UNION’S OBLIGATION TO ACCOMMODATE UNDER ADAAA

INTRODUCTION
After the Americans with Disabilities Act (ADA) was passed, there were initially potential conflicts between the obligations imposed by the ADA and those imposed by the National Labor Relations Act (NLRA) with respect to collective bargaining. The ADA does not directly address the relationship between an employer’s obligation to reasonably accommodate disability and collective bargaining agreements. The Equal Employment Opportunity Commission (EEOC) guidance in an appendix suggested, however, that the terms of a collective bargaining agreement may be relevant to any determination as to whether a particular accommodation presents an undue hardship.

This created a potential conflict with the NRLA. Section 8(a)(5) of the NLRA provides that it is an unfair labor practice for an employer to refuse to bargain with an exclusive bargaining representative of its employees. This obligation arises out of Section 8(d) of the NLRA, which establishes the mutual obligation of the employer and the employee’s exclusive representative to confer in good faith with respect to wages, hours and other terms and conditions of employment.
The National Labor Relations Board has made clear that the issue of accommodation, certainly with respect to the impact of accommodation on rights of employees pursuant to a collective bargaining agreement, is a mandatory item of bargaining.

In 1992, the National Labor Relations Board general counsel issued a memorandum addressing potential conflicts between the ADA and the NLRA. There were two areas identified. One was the employer’s duty to bargain under Sections 8(a)(5) and 8(d) and the other was any potential conflicts between a union’s obligation to its members under the NLRA and obligations imposed on the union by the ADA. The memorandum made clear that the NLRA did not permit employers to unilaterally make accommodations that would have an impact on the collectively bargained rights of employees unless it first negotiated with the union. In essence, the National Labor Relations Board determined that accommodation was a term and condition of employment and, hence, a mandatory subject of bargaining. The National Labor Relations Board has, however, indicated that if the reasonable accommodation does not affect a material, substantial or significant change in working conditions, an employer may, under some circumstances, be able to unilaterally implement the accommodation. The general counsel’s memorandum noted that accommodations such as putting a desk on blocks or installing a ramp would not be changes in terms and conditions of employment that would require the employer to negotiate with the union prior to implementation of the accommodation. However, where the accommodation has a direct impact on the rights of bargaining unit members, there is an obligation to bargain with the exclusive representative. LaMousse, Inc., 259 NLRB 37 (1981), enf’d, 703 F.2d 576 (9th Cir.1983).

The general counsel’s memorandum had the expectation that it was in the interest of the union and employer to try to find an accommodation for an eligible employee. However, the
position of the National Labor Relations Board is that in the event that the employer and the bargaining representative can reach an agreement, it does not have to provide the “best” accommodation possible. It need only meet the needs of the individual who the employer and union are agreeing to accommodate. The general counsel’s memorandum also made clear, however, that a union may rely upon its right to refuse an employer demand for bargaining over accommodations mid-term to the extent that the accommodation is inconsistent with the terms of the collective bargaining agreement.

The National Labor Relations Board adopted the view set forth in the general counsel’s memorandum in Industria Lechera De Puerto Rico, Inc. and Congreso De Uniones Industriales De Puerto Rico, 344 NLRB No.133 (2005). This case involved an employer who unilaterally accommodated an employee who requested a permanent day shift job based upon a medical letter from his treating physician. The union objected based upon the fact that there was at least one other night shift employee with more seniority that would have been entitled to the day shift job. In that case, the Board, notwithstanding the fact that there was no collective bargaining agreement currently in effect, found that a past practice controlled and that practice required the employer to bargain with the union and its failure to do so was an unfair labor practice.

Any dispute in this regard has been largely resolved by the Supreme Court decision in U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002). This case involved a seniority system unilaterally adopted by the employer in a handbook. It was not a collectively bargained seniority system. Notwithstanding that fact, the Supreme Court held that a requested accommodation that conflicted with the rules of the employer’s bona fide seniority system required a finding that the requested accommodation was not reasonable. The Barnett court did leave the door open with respect to an exception in special circumstances. One of the circumstances addressed by the
court was if a seniority system did not create any expectations on the part of the employees the employer might be able to make an accommodation contrary to its seniority policy. This exception, however, is never going to apply in the context of a collectively bargained seniority system.

In the event the employer approaches the union and the union agrees to negotiate, it does not necessarily have to agree to the accommodation requested by the employer. More importantly, to the extent that the accommodation is contrary to established seniority provisions or other assignment rules memorialized in the collective bargaining agreement, the union may rely upon its legal right under the NLRA to refuse to engage in mid-term bargaining over the matter. Prior to *Barnett* many courts had already held that an accommodation that conflicted with guaranteed rights to other employees under a *bona fide* seniority system created an undue hardship. Since *Barnett*, the courts have typically rejected arguments by employees that an employer is required to provide an accommodation that is contrary to the seniority provisions of a collectively bargained agreement.

**The union’s duty of fair representation.** The National Labor Relations Board and the courts have clearly indicated that, the union, as the exclusive collective bargaining representative under a collectively bargained agreement, has a duty of fair representation, which extends to the bargaining unit as a whole and to each individual member of the bargaining unit. Typically, relying on the Title VII cases, courts have enforced the prohibitions against discrimination by a union consistent with the union’s duty of fair representation. If the union had complied with that duty pursuant to the NLRA, it would not violate Title VII.

**Dispute resolution regarding accommodation.** As a practical matter, where there are collectively bargained agreements that contain specific provisions negotiated between the parties
relating to disability accommodation or where there is a dispute over whether an accommodation granted by the employer violates a *bona fide* seniority or other provision of a collective bargaining agreement, is not going to be addressed in the courts. It will typically be resolved through arbitration. The fact that there is a remedy under the collective bargaining agreement does not prevent an employee from filing a lawsuit under the ADA. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). The *Wright* court held that the arbitration clause before it did not preclude the employee from pursuing the case in a judicial forum, it telegraphed the fact that there might be some collective bargaining agreements where the union, by virtue of adoption of language, made a “clear and unmistakable waiver of employee’s rights to pursue claims of discrimination under the ADA in a judicial forum.” That situation subsequently presented itself in *14 Penn Plaza v. Pyett*, 556 U.S. ____, 129 S.Ct. 1456, 173 L.Ed.2d 398 (2009), where the court held that the specific language contained in a collective bargaining agreement created an exclusive remedy requiring a bargaining unit member to arbitrate a federal discrimination claim. It is in this context that the 2008 amendments to the ADA (ADAAA) can create additional issues for the union with respect to accommodation where there is a collective bargaining agreement in place.

The Supreme Court, in *14 Penn Plaza LLC v. Pyett*, supra, expressly declined to resolve the issue of whether a collective bargaining agreement operates as a substantive waiver of union member statutory rights where the clause not only precludes a federal lawsuit, but also allows the union to block arbitration of those claims. The court hinted that a substantive waiver of a federally protected civil right will not be upheld. Thus, the issue becomes whether a union’s decision not to proceed to arbitration with respect to a discrimination claim, where the arbitration clause quite explicitly makes it a contract remedy, operates to prevent the injured employee from
pursuing relief in a judicial forum. See, in this regard, *Morris v. Temco Service Industries, Inc.*, 2010 Westlaw 3291810 (SDNY 2010). To the extent the Supreme Court ultimately holds that refusal by the union to proceed to arbitration does not deprive an individual of their right to separately litigate the issue judicially, it reduces the risk to the union with respect to the administration of such contract arbitration clauses.

In *Kravar v. Triangle Services, Inc.*, 2009 W.L. 1392595 (SDNY 2009), the district court refused to enforce an arbitration clause under *14 Penn Plaza* because the clause permitted only the union or company to pursue a grievance under the arbitration clause. The court held that the union, by failing to file the grievance, prevented the plaintiff from arbitrating her disability claims and, hence, the case fell within the *14 Penn Plaza* exception for those circumstances in which the union controls access to the process and prevents the employee from arbitrating the disability discrimination claims. The arbitration clause at issue in *Kravar* was substantively indistinguishable from that in *14 Penn Plaza*. It is still an open question whether the union’s failure to arbitrate under such circumstance is a violation of the duty of fair representation. Under the contract, the union has the right to determine whether to proceed to arbitration. In *Kravar*, where the union failed to do so, the court essentially protected the employee’s right to pursue the claim in a judicial forum. Under such circumstances, it would be no harm, no foul. See also, *Hollman v. Teamster Local 682*, 2009 W.L. 1393983 (EDMO 2009). This case held that a good faith determination by a union after an investigation not to pursue a grievance alleging gender discrimination did not constitute violation of its duty of fair representation.

**POTENTIAL ISSUES RAISED BY 2008 AMENDMENT (ADAAA)**

A. **Obligation to accommodate.** *A fortiori*, there is no obligation of the employer or the union to accommodate an individual who does not meet the test of disabled under the ADA. The
expansion of the definition of disability now puts into play a number of conditions that, prior to the amendments, both unions and employers could rely upon as being “not disabling” and, hence, did not trigger the right to reasonable accommodation. Because of the expanded definitions, there is greater potential for internal “conflicts of interest” as between a bargaining unit employee seeking an accommodation and another union member who, under the terms of the collective bargaining agreement, might be entitled to the accommodated job.

From the union’s point of view, these disputes can be addressed in the same fashion that unions typically address gender or racial discrimination claims among members of the bargaining unit. The union has an obligation to both unit members to represent them fairly. The typical approach is for the union to have separate business agents represent the interest of each of the employees with respect to the dispute. Oftentimes these disputes will be the subject of arbitration. In many cases, it is because the employer disciplined the alleged harasser. In such cases, the party claiming that he/she was the victim of harassment is going to be a witness for the company and the union will be disputing the discipline imposed on the union member who was accused of the harassing act. The same paradigm is equally effective with respect to disputes under the ADA. Where it is an issue involving accommodation and the dispute is over whether the person seeking accommodation qualifies as disabled under the terms of the collective bargaining agreement, the dispute is between the union and the employer if the employer determines that the individual is qualified and unilaterally applies the contract terms. In this case, the union would be representing the interest of the adversely affected employee who would be grieving the accommodation. This does not create a conflict issue for the union since it is not dissimilar from jurisdictional claims that are made in large industrial plants. For example, welders claiming that certain work performed by maintenance mechanics or millwrights is
properly within the welder’s classification. Whatever the result of the arbitration, a union member is going to be a winner or loser. This does not create a conflict for the union since its obligation is to determine whether a contract provision has been violated.

A more difficult situation for the union is where it determines, together with the employer, that the individual seeking accommodation does not meet the definition of disability under the ADAAA. Since in most cases there will not be an exclusive arbitration remedy, the employee is free to pursue the action in a judicial forum. Under such circumstances, the union should be able to define its duty as its obligations under the NLRA’s definition of duty of fair representation. Based upon EEOC guidelines and the necessity to accommodate the NLRA with the ADAAA, the fact that the union ultimately was wrong in determining that accommodation was not required should not create liability for it under either Act. The union has an obligation to represent the interests of both members fairly and as long as it was not arbitrary or did not have bad motive, a good faith decision regarding the application of the contract should insulate it from liability.

**Negotiation of accommodation provisions.** The ADAAA does not change the underlying law regarding the obligation of employers and unions to negotiate with respect to mandatory items of bargaining. At the time of contract renewal, either side could make proposals with respect to accommodation and would have an obligation to negotiate in good faith over such proposals. However, neither side would be obligated to agree to such proposals. Likewise, if the contract is silent as to accommodation, the union does not have an obligation during the term of that contract to negotiate with the employer over what would otherwise be a mandatory item of bargaining.
B. Impact of arbitration clauses that are deemed a waiver of the bargaining unit member’s right to proceed judicially with respect to ADA claims. The fact that some unions have negotiated collective bargaining arbitration clauses that specifically provide that arbitration pursuant to the collective bargaining agreement is the sole remedy for bargaining unit members with respect to ADAAA claims may fact increased problems as a result of the broadened definitions.

For the reasons described above, it will create a potential conflict between the union and its member regarding whether the union goes to arbitration with respect to a claimed ADAAA violation. The increased scope of disabilities create more risk to the union that a determination by the union that a condition is not a disability and its refusal to proceed to grievance arbitration over the issue could result in greater exposure to the union under its duty of fair representation. Where the union has negotiated an arbitration clause that makes the contract remedy exclusive, there may be a higher burden placed on the union with respect to its obligation to pursue a grievance through arbitration rather than dropping it or resolving it on a compromise basis.