act ("ERISA").[196] The saliency of both views

---

193. *See* George Rubin, *Major Collective Bargaining Developments — A Quarter Century Review*, Current Wage Developments 47 (Feb. 1974). In 1970, roughly 75% of employees in both the public and private sectors were provided with some form of health insurance by their employer. Today, this percentage is considerably higher. *See* 138 CONG. REC. S14,841, S14,847 (daily ed. Sept. 24, 1992) ("Today more than 85 percent of employers provide health insurance.") (statement of Sen. Craig).

194. *See generally* Lizzette Palmer, *ERISA Preemption and Its Effects on Capping the Health Benefits of Individuals with AIDS: A Demonstration of Why the United States Health and Insurance Systems Require Substantial Reform*, 30 HOUS. L. REV. 1347 (1993).

195. *Id.* at 1376-77.

196. 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993); *see* Kimberly A. Ackourey, *Insuring Americans with Disabilities: How Far Can Congress Go to Protect Traditional Practic-*

is currently being tested in pending litigation in district courts of both New York and Maryland.[197]

A. ERISA and the Vesting of Employee Welfare Benefits (Prior to the Rehabilitation & Americans With Disabilities Acts)

In 1974 Congress passed ERISA, a comprehensive statute which established the legal framework through which employers may provide their employees with non-wage supplemental benefits such as a pension and medical insurance.[198] ERISA has three primary objectives: (1) to ensure vesting of retirement benefits; (2) to establish strict fiduciary requirements for trustees of ERISA-covered employee benefit plans; and (3) to require reporting, disclosure, termination insurance, and specified funding requirements for employee benefit plans in order to insure their fiscal integrity.[199] In this respect, ERISA was enacted by Congress as a remedial statute which was intended to prevent previous employer misconduct which jeopardized the fiscal viability of benefit plans.[200] Prior to ERISA's enactment, employers often found ways to withdraw employees' pension entitlements despite the accrual of a substantial amount of equity in their plan.[201]

ERISA covers employee benefit plans.[202] An employee benefit plan, as defined by ERISA, may be either an employee welfare plan or an employee pension plan.[203] ERISA defines an employee welfare

---

es?, 40 EMORY L.J. 1183 (1991); Carl A. Greci, *Use It and Lose It: The Employer's Absolute Right Under ERISA Section 510 to Engage in Post-Claim Modifications of Employee Welfare Benefit Plans*, 68 IND. L.J. 177 (1992).

197. *See* Transcript of Oral Argument at 3, Mason Tenders Dist. Council Welfare Fund v. Donaghey, 93 Civ. 1154 (S. Dist. Rep.) (S.D.N.Y. Nov. 19, 1993) (Transcript of plaintiff's oral argument on motion for summary judgment, Nov. 19, 1993) [hereinafter *Donaghey*]; Memorandum Decision on Plaintiffs' and Defendants' Motion for Summary Judgment, EEOC v. Monroe Foods, Inc., 93 Civ. 2925 (D. Md. May 16, 1994) [hereinafter *Monroe Foods*].

198. *See* 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993). It should be noted that ERISA does not *require* that employers provide supplemental wage benefits to their employees. Benefits are monitored and regulated by ERISA only if an employer chooses to provide them to its employees, and the benefit plans qualify as ERISA trust funds. *Id.* § 1001.

199. *Id.*

200. 29 U.S.C. § 1001(b)(4) (1988).

201. *See, e.g.*, Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441, 442 (Ohio 1934) (even though employee handbook promised a pension to employees who worked longer than twenty-five years, an employee who faithfully discharged his duties for over twenty-four years was denied his pension entitlement because he had simply refused to work overtime on one occasion).

202. 29 U.S.C. § 1003 (1988).

203. *Id.* § 1002(3).

plan as:

> any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds or pre-paid legal services, or (B) any benefit described in section [302 (c) of the Labor Management Relations Act, 1947] . . . (other than pensions or retirement or death, and insurance to provide such pensions).[204]

Under this definition, health insurance provided by an employer to its employees is an "employee welfare plan" and is subject to ERISA's provisions.

While ERISA specifically prohibits the divestiture of retirement benefits and contains minimum vesting standards for pensions,[205] it does not contain comparable terms for employee welfare plans. Case law clearly recognizes that an employer has an absolute right to modify health insurance to reduce benefits, or even terminate benefits completely if its plan does not provide for vesting.[206] For example, the decision in *Moore v. Metropolitan Life Insurance Co.*[207] was one of the first to establish the fundamental principle that ERISA does not mandate the "vesting" of health benefits once such benefits are provided to employees.[208]

---

204. *Id.* § 1002(1).

205. 29 U.S.C. § 1053(a) (1988 & Supp. V 1993).

206. *See, e.g.*, Owens v. Storehouse, Inc., 984 F.2d 394 (11th Cir. 1993); Moore v. Metropolitan Life Ins. Co., 856 F.2d 488 (2d Cir. 1988). However, such modification or termination may not be implemented unilaterally when health benefits are provided to employees under a collective bargaining agreement. *See, e.g.*, Inland Tugs v. NLRB, 918 F.2d 1299 (7th Cir. 1990). Recognizing that § 158(d) of the Taft-Hartley Act requires good faith bargaining between labor and management over wages, hours and other terms and conditions of employment, *id.* at 1307, the court in *Inland Tugs* found health insurance trust funds to be a mandatory topic of bargaining included in the scope of labor and management's § 158(d) bargaining obligations. *Id.* at 1309.

207. 856 F.2d 488 (2d Cir. 1988).

208. *Id.* at 492. ERISA also contains a very broad preemption clause which, except in limited instances, indicates that the statute supersedes all state laws relating to employee benefit plans and which require plans to include specific benefits. *See* 29 U.S.C. § 1144 (1988 & Supp. V 1993); *see also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (preemption found where state law relates to a qualified pension or welfare plan); NGS Am.,

Prior to the enactment of the Rehabilitation Act and the ADA, to prevent welfare insurance modifications an employee could only argue that the change violated either ERISA's anti-discrimination provisions or ERISA's fiduciary responsibility requirements.[209] A review of actions brought under sections 1104 and 1140 of ERISA reveals that there is an almost insurmountable burden on a plaintiff to demonstrate that a plan modification was violative of these sections.[210]

ERISA's fiduciary obligations provision[211] requires a fiduciary (the plan administrator or trustee) to discharge his duties, with respect to a plan, solely in the interests of the plan's participants and/or beneficiaries.[212] Some employees have initiated suits challenging limitations imposed upon their welfare benefits on the ground that the fund's trustees had violated their fiduciary duty under ERISA by imposing such limitations.[213]

In *Musto v. American General Corp.*,[214] several retirees brought a class action suit against the administrator of their welfare fund under ERISA in an attempt to block anticipated plan modifications decreasing their post-retirement medical insurance.[215] The Sixth Circuit reversed a preliminary injunction granted by the trial court barring diminution of benefits, holding that ERISA's fiduciary standards applied only to the administration of an employee benefit plan and not to the determination of whether specific plan benefits should be

---

Inc. v. Barnes, 998 F.2d 296, 298 (5th Cir. 1993) (holding that ERISA's pre-emption provision was enacted to provide uniformity in the administration of employee benefits and to allow for the federalization of this area of law); *cf.* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (holding that a Massachusetts statute mandating that employers provide a minimum level of mental health benefits to their employees did not violate 29 U.S.C. § 1144 since the law only regulated insurance plans).

209. *See* 29 U.S.C. §§ 1104, 1140 (1988 & Supp. V 1993).

210. *See, e.g.*, Turner v. Local 302, Int'l Bhd. of Teamsters, 604 F.2d 1219 (9th Cir. 1979). In some pre-ERISA cases plaintiffs, rather than arguing that fiduciary duties had been breached by a plan's modification or that the modification was discriminatory, argued that the modification was a breach of a collective bargaining agreement under § 301 of the Taft-Hartley Act. However, so long as the plan's modification was accomplished through the process of collective bargaining and was not imposed unilaterally, such claims invariably failed. *See, e.g.*, McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992); Musto v. American Gen. Corp., 861 F.2d 897 (6th Cir. 1988).

211. *See* 29 U.S.C. §§ 1101-1114 (1988 & Supp. V 1993).

212. 29 U.S.C. § 1104(a)(1)(A)(i) (1988).

213. *See, e.g.*, McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992); Musto v. American Gen. Corp., 861 F.2d 897 (6th Cir. 1988); Paul v. Valley Truck Parts, Inc., No. 88-7131, 1990 U.S. Dist. LEXIS 4554 (N.D. Ill. Apr. 18, 1990).

214. 861 F.2d 897 (6th Cir. 1988).

215. *Id.* at 900.

maintained.[216] Thus, the court held that since welfare benefits were not vested, according to the welfare plan's terms, the trustees' prerogative to modify or terminate these benefits was not limited.[217]

The Fourth Circuit came to a similar conclusion in *Sutton v. Wierton Steel Division*.[218] *Sutton* involved an employer's decision to terminate benefits for non-vested severance and contingent early retirement.[219] In deciding that the elimination of these benefits was permissible and that ERISA's fiduciary standards were inapplicable to prohibit it, the court held that:

> Congress authorized an employer to administer its pension plan, and in the discharge of its duties with respect to the plan, the employer must satisfy the exacting fiduciary standards imposed by ERISA. Congress, however, has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before normal retirement age. The changes, accomplished in this manner, are not to be reviewed by fiduciary standards.[220]

More recently, the court in *Paul v. Valley Truck Parts, Inc.*[221] went in the other direction, finding that a genuine issue of material fact existed as to whether a trustee's retroactive amendment of an employee profit-sharing plan violated ERISA's fiduciary standards.[222] In this action, the court questioned whether previous employer contributions to the profit-sharing plan had actually vested for the benefit of plan participants,[223] holding that if the benefits had vested the trustee's diminution of those benefits might have breached their fiduciary responsibility under ERISA.[224] However, the Court's decision in *Paul* is easily distinguishable from the decisions in *Musto* and *Sutton*, since the latter two actions involved employee welfare benefits which indisputably were not vested.

ERISA's anti-discrimination provision states that:

---

216. *Id.*
217. *Id.* at 912.
218. 724 F.2d 406 (4th Cir. 1983).
219. *Id.* at 409.
220. *Id.* at 410-11.
221. No. 88-7131, 1990 U.S. Dist. LEXIS 4554 (N.D. Ill. Apr. 18, 1990).
222. *Id.* at *15-16.
223. *Id.* at *13-14.
224. *Id.* at *17.

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter . . . [section 3001] or for the purpose of interfering with the attainment of any right to which such participant may become entitled under [this] plan [o]r subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information . . . relating to this chapter . . . .[225]

Some disabled employees have argued that a diminution or capping of the particular health benefits provided by their plan for treatment of their condition constitutes discrimination contrary to ERISA Section 510.[226] A review of these decisions reveals that this argument has failed to gain a firm judicial foothold. The seminal case involving Section 510 and its effect on employee health benefit entitlement is *McGann v. H & H Music Co.*[227] In *McGann*, the plaintiff, who had become infected with the AIDS virus, sued his employer for allegedly violating Section 510 of ERISA.[228] The claim was premised on H & H Music's reducing the maximum benefits available to AIDS victims under its welfare plan from one million to five thousand dollars.[229] Plaintiff McGann contended that the reduction of his benefits was illegally motivated because it was implemented almost immediately after he had disclosed his medical condition to his employer.[230]

The district court granted summary judgment in favor of H & H Music and, in dismissing McGann's complaint, held that an employer

---

225. 29 U.S.C. § 1140 (1988). This section (Section 510 of the original act) was enacted by Congress "in the face of evidence that in some plans a worker's pension rights or the expectations of those rights were interfered with by the use of economic sanctions or violent reprisals." S. REP. NO. 127, 93d Cong., 2d Sess. 36 (1973). Although § 510 was enacted to provide additional protection for plan participants and to prevent divestiture of an employee's anticipated benefits, courts considering § 510 have rarely found that it has actually been violated.

226. *See, e.g.*, Simmons v. Willcox, 911 F.2d 1077, 1081-82 (5th Cir. 1990); Clark v. Resistoflex Co., 854 F.2d 762, 770 (5th Cir. 1988); *see also* Joan Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?*, 62 NOTRE DAME L. REV. 1024, 1025-27 (1987).

227. 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

228. *Id.* at 403.

229. *Id.*

230. *Id.* at 405.

has the absolute right to alter the terms of medical coverage to available plan beneficiaries.[231] The Fifth Circuit affirmed the district court opinion and refused to reinstate McGann's suit.[232]

The appellate court based its affirmance on McGann's failure to satisfy the two fundamental components of a prima facie Section 510 suit: intentional discrimination against a plan beneficiary and a denial of *vested* benefits.[233] The court determined that dismissal of the complaint was warranted since McGann had failed to prove that H & H Music had specifically intended to discriminate against him.[234] Dismissal was also based upon McGann's failure to adduce any concrete evidence of his irrevocable entitlement to specific benefits under the welfare plan.[235]

In its analysis of the first Section 510 element — intentional discrimination — the court found that ERISA conclusively establishes that the plaintiff has the burden of proving that an employer specifically intended to interfere with or circumscribe his benefit entitlement, holding that it is not enough to contend that the employer's actions had a disparate impact upon the participant's welfare benefit entitlement.[236] Nor, the Fifth Circuit continued, was it enough merely to show that discriminatory motivation was one among many factors (mixed motive) that led to the employer's decision to eliminate benefits.[237] Thus, McGann needed to demonstrate that the reduction was meant to impair only *his* benefit entitlement.[238] McGann failed to meet this criterion since the plan's reduction in AIDS benefits applied equally to each and every one of H & H Music's employees. Even though the court did find a connection between the employer's decision to modify its welfare plan and McGann's medical condition, it held that:

> Although we assume there was a connection between the benefits reduction and either McGann's filing of claims or his revelations about his illness, there is nothing in the record to suggest that

231. *Id.* at 404.
232. *Id.* at 408.
233. *Id.*
234. *Id.*
235. *Id.* at 407-08.
236. *Id.* at 404.
237. *Id.*; *see also* Dister v. Continental Group, Inc., 859 F.2d 1108, 1112 (2d Cir. 1988); Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987).
238. *McGann*, 946 F.2d at 404.

> defendants' motivation was other than as they asserted, namely to avoid the expense of paying for AIDS treatment . . . no more for McGann than for any other present or future plan beneficiary who might suffer from AIDS. McGann concedes that the reduction in AIDS benefits will apply equally to all employees filing AIDS-related claims and that the effect of the reduction will not necessarily be felt only by him. He fails to allege that the coverage reduction was otherwise specifically intended to deny him particularly medical coverage except "in effect."[239]

Even if McGann had provided the requisite indicia that his employer's AIDS benefits cap intentionally discriminated against him, he still would have failed to allege a prima facie Section 510 suit without producing evidence that he had a vested right to a specific level of health benefits.[240] The court held that this right "is not simply any right to which an employee may conceivably become entitled, but rather any right to which an employee may become entitled pursuant to an existing, enforceable obligation assumed by the employer."[241] Since McGann's health insurance plan's summary description permitted his employer to modify or amend benefits at any time, McGann was incapable of demonstrating that he had an immutable right to a specific level of benefits.[242]

Further, even if the summary description had not contained language allowing the plan's sponsor to terminate or modify welfare benefits, the court indicated that it still would have found McGann incapable of adducing that he had an entitlement to a given level of benefits.[243] The court's decision in *McGann* effectively prohibits individuals whose welfare benefits have been modified (even if the modification is motivated by a discriminatory intent) from bringing a Section 510 action unless an employee can show that the summary plan description, or sponsoring employer, had in fact guaranteed that the benefits would be permanent.[244]

---

239. *Id.*

240. *Id.* at 405.

241. *Id.*

242. *Id.* ERISA provides that individuals covered by a pension or welfare plan must be provided with a summary description of the plan's benefits. *See* 29 U.S.C. § 1023 (1988 & Supp. V 1993).

243. *McGann*, 946 F.2d at 405 ("ERISA does not require such 'vesting' of the right to a continued level of the same medical benefits once those are ever included in a welfare plan.").

244. *Id.* The *McGann* decision has produced a huge outcry for either a welfare benefit vesting provision in ERISA or a comprehensive national health insurance plan. For example, after the Supreme Court refused to review the Fifth Circuit's decision in *McGann*, several

A more recent decision, *Owens v. Storehouse, Inc.*,[245] was based upon a scenario almost identical to *McGann*, amply demonstrating how *McGann* has precluded successful Section 510 litigation when an employer's decision to decrease or cap welfare benefits is the basis of the suit. In *Owens*, an employer had modified its welfare plan to incorporate a lifetime cap of $25,000 on benefits provided to employees infected with the AIDS virus.[246] Owens sought relief under ERISA Section 510, as well as a temporary restraining order prohibiting the reduction of plan benefits.[247] His suit was dismissed by the district court; that decision was affirmed by the Eleventh Circuit.[248]

As in *McGann*, the *Owens* court based its decision on the fact that Owens' employer's welfare plan amendment had not derogated any right which he might have had to specific welfare benefits, find-

---

associations such as the AARP and the AMA called that decision "an outrage," lamenting that:

> There are already almost 35 million Americans without health insurance, and tens of millions more who are underinsured . . . . By permitting employers to cut off the health benefits of their employees after they — or one of their family members — develop AIDS or any other serious illness, this decision will [increase] . . . the ranks of the uninsured.

Letter from the American Association of Retired Persons, the American Hospital Association, the American Medical Association, the National Commission on AIDS, the National Governors' Commission, and the U.S. Conference of Mayors to Kenneth Starr, U.S. Solicitor General (Aug. 10, 1992), *in High Court Declines to Review Insurance Discrimination Case for Employees With AIDS*, HEALTH POLICY AND BIOMEDICAL RESEARCH NEWS OF THE WEEK (F-D-C Reports, Chevy Chase Md.), Nov. 11, 1992, at 13.

Other commentators have extolled the soundness of the *McGann* decision, since to them any other interpretation of § 510 would require a de facto vesting of welfare benefits once they were provided to employees. These commentators argue that de facto vesting would actually create a disincentive for employers to provide any health benefits. *See, e.g.*, Craig C. Dirrim, *Unpopular But Not Unfair: The Fifth Circuit Considers the Terms But Ignores the Endearment in* McGann v. H & H Music Co., 946 F.2d 410 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992), 72 NEB. L. REV. 860 (1993). These commentators, however, ignore the fact that pension benefits are uniformly provided as part of employees' overall compensation package despite the fact that ERISA contains a pension vesting provision. Apparently, vesting does not interfere with an employer's willingness to provide pension benefits. Why should it interfere with an employer's willingness to provide health benefits? Ultimately, cost is the critical factor which prevents employers from guaranteeing health benefits. While pension payouts can be more or less accurately determined by actuarial assessment, welfare benefit utilization and cost per employee is hardly as predictable. Nonetheless, actuarial data might be used by employer-provided welfare plans to provide a basic guideline to assess costs on a per employee basis.

245. 984 F.2d 394 (11th Cir. 1993).

246. *Id.* at 396-97.

247. *Id.* at 397.

248. *Id.* at 400.

ing that:

> the record does not establish that Storehouse amended its plan to interfere with the "attainment of any right" to which Owens might have been entitled under section 510. The "right" referred to is not any right in the abstract. Rather, it is one specifically conferred by the plan or ERISA. As discussed, ERISA does not confer a right to particular health benefits.[249]

Additionally, the court found that since the cap was uniformly applied to all employees, Owens could not prove the existence of the type of discriminatory intent required under Section 510.[250]

From these decisions, it is clear that ERISA, standing alone, provides little protection for an individual whose health benefits have been diminished or terminated. This is true even when a discriminatory motive is involved, primarily because ERISA lacks a vesting provision for health benefits.

B. Denial of Welfare Benefits Under the Rehabilitation Act

After the enactment of the ADA, modification of benefits provided by a welfare plan may be violative of the ADA's anti-discrimination mandate. Before exploring this possibility, it is instructive to examine cases involving the ADA's predecessor statute, the Rehabilitation Act, to first determine what effect that Act has had on covered employees' benefit entitlements.

There are relatively few Rehabilitation Act decisions which involve the denial of a handicapped individual's welfare benefits entitlement. However, the few cases that do involve welfare benefit denial reveal that a litigant suing under Section 504 of the Rehabilitation Act[251] has as difficult a burden proving a legally sufficient case as does an ERISA litigant.

In *Bernard B. v. Blue Cross & Blue Shield*,[252] a class action suit was brought by class representatives suing Blue Cross/Blue Shield (Blue Cross) under Section 504.[253] The suit was initiated when Blue Cross modified plan benefits to exclude coverage for

---

249. *Id.* at 399.

250. *Id.*

251. Rehabilitation Act of 1973, Pub. L. No. 93-112, sec. 504, § 794(a), 87 Stat. 357, 394 (current version at 29 U.S.C. § 794(a) (1988 & Supp. V 1993)).

252. 528 F. Supp. 125 (S.D.N.Y. 1981), *aff'd*, 679 F.2d 7 (2d Cir. 1982).

253. *Id.* at 127.

psychiatric inpatient care.[254] Plaintiffs argued that the insurance company's action had an adverse impact upon individuals suffering from psychiatric disorders and was, therefore, impermissibly discriminatory.[255] The district court denied plaintiffs' request for relief and granted defendant's motion for summary judgment, holding that there was no violation of the Rehabilitation Act because the plan's modification was based upon non-discriminatory factors, such as the huge cost of coverage for inpatient psychiatric care.[256] In *Bernard B.*, the court noted that Blue Cross had not excluded certain insurance benefits only from individuals with psychiatric handicaps.[257] Clearly, such an action would have been impermissible. Rather, the court found that Blue Cross had implemented a limitation which applied to all plan participants across the board: benefits were limited for both the handicapped and nonhandicapped alike.[258] Since the defendant's determination to discontinue psychiatric benefits was at least partially dictated by cost considerations, the court found the discontinuation to be "substantially justified."[259] This rationale was sufficient to shield the defendant from having violated the Rehabilitation Act.[260]

In *Alexander v. Choate*,[261] the Supreme Court considered whether the limitation or elimination of welfare benefits by a covered employer was contrary to the protection afforded by the Rehabilitation Act to handicapped individuals.[262] The Court was asked to determine whether the Rehabilitation Act was violated by a Tennessee legislative proposal to reduce the number of days of state-provided Medicaid benefits for inpatient medical services from 20 to 14 days.[263]

The plaintiffs in *Alexander*, Medicaid recipients, argued that since handicapped individuals were more likely to require a longer duration of inpatient hospital care than nonhandicapped individuals, the legislature's proposal was inherently discriminatory, contending that this benefit reduction would necessarily have an adverse and

254. *Id.*
255. *Id.*
256. *Id.* at 132-34.
257. *Id.* at 133.
258. *Id.* at 133-34.
259. *Id.* at 132. This court explicitly recognized the "substantial justification" exception to § 504, which was first espoused by the Second Circuit in *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977). *Bernard B.*, 528 F. Supp. at 132.
260. *Id.*
261. 469 U.S. 287 (1985).
262. *See id.*
263. *Id.* at 289.

discriminatory impact on the handicapped.[264]

The Court first considered whether discriminatory animus required by ERISA Section 510 was also a required element of an action under Section 504 of the Rehabilitation Act.[265] It ultimately held that if discriminatory animus was a necessary component of a Section 504 action, then plaintiffs' case — based solely upon the statistically adverse impact of defendant's proposal — was without a sufficient legal basis.[266]

The Court also reviewed its prior holding in *Guardians Ass'n v. Civil Service Commission of New York City*,[267] a case decided under Title VI of the Civil Rights Act of 1964, to determine whether disparate impact discrimination could be redressed under the Rehabilitation Act.[268] Based upon *Guardians*, the Court held that the form of disparate impact discrimination challenged in *Alexander* was actionable under the Rehabilitation Act, stating:

> *Guardians*, therefore, does not support petitioners' blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in *Guardians* is relevant to the interpretation of § 504, *Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case.[269]

The Court "assume[d] without deciding" that Congress had intended that "at least some conduct that has an unjustifiable disparate impact on the handicapped" would be covered by Section 504.[270] According to the Court, the legislative history of the Rehabilitation Act indicated that Section 504 was intended to address all forms of discrimination regardless of how discriminatory conduct was manifested:

---

264. *Id.* Plaintiffs produced undisputed statistical evidence which revealed that "in the 1979-1980 fiscal year, 27.4% of all handicapped users of hospital services who received Medicaid required more than 14 days of care, while only 7.8% of nonhandicapped users required more than 14 days of inpatient care." *Id.* at 290.

265. *Id.* at 292.

266. *Id.*

267. 463 U.S. 582 (1983).

268. *Alexander*, 469 U.S. at 292-94; *see also* 42 U.S.C. § 2000 (1988 & Supp. V 1993) (prohibiting programs receiving federal grants and federal aid from discriminating against individuals based on race or ethnicity).

269. *Alexander*, 469 U.S. at 294.

270. *Id.* at 299.

> Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect. . . . Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.
>
> In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.[271]

Hence, plaintiffs' evidence of the disparate impact of Tennessee's proposition was deemed sufficient to set forth a prima facie case under Section 504.[272] This holding is extremely significant in regard to the ADA, since the ADA is modeled on the Rehabilitation Act and prohibits the same forms of discrimination as its predecessor.

Nevertheless, though it recognized the state's proposal would have an adverse impact on handicapped employees, the Court in *Alexander* denied plaintiffs their requested relief, finding that the legislature's proposal was neutral on its face and did not bar handicapped individuals from receiving the same benefits that nonhandicapped individuals would receive.[273]

Although it was not explicitly stated by the Court as a basis for its holding, since Tennessee's decision to decrease its Medicaid benefits was premised on the state's desire to reduce Medicaid costs, there apparently was a "substantial justification" for the state's discriminatory treatment of handicapped individuals. In *Alexander* the Supreme Court implicitly accepted the "substantial justification" defense posited in both *Bernard B. v. Blue Cross & Blue Shield*[274] and *Kampmeier v. Nyquist*.[275] In each of these cases, an employer's decision to eliminate excessive insurance costs was deemed a sufficient basis for its decision to modify health insurance benefits in a way which impaired

---

271. *Id.* at 295-97 (footnotes omitted).

272. *See id.* at 291-92.

273. *Id.* at 309 ("The State has made the same benefit . . . equally accessible to both handicapped and nonhandicapped persons, and the State is not required to assure the handicapped 'adequate health care' by providing them with more coverage than the nonhandicapped.").

274. 528 F. Supp. 125, 132 (S.D.N.Y. 1981).

275. 553 F.2d 296, 299 (2d Cir. 1977).

handicapped individuals' entitlements to benefits.[276]

If decisions under the Rehabilitation Act are used as a model for determinations rendered under the ADA, it would seem that in only very few instances would an employer's decision to limit health benefits create liability. As long as an employer could show that there was either a non-discriminatory reason for the modification, or substantial justification for it such as the necessity of reducing plan costs, no legal action would lie. However, this result is not inevitable. As is discussed in the next section, the ADA contains specific language regarding employee benefits and stricter scrutiny of an employer's decision to limit benefits is justified.

C. The ADA and Employee Welfare Benefit Entitlement

The ADA contains specific language which addresses employee benefit plans which is not contained within the Rehabilitation Act and which is without precedent in civil rights legislation. Section 12201(c) of the ADA provides:

> Subchapters I through III of this chapter and Title IV of this Act shall not be construed to prohibit or restrict —
>
> (1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or
>
> (3) a person or *organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.*
>
> *Paragraphs (1), (2), (3) shall not be used as a subterfuge to evade the purposes of subchapter* [sic] *I and III of this chapter.*[277]

Recently, a federal court has interpreted this provision in a way which might render employers culpable under the ADA if they termi-

---

276. *See id.* at 299-300; *Bernard B.*, 528 F. Supp. at 132.

277. 42 U.S.C. § 12201(c) (Supp. V 1993) (emphasis added).

nate or cap welfare benefits in a manner which discriminates against handicapped individuals.[278] Apparently, the ADA's anti-discrimination mandate also applies to employer welfare benefit plans established under ERISA.[279] In *Donaghey*, one of the first federal court decisions interpreting the application of Section 12201(c)(3) of the ADA, the court was asked to determine whether the ADA prohibited a welfare benefit plan modification which virtually eliminated benefits for AIDS patients.[280] In that case, the Mason Tenders Welfare Fund initiated a suit against both the EEOC and several welfare fund participants who had claimed discriminatory changes to the fund benefits.[281] The Fund sought a declaratory judgment that the ADA did not apply to ERISA-covered welfare plans[282] and that, even if it did, this did not prohibit the capping or elimination of health benefits[283] — a situation virtually identical to that encountered by the Fifth Circuit in *McGann* and the Eleventh Circuit in *Owens*.[284] However, the Southern District of New York's decision would now be based upon the ADA rather than Section 510 of ERISA.

On November 19, 1993, the Fund moved for summary judgment and sought an order granting it the full relief contained in its complaint. In an oral decision issued from the bench, United States District Court Judge John E. Sprizzo denied the Fund's motion and found that a genuine issue of material fact existed as to whether the Fund's elimination of coverage for AIDS patients had violated the ADA.[285]

Despite the Fund's arguments, the court determined that an ERISA fund was a covered entity under the ADA, holding paramount the fact that the statute provided that employer-supplied health insurance could not be used as a subterfuge to evade the purposes of the

278. *See Donaghey*, *supra* note 197, at 1.

279. As stated previously, *supra* note 208, these types of plans are specifically exempted from modification or regulation by state law.

280. *See Donaghey*, *supra* note 197, at 3.

281. The participants in the program had initially filed charges with the EEOC alleging that the welfare fund had violated the ADA. *See* Complaint of Terrence Donaghey, EEOC Charge Number 160930419 (filed Nov. 19, 1992).

282. *See* Complaint for Declaratory Judgment, Donaghey v. Mason Tenders Dist. Council Welfare Fund, 92 Civ. 6301 (S.D.N.Y. 1993) (Mason Tenders filed an action for declaratory judgment against Donaghey and the EEOC).

283. *Id.* at 26.

284. *See supra* text accompanying notes 227-46.

285. *See Donaghey*, *supra* note 197, at 20 (transcript of plaintiff's oral argument on motion for summary judgment, Nov. 19, 1993).

ADA.[286] The court found that the language in Section 11221(c)(3) indicated that such funds were indeed within the parameters of "covered entities" under the ADA.[287] Judge Sprizzo found that Congress had intended that the ADA apply to welfare plans because:

> why talk about pension plans at all if there were no way in which an ERISA trustee could be liable under the ADA? . . . I wonder what Congress was talking about when they talked about a fund not being a basis to avoid the ADA if the ADA didn't apply in the first place to funds, which seems to be most of your argument. . . . [Y]our argument flies in the face of the language of the statute which says the ADA applies notwithstanding any other provision of law which would include ERISA. They specifically make reference to the fact that a fund is not a way to avoid liability under ADA, which seems to be redundant if there could be no liability under the ADA on the part of the funds.[288]

That this was the result intended by Congress is borne out by the ADA's legislative history. The House Education & Labor Committee Report stated that:

> This legislation [§ 501(c)] assures that decisions concerning the insurance of persons with disabilities which are not based on bona

---

286. *Donaghey, supra* note 197, at 19.

287. *Donaghey, supra* note 197, at 19; *see also Monroe Foods, supra* note 197 (Judge Joseph H. Young issuing a memorandum decision denying defendant's motion for summary judgment), wherein the district court also considered and rejected a similar claim that a jointly administered ERISA welfare fund was not an entity covered by the ADA. The *Monroe* court held that:

> [the] EEOC and Johnson argue that under the ADA, the employers have a duty as employers, regardless of whether they actually manage the Fund, to ensure that the Fund did not include disability-based discriminatory provisions. . . . [I]t is clear they have presented evidence showing that the employers have a relationship with the Trustees. The employers incorporated in their collective bargaining agreements the creation of the Fund to administer health and other benefits to its employees. . . . Again, these matters raise factual disputes as to whether or not the employers, directly or indirectly, had control over the Trustees' decisions and, again, preclude granting of summary judgment.

Monroe Foods, supra note 197, at 2. Thus, both the *Donaghey* and *Monroe* courts denied summary judgment, holding that the cases before them presented triable issues of fact.

288. *Donaghey, supra* note 197, at 4-8. Judge Sprizzo also premised his decision on ERISA § 514(d), which provides that "by its own terms ERISA shall not be construed to alter, amend, modify, invalidate, impair, or supersede federal law or any rule or regulation issued under such law." 29 U.S.C. § 1144(d) (1988). The Fund's argument that only ERISA guides the operation of its welfare fund was shown to be erroneous by ERISA's own terms, the court concluded, and there is no inherent incompatibility between the ADA and ERISA. *Donaghey, supra* note 197, at 10-11.

> fide risk classification be made in conformity with non-discrimination requirements. Without such a clarification, this legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness.[289]

Thus, the plaintiff's argument that only ERISA covered the operation of the Mason Tenders District Council Welfare Fund was correctly rejected by the court; *McGann* and its progeny did not dictate that summary judgment be granted in this instance.[290] This would have been the result had the court found that only ERISA provided the standards by which the trustee's conduct was to be judged.

Nevertheless, a decision contrary to *Donaghey* was issued two years ago by the United States District Court for the District of New Hampshire in *Carparts Distribution Center v. Automotive Wholesaler's Ass'n of New England.*[291] This action involved an employee's suit against the Automotive Wholesaler's Association of New England Insurance Plan ("AWANE"), which had placed a $25,000 lifetime cap on benefits provided to individuals infected with the AIDS virus.[292] As was the case in *McGann,* this limitation was implemented immediately after the fund discovered that the plaintiff was HIV positive.[293] The district court in *Carparts* held that although a direct employer might be considered a covered entity under the ADA, the fund which provided an employee's welfare benefits was not; therefore, the plaintiff's ADA claim was dismissed.[294] This decision was, in large part, based upon the court's extremely limited interpretation of the ADA's definition of a covered entity.[295]

---

289. HOUSE COMM. ON EDUCATION AND LABOR, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 485, 101st Cong., 2d Sess. 136-38 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 419-21.

290. *See id.*

291. 826 F. Supp. 583 (D.N.H. 1993).

292. *Id.* at 584-85.

293. *Id.* at 585; *see supra* text accompanying note 230.

294. *Carparts,* 826 F. Supp. at 589.

295. The district court held that under the ADA:

> a covered entity is defined to include "an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2). Carparts, as the former employer of Randy Senter, qualifies as a covered entity. Paragraph 24 of plaintiff's amended complaint states that AWANE and [the] AWANE PLAN are also covered entities under § 12111(2). This is incorrect. Neither AWANE nor AWANE PLAN qualify as a covered entity as that term is defined in the statute as neither was an employer of Randy J. Senter.

Carparts, 826 F. Supp. at 585.

However, the First Circuit rejected the district court's narrow interpretation of "employer" under the ADA, and looked to cases brought under the Civil Rights Act of 1964 to interpret and define this term.[296] The appellate court clearly espoused three theories which could render AWANE an "employer" under the ADA and thus subject the health insurer to liability under the Act.[297]

Under the first theory, the court held that AWANE could be an employer if it "exercised control over an important aspect of [Senter's] employment."[298] Second, if AWANE was found to be an agent of Carparts, Senter's employer, then the plan could be considered an employer because it was acting "on behalf of [a covered] entity in the matter of providing and administering employee health benefits."[299] Lastly, the court found that under Section 12112(a) of the ADA, an employer may not discriminate against a "'qualified individual with a disability . . . in regard to' specified enumerated aspects of employment,"[300] and further noted that "[a] number of cases . . . have interpreted analogous provisions of Title VII to apply to actions taken by a defendant against a plaintiff who is not technically an employer of that employee."[301] Hence, the action was remanded back to the district court to reexamine the facts of the case in light of the standards established by the First Circuit.[302]

As the First Circuit noted, prior case law formulated under Title VII has advocated a more comprehensive view of what entities are covered by civil rights statutes. For example, in *Spirt v. Teachers Insurance & Annuity Ass'n*,[303] a university professor sued her pension fund on the ground that its sex-based mortality tables violated Title VII.[304] The Second Circuit held that even though the pension fund was not the plaintiff's direct employer, it could still be found liable under Title VII since:

---

296. Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12, 16 (1st Cir. 1994). The court noted: "[t]he issue before us is not whether defendants were employers of Senter within the common sense of the word, but whether they can be considered 'employers' for purposes of Title I of the ADA and therefore subject to liability for discriminatorily denying employment benefits to Senter." *Id.*

297. *Id.* at 16-18.

298. *Id.* at 17.

299. *Id.*

300. *Id.* at 18 (citations omitted).

301. *Id.*

302. *Id.*

303. 691 F.2d 1054 (2d Cir. 1982), *cert. denied*, 469 U.S. 881 (1984).

304. *Id.* at 1056.

> it is generally recognized that the term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law.[305]

Clearly, *Spirt*'s conception of an employer is as equally applicable to Title VII as it is to the ADA.[306] The weight of legal authority, as well as the ADA's legislative history, suggests that a more expansive definition of employer under the ADA is warranted; one which would include ERISA funds.

In *Donaghey*, having initially determined that the Mason Tenders Welfare Fund was a covered entity under the ADA, Judge Sprizzo was next required to ascertain whether a material question of fact existed regarding the Fund's allegedly discriminatory conduct. If the *Donaghey* action had been decided in accordance with the Rehabilitation Act, in order for the Fund to succeed on summary judgment its only burden would be to show that its decision to eliminate benefits for AIDS' patients was "substantially justified."[307] However, as will be discussed, since the ADA's "subterfuge" standard varies considerably from the Rehabilitation Act's "substantial justification" standard, more needed to be shown.

As a result of his analysis of the ADA's statutory language, Judge Sprizzo equated the ADA's concept of subterfuge with Title VII's notion of pretext:[308]

> the language of the statute suggests very strongly that this issue of whether what they have done or not done is a violation of the law turns upon whether it is or is not a pretext. I think the word "sub-

---

305. *Id.* at 1063 (citation omitted). *See also* Grossman v. Suffolk County Dist. Attorney's Office, 777 F. Supp. 1101 (E.D.N.Y. 1991) (state retirement system created to administer public employers' retirement benefits was considered to be an employer under ADEA).

306. There does not appear to be any reported cases which decide the issue whether an employee benefit plan provided or subsidized by the federal government is a covered "program or entity" under § 794 of the Rehabilitation Act.

307. *See Donaghey*, *supra* note 197, at 20.

308. In traditional Title VII analysis, an employee may rebut an employer's "business necessity" defense to his or her prima facie Title VII action by showing that the defense was merely a pretext to mask the employer's underlying discriminatory motivation. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing that the burden of proof in a Title VII case shifts between plaintiff and defendant once a prima facie case is set forth).

> terfuge" is another way to talk about pretext, and that entails factual issues that have to be tried. . . . The question is, have you denied them benefits on the basis of what I call bona fide actuarial assumptions, or have you done something which looks like actuarial assumptions and is not? When I talk about the traditional analysis being applicable, they have the burden of proving that you have acted for discriminatory reasons. They don't have to prove bad faith or specific intent, but they have to prove, either on a disparate impact theory or a disparate treatment theory, that you have, in effect, discriminated against them because of their disability. I suspect your defense will be that you did what is good for the fund, based on good actuarial assumptions. That sounds to me like a pretext argument. I think subterfuge and pretext in the context of this argument are interchangeable. You have carved out this one assumption based on actuarial assumptions, and there will have to be a trial on this issue.[309]

In *Donaghey*, if the complainant is ultimately capable of showing that the Fund's underlying decision to eliminate benefits was a pretext to discriminate against employees infected with the AIDS virus, then the Fund's conduct is violative of the ADA. If the Fund can demonstrate that it had a sound actuarial basis justifying the plan's modification, then no violation has occurred.[310]

Judge Sprizzo's decision provides some guidance on what Congress intended by the ADA's "subterfuge" terminology.[311] He analyzed this concept in relation to one already established under Title VII jurisprudence: pretext. Recent case law under the Age Discrimination in Employment Act ("ADEA") — which, until recently, also contained a subterfuge requirement — provides some added insight into how courts may interpret the ADA's subterfuge requirement.[312]

The ADEA's notion of subterfuge was reviewed by the Supreme

---

309. *Donaghey*, *supra* note 197, at 19-21.

310. After summary judgment was denied, the court refused the Fund's request for an immediate appeal. *See* Order, Mason Tenders Dist. Council Welfare Fund v. Donaghey, 93 Civ. 1154 (S. Dist. Rep.) (S.D.N.Y. 1993) (Order dated Sept. 1, 1994) (Sprizzo, J.). The action is presently scheduled for a final pre-trial conference in June 1995. No trial date has yet been established. Telephone Interview with John Gresham, Esq., of New York Lawyers for the Public Interest, Inc., representing Donaghey (May 2, 1995).

311. The EEOC's Technical Assistance Manual provides some additional assistance. It defines subterfuge as a "disability-based disparate treatment that is not justified by the risks or costs associated with the disability." EEOC MANUAL, *supra* note 12, at E-2.

312. *See* 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993). Until recently, the ADEA stated that an employer may "observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this chapter." *Id.* § 623(f)(2).

Court in *Public Employees Retirement System v. Betts*,[313] wherein the Court considered whether a state-provided welfare benefit plan which excluded disability benefits to employees who retired over the age of sixty violated the ADEA.[314] The Court found that a restriction on a retiree's disability benefits did not violate the ADEA and that a plan was not a "subterfuge" unless it discriminated in a manner forbidden by the ADEA's other substantive provisions.[315] In effect, the burden falls on the plaintiff to prove that the "discriminatory" plan provision was intended to "serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation."[316] The Court rejected the plaintiffs' ADEA claim since they were incapable of demonstrating that the plan's limitation was intended to discriminate against them in some aspect of their employment relationship other than fringe benefit entitlements.[317]

If *Betts* is considered controlling, any attempt to apply the ADA to employee benefit entitlements would be futile. Implicit in any court's decision to follow *Betts* is a determination that the ADA does not cover employee benefit plans. This is the result that was advocated by the Mason Tenders Welfare Fund's counsel in *Donaghey*.[318] The ADA's legislative history, however, reveals that the *Betts* decision was not intended to be followed by courts presented with ADA violations.[319] According to the House Committee on the Judiciary's Report on the ADA, its substantive terms were meant to be applied to employee benefit plans:

> while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section, the plan my [sic] not refuse to insure or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a

313. 492 U.S. 158 (1989). In *Betts*, the Court reiterated its previous holding in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), that the term subterfuge should be interpreted under the ADEA according to its ordinary meaning as "a scheme, plan, stratagem, or artifice of evasion." *Betts*, 492 U.S. at 167.

314. *Id.* at 161-65.

315. *Id.* at 177.

316. *Id.* at 181.

317. It was the *Betts* decision which prompted the enactment of the Older Workers Benefit Protection Act, which eliminated the subterfuge provision in the ADEA. *See* Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978 (1990) (current version at 29 U.S.C. § 621 (Supp. V 1993)).

318. *Donaghey*, *supra* note 197, at 7 (Damien Mysak, counsel for plaintiff).

319. H.R. REP. NO. 485, *supra* note 55, at 71.

> physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles, or is related to actual or reasonably anticipated experience.[320]

Furthermore, according to one of the Act's key sponsors, the ADA's "subterfuge" term was not identical to the term as applied in *Betts*. ADA sponsor Senator Kennedy stated during the Senate debates on the ADA that:

> it is important to note that the term subterfuge as used in the ADA, should not be interpreted in the manner in which the Supreme Court interpreted the term in *Betts*. The term subterfuge is used in the ADA to denote a means of evading the purposes of the ADA. Under its plain meaning, it does not connote that there must be some malicious or purposeful intent to evade the ADA on the part of the insurance company. . . . It also does not mean that a plan is automatically shielded just because it was put into place before the ADA was passed. . . . The provision regarding subterfuge section [12201(c)] should not be undermined by a restrictive reading of the term 'subterfuge' as the Supreme Court did in *Betts*.[321]

Thus, how Section 12201(c) of the ADA will actually be applied is yet to be seen after the decisions of cases such as *Donaghey* and *Monroe Foods*. Tentatively, it appears that the concept of subterfuge as applied in litigation under the ADEA will be found inapplicable to the ADA. Judge Sprizzo appears to have recognized this by holding that the ADA applies to ERISA plans, and that an ADA subterfuge is more comparable to Title VII "pretext" than a subterfuge as defined in ADEA litigation.[322]

PART IV

ARBITRATION AND ADA EMPLOYMENT DISCRIMINATION CLAIMS

Since the Supreme Court decided the *Steelworkers' Trilogy* cases in 1960,[323] arbitration has unassailably become the preferred method

---

320. H.R. REP. NO. 485, *supra* note 55, at 71.

321. 136 CONG. REC. 59,697 (daily ed. July 13, 1990) (statement of Sen. Kennedy).

322. *See supra* text accompanying notes 307-12.

323. The *Steelworkers' Trilogy* consists of three Supreme Court decisions which are jointly cited for the proposition that a labor arbitration award may not be vacated or even reviewed by a court if the award has its basis within the terms of the collective bargaining

for the resolution of industrial conflict. This preference for arbitration has largely developed because of the particular expertise which labor arbitrators acquire both in the "law of the shop" and labor contract administration, and the normally final and binding nature of arbitration awards.[324] Contractual labor arbitration clauses are now so pervasive that a recent study conducted by the Bureau of National Affairs found that ninety-eight percent of the collective bargaining agreements sampled contained some form of arbitration provision.[325]

There are several well established exceptions to the rule that arbitration awards are final. Thus, a court may review or even vacate a labor arbitration decision if it is alleged that a union has breached its duty of fair representation to a bargaining unit member during the course of a grievance investigation or hearing.[326] In this situation, the award produced as a result of that breach is subject to de novo review.[327] If the union's duty of fair representation was in fact violated, then the award is rescinded and the respective rights of the parties are re-determined by the reviewing court.[328]

Another instance when an arbitration award is not considered final and binding is where its underlying grievance involves an alleged violation of civil rights created under Title VII.[329] In *Alexan-*

---

agreement under which the dispute was submitted. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). These decisions established a judicially recognized preference for arbitration as a means of resolving industrial disputes.

It should be noted that the Taft-Hartley Act also recognizes that national labor policy in the United States favors the arbitration of industrial conflict. That Act states:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

29 U.S.C. § 173(d) (1988 & Supp. V 1993).

324. *See Warrior & Gulf Navigation*, 363 U.S. at 581.

325. *See Basic Patterns in Union Contracts*, 2 Collective Bargaining Negot. & Contr. (BNA) 51:5 (Mar. 2, 1995).

326. Vaca v. Sipes, 386 U.S. 171, 174-88 (1967).

327. *See id.* In *Vaca*, the Supreme Court held that a union violates its duty of fair representation towards a collective bargaining unit member when its conduct towards that member is in bad faith, arbitrary or discriminatory. *Id.* at 190. In such a situation, a bargaining unit member may either sue its union and the employer with which he or she has a dispute under § 301 of the Taft-Hartley Act, or file charges against the union with the National Labor Relations Board under § 158(b)(1). *See id.*; 29 U.S.C. § 158(b)(1) (1988).

328. *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

329. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Other instances in which arbitration awards are not final include those where arbitrators consider rights created under the Fair Labor Standards Act. These statutory rights exist independently of a collective bargaining agreement providing for grievance arbitration, even though the agreement may contain

der v. Gardner-Denver Co., the Supreme Court held that the arbitration process is particularly ill-suited to determine these rights.[330] Thus, an individual who claims that his rights under Title VII were violated may initiate a federal suit after an arbitration hearing is conducted, even if his grievance has been denied.[331]

Gardner-Denver is particularly noteworthy because of its effect upon arbitrations which consider ADA employment discrimination claims. As previously noted, the ADA has created co-requisite statutory obligations for covered entities not to discriminate against qualified job applicants or employees due to their disability, and to provide reasonable accommodations for disabled individuals who are capable, with the assistance of a reasonable accommodation, to perform the essential functions of a job.[332] These obligations exist independently from union and management obligations created by a collective bargaining agreement. *Gardner-Denver* raises the primary question whether a grievant is entitled to initiate a plenary ADA suit after his or her claim is adjudicated under the grievance machinery of a collective bargaining agreement.[333]

This final section will consider the potential effect of the *Gardner-Denver* decision upon grievance arbitration awards which decide ADA claims. It will also consider the related issue of whether a mandatory arbitration agreement will supplant an individual's right to initiate a federal claim under the ADA. Finally, I shall explore the correct standards by which an arbitrator might be required to decide ADA claims. In sum, this section will explore the tension between the statutory rights created by the ADA and the national labor policy recognizing arbitration as the favored means of resolving industrial disputes.

---

provisions mirroring statutory language. Courts have held that the submission to arbitration of claims which have their basis in these statutes does not bar a grievant from subsequently initiating a federal court suit based on the same facts, thereby allowing a grievant two bites of the apple. *See* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981); Marshall v. N.L. Indus., 618 F.2d 1220 (7th Cir. 1980); *see also* Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988 & Supp. V 1993).

330. *Gardner-Denver*, 415 U.S. at 56-58.

331. The arbitration award may, however, be considered probative evidence regarding the alleged Title VII violation in the federal lawsuit. *See Gardner-Denver*, 415 U.S. at 60 n.21.

332. *See supra* text accompanying notes 16-47.

333. *Gardner-Denver*, 415 U.S. at 38.

A. To Arbitrate or not to Arbitrate

It appears quite likely that the *Gardner-Denver* doctrine will be deemed applicable to ADA claims brought to arbitration, especially in light of decisions such as *Barrentine v. Arkansas-Best Freight System, Inc.*,[334] *McDonald v. City of West Branch*,[335] and *Marshall v. N.L. Industries, Inc.*,[336] where courts have applied the *Gardner-Denver* holding to arbitrations concerning other important federal statutory rights.[337] The ADA seems particularly appropriate for similar treatment because as a civil rights statute, like Title VII, it is meant to ensure an individual's right to equal opportunities for employment. The Court in *Gardner-Denver* explained the difference between statutory rights and rights manifested in a collective bargaining agreement, pointing out that:

> [Title VII] concerns not majoritarian processes, but an individual's right to equal employment opportunities. [Its] strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.
>
> * * *
>
> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not

334. 450 U.S. 728, 737 (1981).

335. 466 U.S. 284, 288-92 (1984).

336. 618 F.2d 1220, 1222 (7th Cir. 1980).

337. Even though the ADA's legislative history indicates that arbitration is considered the preferable method of dispute resolution, *see* 136 CONG. REC. H4582, H4606 (daily ed. July 12, 1990), it was not meant to supplant federal rights created under the statute. As was noted in the Judiciary Committee Report on the ADA, arbitration of an ADA claim was not meant to waive an individual's entitlement to sue under the Act. The Judiciary Committee pointed out that "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act." HOUSE COMM. ON JUDICIARY, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598.

> vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.[338]

Similarly, an ADA claim in an arbitration proceeding should not waive the grievant's right to initiate a plenary ADA action in federal court. As in *Gardner-Denver*, federal rights created under the ADA are not subsumed within the rights created by a collective bargaining agreement, even if that agreement contained language prohibiting employment discrimination against disabled individuals.

A more difficult question is presented by the issue of whether arbitration is a mandatory condition precedent to the initiation of an ADA claim. The ADA itself contains language not previously found in any other civil rights statute indicating that alternate means of dispute resolution ("ADR") is the preferable method of resolving statutory claims:

> where appropriate, and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement, negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.[339]

This language indicates that Congress may have intended ADA claims to proceed to arbitration first, assuming such claims were grievable under the applicable collective bargaining agreement, before an aggrieved individual is permitted to commence legal proceedings. The

---

338. *Gardner-Denver*, 415 U.S. at 51.

339. 42 U.S.C. § 12212 (Supp. V 1993). The legislative history of this section clearly indicates that Congress intended that the Supreme Court's holding in *Gardner-Denver* would apply to the ADA:

> This amendment was adopted to encourage alternative means of dispute resolution that are already adopted by law. The committee wishes to emphasize, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act. Thus, for example, the committee believes that any agreement to submit disputes to arbitration, whether in the context of a collective agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act. This view is consistent with the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated by reference in Title I. The committee believes that the approach articulated by the Supreme Court in Alexander v. Gardner-Denver Co. applies equally to the ADA and does not intend that the inclusion of Section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities.

H.R. REP. NO. 485, *supra* note 55, at 76-77.

Court did not address this issue in *Gardner-Denver*.[340] Title VII litigants simply assumed they had the ability to bring a federal lawsuit once arbitration proceedings concluded.

In 1991, the Supreme Court dealt with a comparable issue in *Gilmer v. Interstate/Johnson Lane Corp*.[341] In *Gilmer*, the Court was presented with the issue of whether an individual who had entered into a private employment contract with the Securities Exchange Commission which required the arbitration of all disputes under that agreement was prohibited from commencing an ADEA action in federal court.[342] The employment contract's arbitration clause was found to be specifically enforceable.[343] Consequently, the Court dismissed plaintiff Gilmer's action on the ground that he failed to arbitrate his employment discrimination claim and granted Gilmer's employer's motion to compel arbitration because arbitration of the dispute was deemed mandatory.[344]

The Court's decision to compel arbitration was premised on the plaintiff having entered into the employment contract, thereby *personally* agreeing to submit his age discrimination claim to arbitration.[345]

---

340. In *Gardner-Denver* the Court did, however, consider the weight to be accorded to an arbitration award in a subsequent federal action:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

Gardner-Denver, 415 U.S. at 60 n.21. Thus, while the weight accorded to an arbitration award will vary depending upon the adequacy of the arbitration hearing as well as the language contained within the collective bargaining agreement, the ultimate resolution of employment discrimination claims is left up to the courts.

341. 500 U.S. 20 (1991). Recently, the Second Circuit considered in the context of the Fair Labor Standards Act whether arbitration is a necessary condition precedent to the initiation of a plenary suit. *See* Tran v. Tran, No. 94-7994, 1995 U.S. App. LEXIS 10235, at *7 (2d Cir. May 5, 1995) (holding, based on the Supreme Court's decisions in *Gilmer* and *Barrentine*, that arbitration did not have to precede initiation of a suit).

342. *Gilmer*, 500 U.S. at 23.

343. *Id.*

344. *Id.* at 35.

345. *Id.* at 33.

Therefore, the Court found no incongruity between the policy concerns of the ADEA and Gilmer's employment contract, which provided that all disputes between employer and employee would be subject to mandatory arbitration.[346]

The fact that Congress failed to bar mandatory arbitration, and included statutory language in the ADEA suggesting that a "flexible" approach should be taken, additionally indicated to the Court that it would be permissible for arbitration to replace litigation as a means of resolving age discrimination disputes.[347]

An equally plausible, if not more persuasive, argument might be advanced that the ADA also permits waiver of an employee's right to initiate a plenary lawsuit if the employee contractually agrees to arbitrate the claims.[348] However, since *Gilmer* suggests that a waiver is only appropriate where the aggrieved party also is a party to the arbitration agreement,[349] waiver of federal statutory rights may not be appropriate in the collective bargaining context because individual employees are not actual parties to the agreement. In this respect, the Supreme Court attempted to distinguish its decisions in *Gilmer* and *Gardner-Denver*:

> In *Gardner-Denver*, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance. In holding that the employee was not foreclosed from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective bargaining agreement are distinct from the employee's statutory Title VII rights.
>
> * * *
>
> We further expressed concern that in collective bargaining arbitration "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."
>
> * * *
>
> There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement

346. *Id.* at 37.
347. *Id.* at 29.
348. *See* 42 U.S.C. § 12212 (Supp. V 1993).
349. *Gilmer*, 500 U.S. at 34.

> to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.[350]

This decision seems to support the proposition that employees may waive their right to have claims decided outside the arbitral context. However, it also suggests that rights created under the ADA are analogous to the rights protected in cases such as *Barrentine* and *Gardner-Denver*, rights which are non-waivable and for which a statutorily created remedy is always available regardless of the existence of a mandatory contractual grievance arbitration provision covering such a claim.

Recent case law under the ADA fails to adequately resolve this contradiction. In *Austin v. Owens-Brockway Glass Container, Inc.*,[351] the court held that an employee who had initiated a federal lawsuit under the ADA was estopped from proceeding with her claim because the collective bargaining agreement covering her employment contained a mandatory arbitration provision.[352] The court analogized the facts of the case to those in *Gilmer* and found that plaintiff was not entitled to litigate her claim:

> The CBA [collective bargaining agreement] provides in pertinent part that disputes under the CBA shall be governed by a grievance procedure which provides for the compulsory submission of all disputes . . . to a neutral third party arbitrator whose decision shall

350. *Id.* at 33-35 (citations omitted).

351. 844 F. Supp. 1103 (W.D. Va. 1994).

352. *Id.* at 1107. In *Austin*, the plaintiff was an equipment cleaner and oiler-greaser at Owens-Brockway Company. In 1992, she became disabled due to an injury sustained while she was working. *Id.* at 1103-04. Instead of being reasonably accommodated by the offer of lighter duty work, plaintiff's position was eliminated and the only other position available for which she was qualified was given to another individual. After the elimination of her position, plaintiff initiated her ADA suit. *Id.* at 1103.

> be final and binding upon the parties. . . .
>
> Defendant claims that plaintiff did not follow the grievance procedure set forth in the CBA and is therefore estopped from proceeding in the instant lawsuit. Defendant cites *Gilmer v. Interstate/Johnson Lane Corporation* . . . in which the Supreme Court held that a claim being brought under the ADEA of 1967 . . . can be subjected to compulsory arbitration pursuant to an arbitration agreement . . . . Defendant also points to amendments to the Civil Rights Act of 1991 which indicate Congress' preference that employment discrimination claims be resolved in alternative dispute forums.
>
> * * *
>
> Because plaintiff's complaint was subject to mandatory arbitration, the *Gilmer* line of cases applies here. Accordingly, because plaintiff did not utilize the grievance procedures available . . . , Summary Judgment will be granted in favor of defendant.[353]

It should be stressed that the court's opinion in *Austin* did not focus solely on the specific wording of the collective bargaining agreement's mandatory arbitration provision to support its holding. The court in that case decided that arbitration would be required because the ADA's own terms provided that it was the favored means of resolving such claims.[354]

More recently, the United States District Court for the Eastern District of Pennsylvania decided contrarily in *Bruton v. Southeastern Pennsylvania Transportation Authority* ("SEPTA").[355] In *Bruton*, the plaintiff asserted that his dismissal was, among other things, in violation of the ADA.[356] SEPTA moved for a dismissal of plaintiff's ADA claim on the ground that it was barred by a contractual arbitration clause in the collective bargaining agreement.[357] Unlike the court in *Austin*, this court held that plaintiff's statutory ADA claim was not precluded by the arbitration clause, and it denied defendant's

---

353. *Id.* at 1106-07.

354. *Id.* at 1107.

355. No. 94-3111, 1994 U.S. Dist. LEXIS 12087 (E.D. Pa. Aug. 19, 1994).

356. *Id.* at *1. Bruton was an employee of SEPTA. He was, during the term of his employment, an untreated alcoholic; a problem of which his employer was apparently aware. *Id.* at *2. Due to his poor attendance, he was discharged from his position. The discharge was grieved by Bruton's union and, as a result of the grievance, he entered into a last chance agreement (an agreement which provisionally reinstated him and which was conditioned on his obtaining medical treatment for his alcoholism) with SEPTA. *Id.* at *3-4. While Bruton was enrolled in a rehabilitation program, he was again discharged due to additional disciplinary infractions. After a second grievance was rejected, Bruton commenced suit. *Id.* at *4.

357. *Id.* at *8-9.