Invisible Illnesses and the ADA:
Union Representation of Disability Discrimination Claims

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Issues involving the Americans with Disabilities Act, and particularly issues involving reasonable accommodations, arise surprisingly often for union advocates. Since the union does not have standing to bring a statutory claim in court on behalf of the member, it must generally rely on the arbitration provisions in the collective bargaining agreement to seek justice for the member.

The first step for the union advocate in such a scenario is to determine whether a claim exists under the CBA. Some CBAs contain very specific language prohibiting discrimination in the workplace. Others contain general statements reflecting the parties’ desire to encourage a respectful and safe work environment. And some CBAs contain no language whatsoever. In the latter case, the union faces an uphill battle and the member’s interests are likely better served by pursuing a civil claim in court.

Part I of this paper will focus on three distinct issues facing union advocates with respect to ADA claims. The first is the ability of the arbitrator to use external law when deciding a case involving discrimination. The second issue involves choice of remedy clauses, which seek to prevent the union member from pursuing both an arbitration hearing and a claim in civil court on the same facts, and compulsory arbitration clauses, which require members to resolve their claims through arbitration rather than the courts. Finally, the third issue involves the drafting of contract language that will best serve the membership in these types of cases.

Part II of this paper recounts as a case study a grievance scenario which actually occurred in the local union that I represent, and will explain the steps that the union was able to take to resolve the issue without having to resort to arbitration.

I. ADA Claims in the Context of Collective Bargaining Agreements

A. The Use of External Law in Labor Arbitration

The parties are generally free to negotiate the degree to which the arbitrator may use external law in rendering an arbitration award, but rarely do they do so. Generally, unless the parties submit an issue to the arbitrator which is narrowly drawn and limited to an interpretation of the CBA, “the arbitrator may base his decision on any number of grounds, including statutes and case law...” RF&P Railroad Co. v. Transportation Communications International Union, 973 F.2d 276, 141 LRRM 2115, 2118 (1992). See also High Concrete Structures, Inc. v. United Electrical, Radio and Machine Workers of America, 879 F.2d 1215, 1218-19 (3d. Cir. 1989) (the
terms of the issue submitted “may empower an arbitrator to resolve disputes that go beyond the four corners of a collective bargaining agreement”).

In some cases, the parties explicitly agree to grant the authority to the arbitrator. This can be done through the submission of an issue statement that references that authority, or the agreement may be in the CBA itself. In South Penninsula Hospital v. General Teamster Local 959, the arbitrator found that a broad non-discrimination provision prohibiting discrimination “as defined by law” constituted an express incorporation of external law covering disability discrimination. 120 LA 673, 678-9 (Landau, 2004).

The agreement may also be implicit. In Southern California Gas Company, an arbitration panel determined that, because “both parties cited external law to give meaning to [the contract language]...it is the apparent intent of the parties that the requirements of [the language] be applied in a manner consistent with the provisions of federal law.” 91 LA 100, 104 (Collins, 1988) (revision of minimum requirements for job classification was job related and did not constitute gender discrimination).

Arbitrators have applied external law even where no agreement was present. In Conagra Frozen Foods, the grievant was terminated for allegedly engaging in sexually harassing behavior toward a female co-worker. 113 LA 129 (Baroni, 1999). The employer had a harassment policy which prohibited “harassment of any individual in our workplace by any person and in any form”, and specifically included “sexual harassment as a form of illegal sex discrimination...” Id. at 130. The union argued that the employer’s policy did not define sexual harassment and that the grievant did not know that his actions constituted sexual harassment. Id. at 133. The arbitrator rejected the union’s argument, stating that it is the perception of the victim, not the alleged perpetrator, that is important. Id. The union also argued that the grievant was not given notice that his behavior was not acceptable. Id. The arbitrator soundly rejected that argument, stating that “…federal law makes sexual harassment in the workplace illegal (Title VII of the Civil Rights Act…) and it is binding on everyone...” Id.

When the parties disagree as to whether the arbitrator has the authority, arbitrators often do consider external law on the basis of a non-discrimination provision and a savings clause in the CBA. See, e.g. GTE North Inc. v. IBEW, Local 986, 113 LA 665 (Brodsky, 1999). The savings clause, which preserves the remaining contract provisions if one is found to be legally invalid, often contains language such as “this agreement is subject to federal and state laws”. Read together, the non-discrimination provision and the savings clause lead to the conclusion that federal and state laws prohibiting discrimination must be used to determine whether the non-discrimination clause was violated.

Some arbitrators refuse to apply external law where the contract makes no specific reference to a particular statute. In finding that an employer did not violate the contract by refusing to accommodate an employee who could not perform the essential functions of her position without that accommodation, the arbitrator set forth the following reasoning:

The question here is whether the parties intended or should be presumed to have intended incorporation of the legal standards and the proper application of those standards if such actual or imputed intent is discerned. In the instant case, I find no explicit language nor actual or imputed intent to incorporate either the
Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990. This, of course, does not mean that the Company is not obligated to adhere to the law but, rather I find that the Company and the Union did not agree to incorporate these statutes into the Collective Bargaining Agreement. Therefore, under the circumstances, I find that the Company did not violate the Collective Bargaining Agreement, because under the Collective Bargaining Agreement, it had no duty to accommodate the Grievant's disability by assigning her limited duties only. Likewise, since she could not perform the regular duties of a Miscellaneous Employee, the Company was justified in terminating her. Jefferson-Smurfit Corp. v. Graphic Communications International Union, Local 16-C, 103 LA 1041, 1048 (Canestraight, 1994).

The application of external law is dependent on the language of the CBA and the agreement of the parties. The union attorney must examine the entire agreement in order to determine whether a discrimination grievance is in the best interest of the member. If the contract contains no language regarding the use of external law, and there is no explicit or implicit intent from the parties as to its use, the union attorney may better serve the member by directing him or her to the EEOC or an equivalent agency. There, he or she may have a more viable claim of discrimination against the employer.

B. Limitations: Choice of Remedies Clauses and Compulsory Arbitration Clauses

1. Choice of Remedies Language

Many CBAs contain election of remedy (or "choice of remedy") clauses, most often in the Grievance Article, which are intended to limit the forums in which a member can pursue a discrimination claim. If the clause is drafted properly and does not limit the member's ability to exercise his or her rights under state and federal employment laws, it will be valid and enforceable. A poorly drafted clause will not be enforceable. The following is an example of an unenforceable choice of remedy clause:

If, as a result of the written Employer response in Step 3, the grievance involves the suspension, demotion or discharge of an employee who has completed the probationary period, the grievance may be appealed to either Step 4 (arbitration) or a procedure such as: Civil Service, Veteran's Preference, or Fair Employment. If appealed to any procedure other than Step 4, the grievance is not subject to the arbitration procedure as provided in this Article. The aggrieved employee shall indicate in writing which procedure is to be utilized – Step 4 or another procedure – and shall sign a statement to the effect that the choice of one procedure precludes the aggrieved employee from making an additional appeal through any other procedure.

This clause is unenforceable because it prevents a grievant from pursuing both arbitration and a discrimination claim over the same set of circumstances. A long line of cases have held
that an employee may not be precluded from both arbitrating a grievance and filing a charge of discrimination with an agency such as the Equal Employment Opportunity Commission.

In *Alexander v. Gardner-Denver Company*, the Supreme Court held that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII." 415 U.S. 36, 60 (1974). (The plaintiff filed a grievance following his discharge and, prior to the arbitration hearing, also filed a racial discrimination complaint with the EEOC. *Id.* at 1015-6.) This holding has become known as the *Gardener-Denver* doctrine. It has been applied in numerous cases, perhaps most notably *Equal Employment Opportunity Commission v. Board of Governors of State Colleges and Universities*, 957 F.2d 424 (1992).

In *Board of Governors*, the EEOC brought an action to challenge the legality of a collective bargaining agreement provision that denied employees the right to a grievance proceeding if the employee initiated a claim, including a discrimination claim, in an administrative or judicial forum. 975 F.2d at 424. The provision at issue stated:

If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, and employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure. *Id.*

The plaintiff, who was denied tenure, filed a grievance and an arbitration date was scheduled. *Id.* at 426. Six days prior to the arbitration, the plaintiff also filed a claim of discrimination with the EEOC. *Id.* The employer was not aware of the claim until after the arbitration hearing had concluded but before the decision had been rendered. *Id.* It instructed the arbitrator to make an award on the matter, which prompted the EEOC to file suit. *Id.*

The court determined that the contract provision which denied the plaintiff the right to arbitration constituted a retaliatory policy under Section 4(d) of the Age Discrimination in Employment Act, which makes it unlawful to discriminate against an employee because he or she participated in an investigation, proceeding, or litigation under the ADEA. 957 F.2d at 429. It used the term "retaliation" as opposed to "discrimination" as "a shorthand way to distinguish substantive age discrimination claims from claims of discrimination based on the exercise of legal rights granted by the ADEA." *Id.* at 427. The court stated that:

Under the collective bargaining agreement between the Board and the Union, an employee has a contractual right to an in-house grievance procedure. However, an employee loses that right if he files a charge of discrimination. [The contract provision] authorized the Board to take an adverse employment action (termination of the in-house grievance proceeding) for the sole reason that the employee has engaged in protected activity (filing an ADEA claim. Under [the provision] an employee must forfeit his contractual right
to a grievance proceeding, a condition of employment, or surrender his legal right to participate in litigation under the ADEA…

By inserting [the provision] in the collective bargaining agreement, the Board adopted a policy which impermissibly discriminates against employees who file ADEA complaints…Id. at 429-30.

The Board challenged the characterization of the provision as discriminatory because it applied to any employee who brings an employment related action in a judicial or administrative forum, not just an employee who brings a discrimination claim. The court rejected this argument, calling it “entirely irrelevant” that the employer could deny grievance proceedings on the basis of participation in unprotected activity. 954 F.2d at 430. “The Board may not deny grievance proceedings on the basis that the employees have filed protected ADEA claims. A policy is discriminatory when it discriminates against members of a protected class on the basis of an impermissible factor.” Id., citing Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

The court also rejected the Board’s assertion that it had a good faith reason for adhering to the contract provision, which was to avoid duplicative litigation, stating that it was “immaterial that an employee might have overlapping contractual and legal remedies.” Board of Governors, 957 F.2d 424, 428. The court cited the Gardener-Denver case, where “the Supreme Court observed that Congress intended to provide parallel and overlapping remedies against discrimination” and quoted the Gardener-Denver doctrine. Id. It stated that the doctrine was “particularly true where, as here, the contractual and legal proceedings involve different claims. [The plaintiff’s] grievance dispute concerns the Board’s failure to adhere to its established tenure procedure. However, his EEOC claim alleges age discrimination.” Id. at fn. 5.

The court ruled unequivocally that a “collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity under the ADEA.” Id. at 431.

The EEOC has long taken the position that an employee may not legally be prohibited from pursuing both an arbitration and a charge of discrimination. In EEOC Notice Number 915.002, which became effective on April 10, 1997, it states that “[a]n employer may not interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing or proceeding” under Title VII, the ADA, the ADEA, or the Equal Pay Act. It goes on to state that “[a]greements that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoot of the anti-retaliations provisions because they impose a penalty on those who are entitled to engage in protected activity under one or more of the statutes enforced by the Commission.” EEOC Notice No. 915.002, p. 4 (citing Board of Governors).

The Gardener-Denver doctrine continues to be applied in cases where a CBA provision requires an election of remedy which prohibits an employee from pursuing both an arbitration and a civil claim. See, e.g., Portland State University Chapter of the American Association of University Professors v. Portland State University, 291 P.3d 658 (2012); Trayling v. AFSCME
Local #2955, 119 FEP Cases 143, W.D. Mich., No. 1:11-cv-787, 6/19/13). The duplicative litigation defense continues to be rejected in such cases.

2. Compulsory Arbitration Language

The duplicative litigation defense is effective in cases involving compulsory arbitration language. The language must clearly and unmistakably require employees to arbitrate discrimination claims in order to be enforceable. See 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 186 LRRM 2065 (2009).

In 14 Penn Plaza LLC, several employees whose grievances concerning workplace reassignments were being arbitrated also filed a claim of age discrimination related to the reassignments with the EEOC. 186 LRMM at 2067. After being issued a right to sue letter, the employees filed suit against the employer, alleging that the reassignments were improperly based on age and therefore violated the ADEA as well as state and local laws prohibiting age discrimination. Id. The employer filed a motion to compel arbitration of the discrimination claims pursuant to the Federal Arbitration Act. Id.

The CBA contained the following provision:

§30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code,...or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination. Id. at 2067.

The District Court denied the motion. Id. at 2067. The Court of Appeals affirmed, relying on Gardener-Denver, stating that it held “that a collective bargaining agreement could not waive covered workers’ rights to a judicial forum for causes of action created by Congress.” 14 Penn Plaza LLC v. Pyett, 498 F.3d 88, 92 (2007).

The Supreme Court reversed. 14 Penn Plaza LLC, 186 LRRM at 2068. The Court held that, since the National Labor Relations Act “provided the Union and the [employer] with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA...there is no legal basis for the Court to strike down the arbitration clause in this CBA...” Id. at 2070.

The Court went on to distinguish the case from Gardener-Denver, noting that the holding in that case was “that the federal policy favoring arbitration does not establish that an arbitrator’s resolution of a contractual claim is dispositive of a statutory claim under Title VII.” Id. at 2071.
The CBA provision in *Gardener-Denver* "did not mandate arbitration of statutory antidiscrimination claims", giving an arbitrator only the authority to decide claims of contractual violations. *Id.* Therefore, the employee could not be prevented from also bringing a Title VII claim in court. *Id.*

In contrast, the provision in *14 Penn Plaza* specifically referenced statutory claims. "[A] collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law." *Id.* at 2076. A duplicative litigation defense would prevail in cases in which the CBA provision is similar to that of *14 Penn Plaza*.

In cases where the language is not clear and unmistakable, the duplicative litigation defense will likely not be effective. Generalized provisions which state that there will be "no discrimination" or which state that the parties will not discriminate in accordance with state and federal laws do not rise to the clear and unmistakable standard set forth in *14 Penn Plaza*. In order for "a waiver of an employee’s right to a judicial forum for statutory discrimination claims to be clear and unmistakable, the CBA must, at the very least, identify the specific statutes the agreement purports to incorporate or include an arbitration clause that explicitly refers to statutory claims." *Ibarra v. United Postal Service*, 695 F.3d 354, 194 LRRM 2177, 2181 (2012). *See also Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199 (2011).

**3. Drafting Contract Language for Discrimination Grievances**

There is no magic template of contractual language that will perfectly serve the needs of every member. Every member experiences their own unique workplace issues, and in discrimination cases the severity of the employer’s illegal conduct will dictate the type of language needed in the CBA. The problem, of course, is that the CBA is always negotiated prior to the member seeking representation from the Union. So what type of provision should the union negotiate?

In my opinion, the best contract language will allow the union seek redress for the member but not limit the member’s rights to pursue further civil claims. In other words, a broadly worded, general non-discrimination provision that does not require an election of remedies will be most advantageous to the union and the member. As discussed in §II.A, above, election of remedies clauses are not enforceable so they should never be negotiated into new CBAs. (Note, however, that some state statutes require members to elect either the grievance procedure or a veteran’s preference hearing. An election of remedies clause including veteran’s preference and excluding discrimination claims would be enforceable.)

There is an argument as to the benefit of compulsory arbitration provisions. Pursuing discrimination claims through the arbitration process means no attorney’s fees for the member – he or she is represented by the union on the basis of the monthly dues payment. This is, of course, a rather significant cost savings. There is, however, a rather significant downside to the arbitration process as well.

The member is almost always limited to actual or compensatory damages (the “make whole” remedy). The make whole remedy can include a variety of things. In *U.S. Dept. of Labor and American Federation of Government Employees, Local 12*, a female employee who had been
sexually harassed would have, but for the harassment, been promoted up the department's career ladder in the same manner as other employees who were not harassed. 98 LA 1129, 1134 (Barnett, 1992). The arbitrator order the employer to retroactively promote the grievant and to provide her with "back pay in the amount of the difference between what she actually earned and what she would have earned, taking appropriate step increases into effect..." Id. A similar award would likely result in a termination case involving discrimination.

Mental distress damages are rarely awarded in arbitration. For many arbitrators, it is simply not reasonable to conclude that the parties contemplated such damages when negotiating the arbitration provisions in the CBA. See, e.g., Champlain Cable Corp. and Teamsters Local 597, 108 LA 449 (Sweeney, 1997). This is true even where the CBA expressly states that discrimination is prohibited "as provided by law". See Union Camp Corp. and United Paperworkers International Union Local 1692, 104 LA 295 (Nolan, 1995) (arbitrator refused to award monetary damages for pain and suffering despite the CBA's reference to legally prohibited discrimination because the reference did not intend to vest the arbitrator with all the powers of a federal judge).

Punitive damages are also rare in arbitration. Unless the CBA expressly provides the arbitrator with that authority, it is likely that such damages will not be awarded unless "there is evidence of such bad faith as shock the conscience of the arbitrator." Elkouri & Elkouri, How Arbitration Works, 7th ed., Kenneth May, Editor-in-Chief, p. 18-30.

In cases where the discrimination was so severe that the member has been mentally or physically harmed, a compulsory arbitration clause will drastically limit the member's potential recourse for the employer's adverse actions. Further, if the member does not wish to remain working for the employer, an arbitration would be fruitless.

If the parties do negotiate a compulsory arbitration provision, it is in the best interest of the union and its members to also negotiate a provision allowing the arbitrator to award mental distress, punitive, and other types of damages.

Negotiating mediation provisions may also be effective. If the union can intercede early on in the discriminatory situation and bring in a neutral third party, the neutral may be able to educate the employer and its managers, or its employees, on why the actions taking place are discriminatory. An early intervention can often diffuse what would otherwise remain a ticking time bomb.

II. Reaching a Settlement Prior to Arbitration: How an iPad Saved a Teaching Assistant's Job

It is almost always to the benefit of both parties to resolve conflicts prior to arbitration. When issues arise resulting from an ADA qualifying invisible illness, the union can play an important role in the interactive process to craft a reasonable accommodation for the member. Unfortunately, this role usually develops as a result of a disciplinary action taken against the disabled member. The case that follows is an excellent example of the challenges and prejudices that an employee with an invisible illness may face, and demonstrates that when the employer is open to non-traditional reasonable accommodations everybody wins.
The grievant was a teaching assistant in a large metropolitan school district. Teaching assistants perform a variety of tasks to assist teachers in classrooms, educational programs, buses, lunchrooms, and other areas. They advise students and direct appropriate behavior, review and correct student work, and help students with workbooks and other materials, and perform many other related tasks.

The grievant contracted viral meningitis and, later, Rocky Mountain spotted fever as a child. Both illnesses caused the grievant to experience prolonged comas. As a result, the grievant had some cognitive impairment and a learning disability. The cognitive impairment presented primarily as short term memory loss. Because of her disability, she took longer to learn new things than someone without her disability. For example, learning to use a copy machine required repetition with multiple exposures to the same information before she could remember and master the task. If her daily routine or schedule was variable, she might forget what she needed to do and when she needed to do it. The delay in learning and retaining memory that came with her disability required repetition and predictability.

Despite her particular disability, the grievant was of normal intelligence. She had no difficulty expressing herself both verbally and in writing. She spoke some Spanish, and was moderately proficient in sign language. By all outward appearances, the grievant was “normal”.

The district was aware of the grievant’s disability at the time of hire. While no formalized reasonable accommodation was in place, the grievant was allowed to take necessary steps to perform her duties. With some exceptions, she worked successfully this way for many years. At various times, the grievant was counseled or given a performance improvement plan regarding her performance. She was able to complete the plans successfully, however, and her general success as a teaching assistant continued until the grievant was transferred to a different school and assigned to a new teacher.

The new teacher complained to the administration about the grievant’s work performance. The teacher felt that the grievant was being combative, and she did not believe that it was her responsibility to remind the grievant to perform her duties. After evaluating the teacher’s complaints and the grievant’s performance, the grievant and the district formalized a reasonable accommodation that would allow the grievant to meet the expectations of the new teacher. The accommodation included the following:

1. The grievant would work with younger students, in a pre-K or elementary setting, in a group no larger than four or five students.

2. The grievant would be given three to four days to establish a routine when any new duties were added, or changes were made to her schedule.

3. Work instructions would be reinforced through repetition.

4. Written instructions would be provided when possible.
5. The grievant would be given advance notice for changes in her assignment or schedule.

The grievant also began carrying a notebook in which she would make notes regarding her assignments and schedule, and wrote reminders as to when she needed to do certain things. The teacher objected to the notebook after several months, claiming that the grievant was writing things about her (the teacher). The teacher did not allow the grievant to use the notebook any longer.

The grievant was put on another performance improvement plan ("PIP") in 2014. Among the deficiencies noted in the PIP were: “requires frequent reminders to perform daily tasks”, “consistently throughout the school day must be reminded of what needs to be done”, “often must be reminded of what needs to be done”, and “fails to observe work hours and/or to follow schedules”. All of these notes were directly related to the grievant’s disability. This time, the grievant did not pass the plan, and was terminated. The union promptly filed a grievance on her behalf, arguing that the district had failed to provide the agreed upon reasonable accommodation.

The parties agreed to meet to try to resolve the matter. The union proposed that the grievant be allowed to carry and use an iPad to keep track of her schedule and daily tasks. The district would send the grievant a written list of daily responsibilities along with the time at which the responsibilities should be carried out. The grievant would be allowed to use the Notes app to write notes to herself when necessary. Using the calendar app, the grievant would get automatic reminders of when she needed to do a particular duty. The grievant would also receive written notice via the iPad if her schedule was being changed. Finally, the union reminded the district that it could not satisfy its obligations under the law if it continued to allow other staff members to interfere with or sabotage a reasonable accommodation.

The district agreed to the union’s proposal and reinstated the grievant. It provided her with an iPad, and the newly created reasonable accommodation allowed the grievant to successfully perform the duties of her position for the remainder of her tenure with the district.

III. Conclusion

Representing members with invisible illnesses can be both rewarding and frustrating for the union attorney. A settlement involving reasonable accommodations, or more effective reasonable accommodation, is the ideal result. If the case is arbitrated, the member can receive some measure of justice in the workplace so long as the contract contains the right language, and the right arbitrator hears the case. Without the right contract language, the best advice the attorney can give the member is to bring his or her concerns to the EEOC or a similar agency. It is difficult to tell a member that their problem cannot be solved by the union, but it is far more important to ensure that the member seek out the best and most appropriate forum for his or her claim.

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