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

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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

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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 Act6 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

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.
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,\textsuperscript{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 dis-


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 compen-
sation, job training and other terms, conditions, and privileges of
employment.\textsuperscript{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.\textsuperscript{12}

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

\textsuperscript{11} Id. § 12112(a).
\textsuperscript{12} See EEOC TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TI-


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of the Civil Rights Act of 1964. 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." 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.

Title I of the ADA protects only "qualified individual[s] with a disability." 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. 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. 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. The statute, however, provides little guidance as to how an employer is to determine what the essential functions of a position are. Despite this fact, it seems quite clear that a handi-
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.\textsuperscript{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:

\begin{itemize}
  \item [(A)] a physical or mental impairment that substantially limits one or more of the major life activities of the individual;
  \item [(B)] a prior record of such an impairment; or
  \item [(C)] being regarded as having such an impairment.\textsuperscript{22}
\end{itemize}

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.\textsuperscript{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

\textit{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."

\textsuperscript{21} EEOC MANUAL, \textit{supra} note 12, at II-12.

\textsuperscript{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. \textit{See} EEOC Compliance Manual Directive No. 915.002, § 902 (Mar. 14, 1995).

\textsuperscript{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. \textit{See} S. Rep. No. 116, \textit{supra} note 2, at 24. In \textit{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.

\textit{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 mental26 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-
lished; and full-blown AIDS.

Furthermore, the ADA specifically excludes current alcohol and illegal drug users from its definition of "qualified individual[s] with a disability." 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. In this respect, a significant distinction between the ADA and the Rehabilitation Act exists. While an alcoholic is absolutely protected by the Rehabilitation Act, 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.

The ADA specifically removes from its scope individuals with such alleged "disorders" as homosexuality, transsexualism, sexual behavior disorders, compulsive gambling, kleptomania or pyromania. 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. 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. 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.

32. See Phelps v. Field Real Estate Co., 991 F.2d 645 (10th Cir. 1993).
34. See id. § 12114(b).
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. 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. 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. 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.” 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. 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. 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.

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.
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(1) 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. 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.

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. 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.

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. 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-

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.
52. See id. § 12111(9).
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. 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." 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" 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. 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. 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. Of course, blind or visually impaired individuals require specific computer software or hardware to accommodate their disability. Similarly, the hearing impaired may require telephone handset amplifiers, telephones which are compatible with hearing aids and/or special telecommunications devices. Individuals with impaired physical dexterity may require

53. Id.
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. Finally, part-time or modified work schedules may be required for people with chronic disabilities which require regularly scheduled medical attention and treatment. 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.”

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. 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.

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.” 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. 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.
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

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.

As with the ADA’s reasonable accommodation requirement, the undue hardship defense had its genesis in the Rehabilitation Act. 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. 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. On the other hand, a determination of whether an accommodation is reasonable is part of the prima facie case under both acts. 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.


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.

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:

the 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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{88} Nor is an employer required to modify job requirements to eliminate a specific essential element which a disabled employee is unable to perform.\textsuperscript{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.\textsuperscript{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


\textsuperscript{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).


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

\textsuperscript{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. 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.

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. Also, the ADA specifically provides that employers may consider job reassignment as an available reasonable accommodation.

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. 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.

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).
   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, the Equal Pay Act and Title VII of the Civil Rights Act of 1964, 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.

Additionally, the provisions of a collective bargaining agreement may not be changed without the explicit consent of both parties to the agreement. 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.

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.

101. Id. § 158(d).
consulting the employees' exclusive bargaining representative.\textsuperscript{103} Such a unilateral change in employment conditions may subject the employer to unfair labor practice charges.\textsuperscript{104} An unfair labor practice charge may also be filed, or a breach of contract action initiated,\textsuperscript{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.\textsuperscript{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.\textsuperscript{107} Its primary focus was on increasing federal economic aid and providing vocational rehabili-

\textsuperscript{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).


\textsuperscript{105} Id. § 185.

\textsuperscript{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).

tation for such individuals. However, the Rehabilitation Act, including its anti-discrimination provision, only applies to employees of the federal government or to employers who receive federal funding. 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. 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. 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." 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.

In Daubert v. United States Postal Service, 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." 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.
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.\footnote{116}{Id.} Unfortunately, Ms. Daubert had only been employed with the Postal Service for less than two years.\footnote{117}{Id. at 1368-69.} 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.\footnote{118}{Id. at 1369.}

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.\footnote{119}{Id. at 1370.} 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.\footnote{120}{Id. at 1372.} 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.\footnote{121}{822 F.2d 465 (4th Cir. 1987).} In Carter, an employee who had developed asthma — and was no longer capable of performing his regular duties as a custodian — sought a permanent light duty custodial position.\footnote{122}{Id. at 466.} The plaintiff’s employer refused to permit him to engage in light duty work since he had failed to meet the requisite seniority requirements under the applicable collective bargaining agreement.\footnote{123}{Id.} 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.\footnote{124}{Id. at 469.} 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.
a manner which violated the agreement's seniority terms.\textsuperscript{125} Since the collective bargaining agreement's seniority provision was determined to be bona fide in \textit{Carter}, the circuit court affirmed the dismissal of the complaint.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\ldots \textsuperscript{129} In the employment section, the ADA basically extends the provisions of

\textsuperscript{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)(b) (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.

\textsuperscript{126} \textit{Carter}, 822 F.2d at 467.

\textsuperscript{127} S. REP. No. 116, \textit{supra} note 56, at 32.

\textsuperscript{128} S. REP. No. 116, \textit{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

130. See supra note 113 and accompanying text.
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

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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 “conflicts 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. 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.

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.* 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. 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." The QRC determined that the employee was capable of returning to

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{145} The parties were directed to negotiate the specific job functions that the employee would perform and the pay he would receive.\textsuperscript{146} Finally, the arbitrator awarded the grievant full back pay, seniority rights, and benefits.\textsuperscript{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.\textsuperscript{148} The effect of this clause was a direct prohibition on disparate treatment of physically and mentally impaired employees.\textsuperscript{149} The second clause was a “modified” reasonable accommodation provision,\textsuperscript{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.\textsuperscript{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-
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*,\textsuperscript{152} which concerned a mechanic who was discharged from employment after he sustained a self-inflicted gunshot wound to his head.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{159}

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

\begin{itemize}
\item \textsuperscript{152} 100 Lab. Arb. Rep. (BNA) 1039 (1993) (Lipson, Arb.).
\item \textsuperscript{153} Id. at 1040.
\item \textsuperscript{154} Id. at 1041.
\item \textsuperscript{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.
\item \textsuperscript{156} Id. at 1044.
\item \textsuperscript{157} Id. at 1043-44.
\item \textsuperscript{158} Id. at 1045.
\item \textsuperscript{159} Id.
\end{itemize}
jeopardize the seniority rights of other employees.\textsuperscript{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.\textsuperscript{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 \textit{Stone Container Corp.},\textsuperscript{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.\textsuperscript{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.\textsuperscript{164} Consequently, the grievants — who had the requisite seniority — were removed from the preferential shift.\textsuperscript{165}

The arbitrator noted that if the ADA was not the law of the land, the union and the grievant would obviously prevail.\textsuperscript{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.\textsuperscript{167} The arbitrator wrote:

\begin{quote}
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.\textsuperscript{168}
\end{quote}

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

\begin{itemize}
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} 101 Lab. Arb. Rep. (BNA) 943 (1993) (Feldman, Arb.).
\item \textsuperscript{163} Id. at 944.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. at 945.
\item \textsuperscript{166} Id. at 946.
\item \textsuperscript{167} Id. at 947.
\item \textsuperscript{168} Id.
\end{itemize}
presented at the arbitration to conclusively show that the employee who was given the preferential shift was actually disabled. 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. 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.

The same result occurred in Clark County Sheriff's Department. 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. 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.

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. 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. 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.

169. Id.
170. Id.
171. Id.
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.\(^{78}\) 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.\(^{79}\) 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.\(^{80}\) 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.\(^{81}\) However, unlike the other arbitration decisions, the arbitrator in *Dearborn Heights* found that the grievance was without merit and permitted the reasonable accommodation.\(^{82}\)

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.\(^{83}\) 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.\(^{84}\) 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.*

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\(^{79}\) *Id.*

\(^{80}\) *Id.*

\(^{81}\) *Id.* at 810.

\(^{82}\) *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.

\(^{83}\) *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.

\(^{84}\) *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,"\footnote{Dearborn Heights, 101 Lab. Arb. Rep. at 816.} 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.\footnote{See S. REP. NO. 116, supra note 56, at 32.} 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-
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. 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. 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. 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), 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. 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. 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.

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).
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. 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. 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.

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”). 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).


195. Id. at 1376-77.

is currently being tested in pending litigation in district courts of both New York and Maryland.97

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.98 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.99 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

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98. 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.

99. Id.


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).


203. Id. § 1002(3).
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).
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 provision211 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

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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).


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

215. Id. at 900.
maintained.\textsuperscript{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.\textsuperscript{217}

The Fourth Circuit came to a similar conclusion in Sutton v. Wierton Steel Division.\textsuperscript{218} Sutton involved an employer's decision to terminate benefits for non-vested severance and contingent early retirement.\textsuperscript{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.\textsuperscript{220}

More recently, the court in Paul v. Valley Truck Parts, Inc.\textsuperscript{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.\textsuperscript{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,\textsuperscript{223} holding that if the benefits had vested the trustee's diminution of those benefits might have breached their fiduciary responsibility under ERISA.\textsuperscript{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:

\begin{thebibliography}{99}
216. Id.
217. Id. at 912.
218. 724 F.2d 406 (4th Cir. 1983).
219. Id. at 409.
220. Id. at 410-11.
222. Id. at *15-16.
223. Id. at *13-14.
224. Id. at *17.
\end{thebibliography}
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 [or] 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 . . . .

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. 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.* In *McGann*, the plaintiff, who had become infected with the AIDS virus, sued his employer for allegedly violating Section 510 of ERISA. 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. 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.

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

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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).


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.\textsuperscript{231} The Fifth Circuit affirmed the district court opinion and refused to reinstate McGann’s suit.\textsuperscript{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 \textit{vested} benefits.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{237} Thus, McGann needed to demonstrate that the reduction was meant to impair only \textit{his} benefit entitlement.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{231} Id. at 404.
\item \textsuperscript{232} Id. at 408.
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Id.
\item \textsuperscript{235} Id. at 407-08.
\item \textsuperscript{236} Id. at 404.
\item \textsuperscript{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.), \textit{cert. denied}, 484 U.S. 979 (1987).
\item \textsuperscript{238} McGann, 946 F.2d at 404.
\end{itemize}
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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{243} The court’s decision in \textit{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.\textsuperscript{244}

\textsuperscript{239} \textit{Id.}
\textsuperscript{240} \textit{Id. at 405.}
\textsuperscript{241} \textit{Id.}
\textsuperscript{242} \textit{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).}
\textsuperscript{243} \textit{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.”).}
\textsuperscript{244} \textit{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.*, 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. *Owens* sought relief under ERISA Section 510, as well as a temporary restraining order prohibiting the reduction of plan benefits. His suit was dismissed by the district court; that decision was affirmed by the Eleventh Circuit.

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-
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.*


\(^{252}\) 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. Plaintiffs argued that the insurance company’s action had an adverse impact upon individuals suffering from psychiatric disorders and was, therefore, impermissibly discriminatory. 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. In Bernard B., the court noted that Blue Cross had not excluded certain insurance benefits only from individuals with psychiatric handicaps. 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. 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.” This rationale was sufficient to shield the defendant from having violated the Rehabilitation Act.

In Alexander v. Choate, 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. 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.

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.
262. See id.
263. Id. at 289.
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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).


\(^{269}\) *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.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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 \textit{Alexander} the Supreme Court implicitly accepted the "substantial justification" defense posited in both \textit{Bernard B. v. Blue Cross & Blue Shield}\textsuperscript{274} and \textit{Kampmeier v. Nyquist}.\textsuperscript{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

\begin{footnotes}
\item 271. \textit{Id.} at 295-97 (footnotes omitted).
\item 272. \textit{See id.} at 291-92.
\item 273. \textit{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.").
\item 275. 553 F.2d 296, 299 (2d Cir. 1977).
\end{footnotes}
handicapped individuals' entitlements to benefits.\textsuperscript{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.\textsuperscript{277}

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

\textsuperscript{276} See id. at 299-300; Bernard B., 528 F. Supp. at 132.
\textsuperscript{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.\textsuperscript{278} Apparently, the ADA’s anti-discrimination mandate also applies to employer welfare benefit plans established under ERISA.\textsuperscript{279} In \textit{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.\textsuperscript{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.\textsuperscript{281} The Fund sought a declaratory judgment that the ADA did not apply to ERISA-covered welfare plans\textsuperscript{282} and that, even if it did, this did not prohibit the capping or elimination of health benefits\textsuperscript{283} — a situation virtually identical to that encountered by the Fifth Circuit in \textit{McGann} and the Eleventh Circuit in \textit{Owens}.\textsuperscript{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.\textsuperscript{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

\textsuperscript{278} See \textit{Donaghey}, supra note 197, at 1.

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

\textsuperscript{280} See \textit{Donaghey}, supra note 197, at 3.

\textsuperscript{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).


\textsuperscript{283} Id. at 26.

\textsuperscript{284} See supra text accompanying notes 227-46.

\textsuperscript{285} See \textit{Donaghey}, supra note 197, at 20 (transcript of plaintiff’s oral argument on motion for summary judgment, Nov. 19, 1993).
ADA. 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. 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.

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

290. See id.
292. Id. at 584-85.
293. Id. at 585; see supra text accompanying note 230.
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. 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.

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.” 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.” 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,” 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.” 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.

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, a university professor sued her pension fund on the ground that its sex-based mortality tables violated Title VII. 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.
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 signifi-
cantly 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, Spirit's conception of an employer is as equally applica-
table to Title VII as it is to the ADA.306 The weight of legal authori-
ty, 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 Rehabili-
tation 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 consider-
ably 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 "pro-
gram 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).
"subterfuge" 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.  

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.

Judge Sprizzo’s decision provides some guidance on what Congress intended by the ADA’s “subterfuge” terminology. 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.

The ADEA’s notion of subterfuge was reviewed by the Supreme
Court in *Public Employees Retirement System v. Betts*,\(^3\) 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.\(^3\) 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.\(^3\)\(^\)\(^4\) 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.”\(^3\)\(^\)\(^5\)\(^6\)\(^7\) 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.\(^\)\(^8\)

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*.\(^3\)\(^9\) The ADA’s legislative history, however, reveals that the *Betts* decision was not intended to be followed by courts presented with ADA violations.\(^3\)\(^\)\(^0\) 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 may 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

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\(^3\) 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.

\(^4\) *Id.* at 161-65.

\(^5\) *Id.* at 177.

\(^6\) *Id.* at 181.

\(^7\) 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)).

\(^8\) Donaghey, supra note 197, at 7 (Damien Mysak, counsel for plaintiff).

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.\textsuperscript{220}

Furthermore, according to one of the Act’s key sponsors, the ADA’s “subterfuge” term was not identical to the term as applied in\textit{ Betts}. ADA sponsor Senator Kennedy stated during the Senate debates on the ADA that:

\begin{quote}
\textit{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.}\textsuperscript{31}
\end{quote}

Thus, how Section 12201(c) of the ADA will actually be applied is yet to be seen after the decisions of cases such as\textit{ 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.\textsuperscript{32}

\section*{PART IV}

\textbf{ARBITRATION AND ADA EMPLOYMENT DISCRIMINATION CLAIMS}

Since the Supreme Court decided the\textit{ Steelworkers' Trilogy} cases in 1960,\textsuperscript{33} arbitration has unassailably become the preferred method

\begin{itemize}
\item \textsuperscript{320} H.R. REP. NO. 485, supra note 55, at 71.
\item \textsuperscript{322} See supra text accompanying notes 307-12.
\item \textsuperscript{323} The\textit{ 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
\end{itemize}
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. 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.

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. In this situation, the award produced as a result of that breach is subject to de novo review. 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.

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. In 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


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.


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

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. 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.

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).

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.
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

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:

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

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


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.

Court did not address this issue in *Gardner-Denver*." 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.* 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. The employment contract’s arbitration clause was found to be specifically enforceable. 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.

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.

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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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{348} However, since Gilmer suggests that a waiver is only appropriate where the aggrieved party also is a party to the arbitration agreement,\textsuperscript{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.

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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."

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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

\begin{footnotes}
\item[346] \textit{Id.} at 37.
\item[347] \textit{Id.} at 29.
\item[349] \textit{Gilmer}, 500 U.S. at 34.
\end{footnotes}
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.  

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., 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. 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).
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. InterstateJohnson 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.\(^3\)

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.\(^4\)

More recently, the United States District Court for the Eastern District of Pennsylvania decided contrarily in *Bruton v. Southeastern Pennsylvania Transportation Authority* ("SEPTA").\(^5\) In *Bruton*, the plaintiff asserted that his dismissal was, among other things, in violation of the ADA.\(^6\) 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.\(^7\) 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

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353. *Id.* at 1106-07.
354. *Id.* at 1107.
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.
motion because:

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

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

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

358. Id. at *5.
359. Id. at *8.
360. Id. at *7.
361. Id. at *8-9.
362. See Wendy S. Tien, Compulsory Arbitration of ADA Claims: Disabling the Disabled, 77 Minn. L. Rev. 1443 (1993); see also Block v. Art Iron, Inc., 866 F. Supp. 380 (N.D. Ind. 1994) (holding that a contractual arbitration clause does not waive an employee's right to initiate a federal claim under the ADA). In Block, the district court found Gardner-Denver controlling rather than Gilmer. Block, 866 F. Supp. at 383.
363. Counsel for Austin, Ms. Barbara Hudson, Esq., has advised the author that an appeal of this decision was filed in February 1994 and was argued before the United States Court of Appeals for the Fourth Circuit in February 1995. On appeal, appellant argued, inter alia,
B. Arbitration Standards

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

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

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

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

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

365. See, e.g., id. at 13.
interpretation and application of the agreement, and upon his view as the effect of that restriction insofar as consideration of "law" is concerned. It is also to be noted that many arbitrators have viewed the role of public enforcement agent to be beyond their authority and function; these arbitrators believe that the enforcement of statutes which impose affirmative duties or make conduct illegal in an affirmative way should be left to the courts or statutory agency which was established for that purpose.\textsuperscript{366}

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

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

In \textit{Stone Container Corp.},\textsuperscript{371} the arbitrator also refused to adjudicate the grievance according to the dictates of the ADA, stating that

\begin{itemize}
  \item \textsuperscript{367} Id. at 369.
  \item \textsuperscript{368} 102 Lab. Arb. Rep. (BNA) 650 (1993) (Jones, Arb.).
  \item \textsuperscript{369} Id. at 654. In \textit{Altoona}, the contract arbitrator was presented with a grievance in which a disabled employee insisted that, upon her personal physician's recommendation, she be permitted to return to work under an abbreviated work schedule. Nevertheless, the employer refused the grievant's request for an accommodation claiming that there was no job vacancy available for her which would allow a shortened work schedule. \textit{Id.} Additionally, grievant's employer deemed the requested accommodation entirely unnecessary because two independent physicians found her fit to return to duty without any work restriction whatsoever. \textit{Id.}
  \item \textsuperscript{370} The basis for this approach is the \textit{Steelworkers Trilogy}, which mandates that in order for an arbitration award to be judicially confirmable it must have its foundation in the terms of the collective bargaining agreement under which the grievance was submitted. \textit{See supra} notes 323-25 and accompanying text.
\end{itemize}
he could not consider the ADA because the collective bargaining agreement did not grant him the authority to do so.\textsuperscript{372} In that case, the arbitrator noted that there was "no clear language placing before the arbitrator the right to determine the answer to the grievance under the law of the land."\textsuperscript{373}

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

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

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

\begin{itemize}
\item \textsuperscript{372} \textit{Id.} at 947.
\item \textsuperscript{373} \textit{Id.} Nevertheless, in \textit{Stone Container Corp.} the arbitrator did discuss, at least indirectly, the effect the ADA might have had upon his decision had it been relevant. \textit{Id.}
\item \textsuperscript{374} \textit{101 Lab. Arb. Rep. (BNA) 809 (1993) (Kanner, Arb.).}
\item \textsuperscript{375} \textit{Id.} at 816.
\item \textsuperscript{376} \textit{Id.}
\item \textsuperscript{377} \textit{See Alexander v. Gardner-Denver Co., 415 U.S. 36, 54-55 (1974).}
\item \textsuperscript{378} \textit{See id. at 55.}
\item \textsuperscript{379} \textit{See id. at 59.}
\end{itemize}
discrimination and which includes the application of statutory law. The danger in this approach is the fact that arbitration awards are, in most respects, non-reviewable and nonappealable. What does a grievant do if an arbitrator fails to understand the law and comes to an incorrect result? What does a grievant have against an improper and inconsistent interpretation of the ADA?

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

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

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

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

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

382. See, e.g., Gulf Coast Indus. Workers Union v. Exxon Co., 591 F.2d 244 (5th Cir. 1979); Stroehmann Bakeries v. International Bhd. of Teamsters, 969 F.2d 1436 (3d Cir. 1992); Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990).


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

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

386. Id. at 251.

387. Id. at 250; see 41 U.S.C. §§ 701-707 (1988).
determining the merits of the grievance de novo because:

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

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

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

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

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388. *Gulf Coast*, 991 F.2d at 249 (citations omitted).
389. *Id.* at 251.
390. *Id.* at 257 (citing 42 U.S.C. § 12114 (Supp. V 1993)).
ADA. With this approach, even if a grievant’s claim is denied after arbitration, he or she will still have access to federal court. The grievant may then utilize the federal court’s disclosure and evidentiary rules to prove the existence of an ADA claim which may not have been apparent in the less formal arbitral context. Consequently, the best suited role for an arbitrator appears to be the traditional one, that of an interpreter of the contractual rights engendered in collective bargaining agreements.

PART V

CONCLUSION

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

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

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

392. See NLRB, EEOC Memo of Understanding on Procedure for Coordinating ADA, NLRA, 1 EMPL. DISCRIMINATION REP. 156 (Dec. 1, 1993).
393. Id.
This mutual understanding between the EEOC and the NLRB will do much to promote and harmonize the important concerns involved in both the ADA and the Taft-Hartley Act. The counsel’s office of both the NLRB and the EEOC have advised this author that since the memorandum’s issuance, there have been to date less than a dozen occasions when Board charges have implicated the ADA. This may be prima facie evidence that conflicts between the ADA and the Taft-Hartley Act are being resolved by good faith negotiation between the parties before charges are filed; negotiation which might be the product of a collective bargaining agreement’s reasonable accommodation provision.

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

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

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

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

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