BARGAINING FOR ACCOMMODATIONS

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Accommodations can be essential for the employment of people with disabilities but these accommodations face a potential conflict with contractual rights of other employees under a collective bargaining agreement. In the past fourteen years, courts have expanded upon the Supreme Court's deference to contractual rights, making it increasingly difficult for unionized employees to receive accommodations. The Supreme Court left room for parties to a collective bargaining agreement to resolve potential conflicts between accommodations and contractual rights. This article suggests that parties to a collective bargaining agreement, as well as employees with disabilities, would benefit from the use of bargaining to resolve such conflicts.

INTRODUCTION

People with disabilities often require accommodations to participate in the labor market. Any medical impairment or even a change in duties, may prevent an employee from continuing to work without some accommodation. If that employee is part of a bargaining unit, that accommodation may appear to infringe on other employees' rights under the applicable collective bargaining agreement ("CBA"). Instead of turning to collective bargaining to resolve such conflicts, employers have been allowed to deny accommodations for employees with disabilities based on real or even imagined conflicts with the terms of a CBA.

This potential conflict between an employee's right to reasonable accommodation under the Americans with Disabilities Act (ADA) and the provisions of a CBA raises questions about duties of employers and unions to comply with the ADA and their obligation to bargain under the National Labor Relations Act (NLRA) or public sector labor laws. This paper examines how bargaining can resolve these conflicts for the benefit of the employer, the union, and employees with disabilities.

Accommodations are intended to enable a person with a disability to perform his or her essential job duties,[1] providing a way for people with disabilities to overcome systemic subordination and oppression.[2] An employer must take reasonable steps to accommodate an employee's disability unless the accommodation "would impose an undue hardship on the operation of the business" of the employer.[3] Thus, accommodations can be required to preserve the employee's status as a "qualified individual," while the reasonableness of such accommodations rests on "the needs and disability of the employee and the resources and expectations of the employer."[4]

Even with this fairly broad duty to accommodate, the ADA has not fulfilled its promise to "substantially improve[]" the employment opportunities of persons with disabilities.[5] The state of employment for

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1. 42 U.S.C. § 12111(8) (2014).

2. Samuel R. Bagenstos, "*Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 830 (2003).

3. 42 U.S.C. § 12112 (b)(5)(A)(2014).

4. Carrie Griffin Basas, *Back Rooms, Board Rooms – Reasonable Accommodation and Resistance under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 68 (2008).

5. Scott Burris & Kathryn Moss, *The Employment Discrimination Provisions of the Americans with Disabilities Act: Implementation and Impact*, 25 HOFSTRA LAB. & EMP. L.J. 1, 3 (2007). *See also* David C. Stapleton, et al., *Has the Employment Rate of People with Disabilities Declined?*, CORNELL U. EMP'T & DISABILITY INST. 1 (Dec. 2004), *available at* http://www.ilr.cornell.edu/edi/publications/PB_EmpDecline.pdf [https://perma.cc/N5XK-XCHR] (stating that the decline in employment for persons with disabilities is real);

people with disabilities has been described as "at best, precarious."[6] In 2014, only 17.1% of persons with a disability were employed,[7] a decrease from 21.5% in 2009,[8] and significantly lower than the 64.6% rate for those without a disability.[9] This exclusion from the labor market has been characterized as "a significant waste of potential."[10] Accommodations are important to encourage participation of people with disabilities in the labor market since lack of access to employment often stems, at least in part, from impairments which limit one's ability to work.[11]

Since work is designed for the able-bodied, accommodations are sometimes necessary to achieve the ADA's goal of providing equal opportunity.[12] Although not confirmed by research, this lower employment rate logically arises from employers' refusal to provide accommodations since refusal to hire or discharge is often the result of refusing to provide an accommodation. Litigation under the ADA may be insufficient to expand employment opportunities for people with disabilities, since ADA complaints are rarely successful,[13] and complaints

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Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 917 (2001) (discussing the decline in employment among disabled persons after passage of ADA); Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L. J. 1, 19–20 (2004) (noting drop in employment rate for persons with disabilities during the 1990s); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RES. 693, 705 (2000) (noting that statistics show ADA led to relative decrease in employment).

6. Carrie Basas, *A Collective Good: Disability Diversity as a Value in Public Sector Collective Bargaining Agreements*, 87 ST. JOHN'S L. REV. 793, 799, 801 (2013) [hereinafter Basas, *A Collective Good*].

7. Bureau of Labor Statistics, U.S. Dep't. of Labor, *Persons with a Disability: Labor Force Characteristics – 2015* (June 16, 2015), http://www.bls.gov/news.release/disabl.nr0.htm [https://perma.cc/LS46-45CY]. [hereinafter Bureau of Labor Statistics, *Persons with a Disability 2015*].

8. Bureau of Labor Statistics, U.S. Dep't. of Labor, *Persons with a Disability: Labor Force Characteristics– 2009* (Aug. 25, 2010), http://op.bna.com/dlrcases.nsf/id/mroe-88nsrh/$File/ Disabilities%20Employment%202009.pdf [https://perma.cc/YMM6-NPBY]. [hereinafter Bureau of Labor Statistics, *Persons with a Disability 2009*].

9. Bureau of Labor Statistics, *Persons with a Disability*, *supra* note 7.

10. ILO, DISABILITY INCLUSION STRATEGY AND ACTION PLAN, 2014-17 1 (2015), http://www.ilo.org/wcmsp5/groups/public/—-ed_emp/—-ifp_skills/documents/genericdocument/wcms_370772.pdf [https://perma.cc/R9ZG-MWCJ].

11. Basas, *A Collective Good*, *supra* note 6, at 799.

12. *See* Office of the Architect of the Capitol v. Office of Compliance, 361 F.3d 633, 641-42 (Fed. Cir. 2004)(citing the ACA's goal of providing equal opportunity as a reason for mandating employer to provide reasonable accommodation); Helen A. Schartz, et al., *Workplace Accommodations: Evidence Based Outcomes*, 27 WORK 345, 349 (2006)(citing statistics demonstrating that the ACA allowed employers to provide opportunities to retain or promote a significant percentage of employees with disabilities by providing accommodations).

13. Kathryn Moss, *Unfunded Mandate: An Empirical Study of the Implementation of*

by applicants who might need accommodations are very rare.[14]

Rather than relying on litigation, access to the labor market for people with disabilities can be enhanced through collective bargaining, to fully realize the ADA's potential for providing accommodations. Rather than turning to bargaining to enhance the opportunities of people with disabilities, a CBA has sometimes created a barrier to providing accommodations that conflict with the interests or rights of other employees. Two studies have shown that the coverage of a CBA negatively affected the probability that an employee would be accommodated, at least in some ways. One study suggested that seniority provisions in CBAs may "mitigate against flexibility in work assignment," and another surmised that "union membership may be a constraint on the capacity of employers to make particular types of accommodations."[15]

When the ADA was adopted, some saw it as one more extension of individual rights "signaling and causing the demise of the industrial pluralist model of collective bargaining."[16] Instead of this either-or approach, the collective bargaining relationship should be seen as an opportunity for both employers and unions to fulfill their obligations under the ADA.

Some early attention was given to the potential conflict between the ADA and collectively bargained rights.[17] In 2000, one study noted that

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the Americans with Disabilities Act by the Equal Employment Opportunity Commission. 50 U. KAN. L. REV. 1, 110 (2001); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 105-08 (1999).

14. In 2015, only 6% of all ADA charges filed concerned hiring. *See* EEOC Charge Statistics, 2015, https://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm [https://perma.cc/TM8W-RUWJ] (documenting the number of charges filed and resolved under the ADA) and EEOC, Statutes by Issue, 2015, https://www.eeoc.gov/eeoc/statistics/enforcement/statutes_by_issue.cfm [https://perma.cc/9UBA-5WB2] (categorizing charges of employment discrimination by statute and type of discrimination).

15. Thomas N. Chirikos, *Employer Accommodation of Older Workers with Disabilities* in EMPLOYMENT, DISABILITY AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH 228, 245 (Peter D. Blanck 2000); Deborah B. Balser, *Predictors of Workplace Accommodation for Employees With Mobility-Related Disabilities*, 39 ADMIN. & SOC'Y 656, 672-74 (2007).

16. Richard Bales, *Title I of the Americans with Disabilities Act: Conflicts between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J. L. & PUB. POL'Y 161, 164 (1992-93). *See also* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 578-79 (1992) (overlapping systems endanger both collective and individual rights).

17. *See, e.g.*, Ann C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 U. MIAMI L. REV. 567, 569, 616-17 (1994) [hereinafter Hodges, *The Americans with Disabilities Act*] (discussing tensions that may arise between the ADA and collective bargaining agreements); Ann C. Hodges, *Protecting Unionized Employees*

unions were often involved in discussions about potential accommodations for employees with disabilities, but even then, only 45% were involved in grievance proceedings related to accommodations.[18] Since then, little or no research has considered the role of unions and collective bargaining in the provision of accommodations for employees with disabilities.[19] Lareau's guidance on drafting union contracts dedicates five pages to an explanation of the ADA, but fails to even mention the possibility that the parties could negotiate to lessen the ambiguities and potential conflicts that can arise under the ADA.[20]

Despite these early concerns, a CBA need not inhibit the provision of accommodations. Rather, judicial interpretation of the ADA's duty to accommodate leaves ample room for an employer and union to bargain about accommodations. In 2002, the U.S. Supreme Court held that a transfer as an accommodation may be unreasonable because of seniority rights of another employee under an employer's policy.[21] The Court was concerned particularly with protecting the established rights of other employees that preexisted the request for an accommodation.[22] Despite this respect for the rights of other employees, this decision also provides that an accommodation may be reasonable if it does not overly infringe on the rights of other employees or does not directly conflict with a contractual right.

The Supreme Court's decision did not concern a CBA, but both employers and courts have relied on this decision to avoid requiring an accommodation which allegedly conflicts with a CBA.[23] Both lower courts and the parties to CBAs have deferred to the Supreme Court's 2002 determination that collectively bargained rights typically prevail over conflicting requests for accommodation. This paper examines the courts' decisions that have applied the Supreme Court's decision and then discusses the potential for a greater role of collective bargaining in

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Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent, 2 EMP. RTS. & EMP. POL'Y J. 123, 151 (1998) [hereinafter Hodges, *Protecting Unionized Employees*] (citing a case in which the Supreme Court considered the tension between the ADA and collective bargaining agreements).

18. Susanne M. Bruyere, *Disability Employment Policies and Practices in Private and Federal Sector Organizations*, Ithaca, NY: Cornell University, School of Industrial and Labor Relations Extension Division, Program on Employment and Disability (2000).

19. Lisa Schur, et al., *Corporate Culture and the Employment of Persons with Disabilities*, 23 BEHAV. SCI. & THE L. 3, 14 (2005).

20. N. PETER LAREAU, DRAFTING THE UNION CONTRACT: A HANDBOOK FOR THE MANAGEMENT NEGOTIATOR §5A.10 (2008).

21. *U.S. Airways v. Barnett*, 535 U.S. 391, 404 (2002).

22. *Id.* at 405.

23. *Id.* at 404.

providing accommodations for the benefit of the employer, union, and employees with disabilities.

Bargaining over accommodations can be beneficial for employers, unions, and employees with disabilities. Employers can hire and retain valuable employees with disabilities by collaborating with the union to find accommodations that best fit their work environment.[24] The negotiation process itself can promote access to accommodations which are least disruptive to the workplace and earn the acceptance of co-workers.[25] Such collaboration can help employers avoid both litigation under the ADA and contractual claims from other affected employees. By engaging in this process, unions can establish their value to their membership while limiting the employer's discretion in making determinations about accommodations.[26] For employees with disabilities, negotiation enhances the ADA's obligation to accommodate by directing a union's resources to address the barriers to their success in the workplace.[27] Thus, bargaining over accommodations can help to expand access to the labor market for people with disabilities while still allowing an employer and union to confer over terms and conditions of employment in that workplace.

I. "CONFLICTING" OBLIGATIONS UNDER ADA & NLRA

Employers and unions must uphold the nondiscrimination provisions of the ADA, including the duty to provide reasonable accommodations. Reasonable accommodations can include shift changes, reassignment of nonessential duties, leave, and even transfer to another position, all of which can come into conflict with negotiated rights under a CBA.[28] At the same time, the NLRA obligates both employers and unions to fulfill their mutual obligations to bargain in good faith over changes in terms and conditions of employment, which can include the changes sought as accommodations.[29] While these obligations have been characterized as potentially conflicting, they can also be seen as an opportunity to fully address the purposes of the ADA's duty to accommodate.

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24. *See* notes 249-269 and accompanying text for discussion of the benefits to employers.

25. *Id*.

26. *See* notes 270-327 and accompanying text for discussion of benefits to unions.

27. *See* notes 328-358 and accompanying text for discussion of benefits to employees with disabilities.

28. 42 U.S.C. § 12111(9)(2014).

29. Judith Fornalik, *Reasonable Accommodations and Collective Bargaining Agreements: A Continuing Dispute*, 31 U. TOL. L. REV. 117, 127 (1999-2000); William J. McDevitt, *Seniority Systems and the Americans with Disabilities Act: The Fate of "Reasonable Accommodation" After Eckles*, 9 ST. THOMAS L. REV. 359, 373 (1997).

A. *Shared Duty to Accommodate under ADA*

Both employers and unions can be held responsible for a violation of the ADA, including the failure to provide reasonable accommodations.[30] Where the parties to a CBA fail to resolve an accommodation issue to the satisfaction of the employee with a disability, both the employer and union have been joined as defendants in failure to accommodate claims.[31] Given these obligations under the ADA, it is important to understand the role of a CBA in defining the scope of reasonable accommodations.

ADA's prohibition against discrimination extends to a "contractual or other arrangement or relationship which has the effect of subjecting a covered entity's qualified applicant or employee with a disability to discrimination," including the relationship with a labor union.[32] This prohibition applies to a CBA which could disproportionately exclude or hinder the opportunities of persons with disabilities,[33] unless that policy serves some business necessity.[34] For example, a CBA could not define job duties so broadly as to exclude people with disabilities from holding that position.[35] Arguably, then, a union's duties under the ADA include "either modifying a contract with discriminatory effects or waiving compliance with contractual provisions that cause discrimination."[36]

Keeping in mind this prohibition against contractual terms with a

30. Robert W. Pritchard, *Avoiding the Inevitable: Resolving the Conflicts Between the ADA and the NLRA*, 11 THE LAB. LAWY. 375, 381 (1996). Unions are covered entitles under ADA. *See* 42 U.S.C. § 12111(2) (1994) (stating that a labor organization is a covered entity under the ADA); *see also* Joanne J. Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, 1991 DET. C.L. REV. 925, 956-58 (1991) (distinguishing key differences between the ADA, which treats all covered entities identically, and the Rehabilitation Act of 1973, which places the duty to accommodate on the employer alone).

31. Pritchard, *supra* note 30, at 375.

32. 42 U.S.C. § 12112(b)(2)(2014).

33. Hodges, The Americans with Disabilities Act, *supra* note 17, at 586-88.

34. EEOC Interpretive Guidance on Title I of the Americans with Disabilities Act ("EEOC Guidance"), C.F.R. § 1630.4(2) (App) ("Employers can continue to use criteria that are job related and consistent with business necessity to select qualified employees"). *See also* Mary K. O'Melveny, *The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts?* 82 KY. L.J. 219, 241 (1994) (explaining that the ADA is not intended to limit an employer's ability to maintain a qualified workforce); Condon A. McGlothlen and Gary N. Savine, *Symposium: Individual Rights and Reasonable Accommodations under the Americans with Disabilities Act: Eckles v. Consolidated Rail Corp.: Reconciling the ADA with collective bargaining agreements: Is this the correct approach?* 46 DEPAUL L. REV. 1043, 1044 (1997).

35. *See, e.g., Lujan v. Pacific Maritime Association*, 163 F.3d 738, 742 (9th Cir. 1999).

36. Hodges, The Americans with Disabilities Act, *supra* note 17, at 586-88.

disparate impact without a business necessity, the legislative history of the ADA suggests that the terms of a CBA can help define the limits of reasonable accommodation. Rights created under a collective bargaining agreement may factor into determining whether a particular accommodation is reasonable; e.g., a seniority provision may factor into determining whether it is reasonable to reassign a disabled employee without the required seniority to a position.[37] Both the Senate and House cautioned that a CBA cannot alone justify a refusal to accommodate based on an arguably inconsistent CBA term.[38] This guidance, while described as "ambiguous," suggests the legislature intended that the duty to accommodate would outweigh conflicting contractual duties.[39]

Despite some ambiguity, the ADA's legislative history does not support giving absolute deference to seniority systems that conflict with an accommodation request. Unlike Title VII of the Civil Rights Act or the Rehabilitation Act of 1973, the ADA does not include any special status for seniority or any other collectively bargained rights.[40] This omission indicates that Congress did not intend to provide any special treatment for seniority unlike that provided under Title VII.[41]

If CBA language is not dispositive, how should employers and unions resolve conflicts between CBA language and an accommodation? The ADA's House Report and the Equal Employment Opportunity

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37. S. REP. NO. 101-116, at 132 (1989) *reprinted in* 1990 U.S.C.C.A.N. 303, 314; H.R. REP. NO. 101-485 at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314. *See also* John W. Boyle, Comment, *The Error of Eckles: Why Seniority Rights Present an Undue Hardship for Employees with Disabilities*, 35 DUQ. L. REV. 1023, 1034 (1997) (explaining that a seniority provision in a collective bargaining agreement may factor into determining whether it is reasonable to reassign a disabled employee without the required seniority to the position); McDevitt, *supra* note 29, at 373 (explaining that an employer cannot rely on CBA as an excuse for refusing accommodation).

38. 29 C.F.R. § 1630.6 (b) (1993). *See also* 34 C.F.R. § 104.11(c) (1993) ("A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party"); Eric H. J. Stahlhut, *Playing the Trump Card: May an Employer Refuse to Reasonably Accommodate under the ADA by Claiming a Collective Bargaining Obligation?*, 9 THE LAB. LAW. 71, 74, 90-91 (1993) (describing reasonable accommodation provision are to be construed more broadly than under Title VII or the ADEA; accommodation is "crucial vehicle by which the rights of the disabled are protected").

39. Pritchard, *supra* note 30, at 394; Stahlhut, *supra* note 38, at 88 (noting the absence of statutory protection for seniority shows Congressional rejection of deference to seniority given under Rehabilitation Act). *See also* Rose Daly-Rooney, Note, *Reconciling Conflicts Between the Americans with Disabilities Act and the National Labor Relations Act to Accommodate People With Disabilities*, 6 DEPAUL BUS. L.J. 387, 401, 403 (1994) (highlighting that Congress chose not to incorporate express provision exemption for rights under seniority systems).

40. Fornalik, *supra* note 29, at 132-33.

41. Ervin, *supra* note 30, at 961-62.

Commission's (EEOC) enforcement manual suggest that CBAs could allow an employer "to take all actions necessary to comply with [the ADA]".[42] This approach would allow an employer to provide an accommodation even if it conflicts with a CBA.[43]

Some characterize giving employers discretion to allow accommodations that could conflict with a CBA as "a poor and problem-ridden substitute for an ongoing dialogue between all of the parties affected by an ADA accommodation request."[44] Instead, the collective bargaining process can maximize the effectiveness of the ADA.[45] As one expert noted even before the ADA came into effect, "where the union secures a set of rights through bargaining, it should have the primary responsibility for sorting out those rights if a conflict arises."[46] The ADA's legislative history supports this idea and promotes an "individualized and contextual approach to determining disability accommodations" through a "compromise model...balancing seniority rights and disability accommodation."[47]

Likewise, both the EEOC and the NLRB have suggested that parties to a CBA can negotiate modifications when the CBA appears to conflict with the proposed accommodation.[48] The parties to a CBA can address requests for accommodation on a "case-by-case basis," since both are covered entities under the ADA, and therefore should meet to resolve accommodation requests.[49] Some have criticized this guidance for not explicitly stating which statutory right should prevail when the parties

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42. H.R. REP. NO. 101-485 (1990), *as reprinted in* 1990 U.S.C.C.A.N 68. *See also* Equal Employment Opportunity Commission, Technical Assistance Manual, 6, §§ 3.9, 7.1 l(a), 8 Lab. Rel. Rep. (BNA) 405:7007, 405:7050 (suggesting employers seek a provision in agreements to permit employers to take all actions to comply with the ADA).

43. Hodges, The Americans with Disabilities Act, *supra* note 17, at 573.

44. O'Melveny, *supra* note 34, at 235.

45. *Id*. at 221.

46. Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 USF L. REV. 169, 197 (1991).

47. Ravi A. Malhatra, *The Duty to Accommodate Unionized Workers with Disabilities in Canada and the United States: A Counter-Hegemonic Approach*, 2 J. OF LAW & EQUALITY 92, 125-26 (2003).

48. *See* Michael Ervin, *Seventh Circuit Ponders Limits of ADA When Act Conflicts With Union Contract,* DAILY LAB. REP. (BNA), Apr. 9, 1996 (noting that an attorney from the EEOC argued unions and management should be required to negotiate a variance to agreements in which seniority interferes with accommodations); EEOC Technical Assistance Manual, *supra* note 42, § 3.9(5). *See also* Robert A. Dubault, Note, *The ADA and the NLRA: Balancing Individual and Collective Rights*, 70 IND. L.J. 1271, 1282 (1995) (stating that unions should be included in discussions regarding grievance related accommodations).

49. Fornalik, *supra* note 29, at 136.

cannot agree to an accommodation,[50] thus ignoring the employer's ability to implement changes once the parties have reached an impasse.

This more collaborative approach is based on the hope that unions and employers will bargain to resolve potential conflicts between the ADA and collective bargaining agreements.[51] As outlined below, through bargaining, unions can "balance the right of the disabled employee under the ADA to the accommodation against the expectative interests and rights of the other bargaining unit members."[52] Some assert that bargaining over accommodations could put an undue burden on the employer, since employers' need to comply with the ADA could force bargaining concessions on other issues to obtain the union's consent to accommodations.[53] However, since the union has a corresponding obligation to avoid discrimination under the ADA, the pressure to find a solution would not be on the employer alone.

B. *Duty to Bargain under the NLRA*

Just as both parties to a CBA cannot discriminate under the ADA, both employers and unions are obligated to bargain in good faith under Sections 8(a)(5) and 8(b)(3) of the NLRA.[54] This duty extends to bargaining over any accommodation which "materially, substantially or significantly" affects terms and conditions of employment.[55] Since the determination of accommodation reasonableness should be made on a case-by-case basis, "an employer has sufficient discretion under the ADA to warrant requiring it to afford a union notice and an opportunity to bargain

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50. Boyle, *supra* note 37, at 1025, 1040-41.

51. *See, e.g.*, H.R. REP. NO. 101-485 at 63 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 345 ("[C]onflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodation may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation."); *Eckles*, 94 F.3d at 1051 (indicating that the EEOC read an actual duty into the ADA that employers and unions must negotiate a variance from seniority provisions). *See also* Boyle, *supra* note 37, at 1039 ("Both the EEOC and Congress had hoped that unions and employers would resolve potential conflicts between the ADA and collective bargaining agreements through waiver provisions in subsequent agreements.").

52. McDevitt, *supra* note 29, at 377.

53. Bales, *supra* note 16, at 184.

54. 29 U.S.C. § 158 (a)(5), (b)(3).

55. McDevitt, *supra* note 29, at 374-75. *See also* Fornalik, *supra* note 29, at 135 (explaining that if an employee needs an accommodation that will not materially, substantially or significantly alter working conditions, the employer has a duty to provide the accommodation).

about a proposed accommodation."[56] If the union refuses to bargain or the parties bargain to impasse,[57] then the employer can implement new terms and conditions of employment unilaterally.[58]

Nondiscrimination provisions have long been categorized as mandatory subjects of bargaining, so any proposals to implement or change such a provision must be bargained to the point of agreement or impasse before implementation.[59] Thus, parties have a duty to bargain in good faith over the elimination of discrimination in the workplace.[60] For example, an employer may violate its duty to bargain in good faith by insisting on a nondiscrimination clause which would "prevent the union from fulfilling its duty of fair representation and exposethe union to legal liabilities" under nondiscrimination statutes.[61] As the result of such bargaining, general prohibitions against discrimination are commonly included in CBAs.[62] Incorporation of the ADA specifically has been less common, but even in 1995, 49 of 400 sample CBAs included a provision promising compliance with the ADA.[63]

In the context of racially discriminatory practices, one court upholding an order for an employer to bargain over specific discriminatory practices noted that agreement to a general nondiscrimination clause means "little if the company would not also work to correct individual grievances."[64]

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56. Jerry M. Hunter, *NLRB General Counsel's Memorandum to Field Personnel on Potential Conflicts Raised by the Americans with Disabilities Act,* 158 DAILY LAB. REP. (BNA) at *2 (1992). *See also* O'Melveny, *supra* note 34, at 243.

57. *See* Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23 (1973) (establishing the definition of impasse as deadlock following bargaining in good faith).

58. TruServ Corp. v. NLRB, 254 F.3d 1105, 1113 (D.C. Cir. 2001).

59. *See* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 69 (1975) (highlighting that elimination of discrimination and its vestiges is an appropriate subject of bargaining); *see also* IUERMW v. NRLB, 648 F.2d 18, 25 (D.C. Cir. 1980) (affirming the elimination of discrimination and its vestiges is an appropriate subject of bargaining); Farmers' Coop. Compress, 169 N.L.R.B. 290, 295 (1968) (discussing a case where employer violated section 8(a)(5) by failing to bargain meaningfully over elimination of discrimination in the plant), *aff'd sub nom*. United Packinghouse Workers Int'l Union v. NLRB, 416 F.2d 1126, 1133 (D.C. Cir. 1969).

60. *Farmers' Coop. Compress*, 169 N.L.R.B. at 295.

61. *Graphic Arts Int'l Union*, 235 NLRB 1084, 1084 (1978).

62. *See* Lareau, *supra* note 20, § 5A-10 ("It has been estimated that 94% of all collective bargaining agreements contain a non-discrimination clause."). *See also* Bureau of Nat'l Affairs, Inc., BASIC PATTERNS IN UNION CONTRACTS 127 (BNA Books 14th ed. 1995) [hereinafter BNA, *Basic Patterns*] (reporting that in 1995, 87% of CBAs banned discrimination based on face, color, creed, sex, national origin or age, and 65% extended prohibition to at least one of: political affiliation, marital status, mental or physical handicap, Vietnam veteran, sexual preference).

63. BNA, Basic Patterns, *supra* note 57, at 128.

64. United Packinghouse, Food & Allied Workers Int'l Union v. NLRB, 416 F.2d 1126, 1132-33 n. 10(D.C. Cir. 1969).

Bargaining allows the union to have input "to ensure that the employee's rights are protected and to reduce the chance for conflict."[65]

Under this approach, any changes to policies concerning terms and conditions of employment which allow for accommodations would constitute mandatory subjects of bargaining. Additionally, an individual request for an accommodation could create an obligation to bargain if it would require a material, substantial or significant change in working conditions for the employee seeking the accommodation or co-workers who are affected by that accommodation.[66] For example, an employer was obligated to bargain over a request for a permanent day shift assignment as an accommodation.[67]

Some accommodations may not create a corresponding duty to bargain if there is no effect on terms or conditions of employment. For example, employees would not be required to bargain over accommodations which allow the employee to perform the same job in a different way or allow for performance of nonessential duties by a supervisor; neither of these changes would infringe on any expectations of bargaining unit members.[68] Similarly, some accommodations can be seen as variations in the employer-employee relationship which do not alter that relationship,[69] such as telework or using alternative means of communication.

Like changes that do not affect terms or conditions of employment, accommodations that do not give an employee with a disability an

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65. O'Melveny, *supra* note 34, at 229. *See also* Hunter, *supra* note 56, at 2 (quoting "employer that arranges a reasonable accommodation with an employee which would change working conditions without negotiating with the affected union may be liable for 'direct dealing' with the employee [in violation of the NLRA]").

66. Hodges, *The Americans with Disabilities Act*, *supra* note 17, at 569, 616-17. *See also* Seth D. Harris, *Re-Thinking the Economics of Discrimination: U.S. Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123, 136 (2003) (explaining that employers are obligated to obey CBA or bargain for its modification); Brian P. Kavanaugh, *Collective Bargaining Agreements and the Americans with Disabilities Act: A Problematic Limitation on "Reasonable Accommodation" for the Union Employee*, 1999 U. ILL. L. REV. 751, 761 (1999) (explaining that the ADA grants bargaining power to the union in instances where accommodations made for an employee require job reassignment or circumventing seniority provisions).

67. Industria Lechera De Puerto Rico, Inc. and Congresso De Uniones Industriales De Puerto Rico, 344 NLRB No. 133 (2005).

68. Hunter, *supra* note 56, at 2; Pritchard, *supra* note 30, at 389 (noting an employer can unilaterally implement changes in working conditions if changes are not material, substantial or significant).

69. Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 568-70, 73 (2013) [hereinafter Porter, *Martinizing Title I*] (borrowing fundamental alternation of relationship rule from *Martin v. PGA*).

advantage over his or her co-workers do not require bargaining.[70] Arguably this would include providing an employee with a transfer to a position for which he or she lacks the requisite seniority, where the only alternative is discharge, since such a transfer would not give that employee an unfair competitive advantage.[71]

Neither party has any obligation to bargain regarding a mandatory subject of bargaining, such as an accommodation, during the term of a CBA,[72] since neither party is obligated to consent to the modification of a current CBA unless it includes an agreement to do so.[73] At the same time, the parties can facilitate the accommodation process by agreeing to a procedure for considering accommodation requests, including a reopener clause in the CBA to allow midterm negotiations over such requests.[74] Agreement to such a process would decrease the potential for failure to negotiate claims or for violation of a CBA if a request for an accommodation is made.

II. DEFERENCE TO CBA'S IN THE COURTS

The ADA provides an affirmative right to reasonable accommodations that do not impose an undue hardship on the employer.[75] The Supreme Court has recognized that accommodation sometimes requires differential treatment.[76] While some characterize employers as "reasonably responsive" to employees' requests for accommodation,[77] employers may feel less inclined or even prohibited from providing an accommodation which conflicts with provisions of a CBA. Both the Supreme Court and the lower federal courts generally have resolved this potentially conflicting obligation by allowing deference to the terms of a CBA at the cost of the employee with a disability. The courts have failed to recognize the potential for parties to a CBA to incorporate their duty to accommodate into their CBA to avoid such conflicts, or to

70. *Id*. at 570, 573.

71. *Id*. at 575-76.

72. Pritchard, *supra* note 30, at 412.

73. *See, e.g*., Boeing Co., 337 NLRB 758 (2002) (holding the respondent did not fail to bargain in good faith with the Union regarding compensation and benefit plans to cover affected employees because in the absence of a provision in the contract, parties have no obligation to bargain during mid-term of an agreement).

74. Dubault, *supra* note 48, at 1280-81.

75. 42 U.S.C. § 12112(b)(5). *See also* Harris, *supra* note 66, at 144 (noting that plaintiffs have the low-bar burden of proving their accommodation is reasonable in court).

76. *Barnett*, 535 U.S. at 397.

77. Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 307 (2008).

bargain over individual accommodation requests so as to resolve any such conflict.

A. *Supreme Court and Accommodations*

In its 2002 decision, the Supreme Court found that an employer's seniority policy is relevant but not conclusive as to whether a transfer would be a reasonable accommodation when another employee seeks that position based on their seniority.[78] The Supreme Court has not directly addressed the conflict between an employer's obligation to accommodate under the ADA and its obligations under a CBA. Yet this decision has been relied upon by lower courts in deferring to policies in a CBA to justify the denial of an accommodation.[79]

The *Barnett* Court explained that an employer's seniority policy generally was entitled to deference based on "the importance of seniority to employee-management relations,"[80] which includes fulfillment of employee expectations of fair, uniform treatment.[81] At the same time, the Supreme Court recognized that where a policy has included either formal or informal exceptions, an employer cannot rely on a strict interpretation of that policy to deny an accommodation.[82] If these exceptions, or "special circumstances" are built into a policy, then co-workers of the employee requesting an accommodation do not have pre-existing expectations worthy of such deference.[83] Thus, if the CBA clearly provides for accommodations as exceptions to a seniority policy or some other contractual provision, then employees' expectations will not be violated by provision of accommodations without consideration of the seniority of the person with a disability.

The Court's decision recognizes that under a seniority system, co-workers of employees seeking accommodation "have rights and interests that are both legitimate and significant."[84] In general, seniority systems

78. *Barnett*, 535 U.S. at 397.

79. *See, e.g.*, Manigan v. Southwest Ohio Reg'l Transit Auth., 385 F. App'x 472, 477 (6th Cir. 2010) (noting shifts can be assigned based on seniority under the CBA).

80. *Barnett*, at 403.

81. Harris, *supra* note 66, at 171.

82. *Barnett*, at 405.

83. *Id*.

84. Lisa E. Key, *Co-Worker Morale, Confidentiality, and the Americans with Disabilities Act*, 46 DEPAUL L. REV. 1003, 1013, 1033, 1039 (1997). *See also* Agnieszka Kosny, et al., *Buddies in Bad Times? The Role of Co-Workers after a Work-Related Injury*, 23 J. OCCUPATIONAL REHAB. 438, 439 (2013) (finding that co-workers may resent employees with limitations if their workload increases or the employee is provided with easier work); Debra A. Dunstan & Ellen MacEachen, *Bearing the Brunt: Co-workers'*

have been characterized as "the employer's sunk investments/delayed dividends contract with its employees."[85] In CBAs, seniority provisions are often adopted because employers and unions perceive various benefits, including more efficient administration and the avoidance of claims of favoritism and discrimination in personnel actions, such as layoffs, transfers, and shift assignments.[86] Despite this important role of seniority in CBAs, it is important to recognize that the rights associated with seniority are a product of contract negotiation. If the parties to a CBA decide to create exceptions for accommodations in the CBA's seniority policy, or any other provision, then that intention of the parties should be enforced.

The *Barnett* Court's deference to an employer's seniority policy should not prevent or even discourage bargaining over CBA provisions which could conflict with a requested accommodation. Under the Court's reasoning, parties to a CBA can negotiate exceptions to general policies to fulfill their obligation to accommodate under the ADA. The Court gave deference to an employer's unilaterally implemented policy. A CBA is an agreement between an employer and a union that has the authority to represent the members of its bargaining unit. With this authority, a union can agree at any time to renegotiate the terms and conditions of employment encompassed in the CBA or not addressed therein.

Even if the parties have not negotiated exceptions to a policy in a CBA, negotiation regarding an individual request for accommodation can still resolve a conflict that arises. Rights created by a CBA are dependent on the continuation and enforceability of that CBA.[87] Employees represented by a union are always on notice that their rights can change according to the priorities established by their union representative.[88] Thus, one can also conclude that a union is empowered to negotiate changes or exceptions to a policy or practice

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Experiences of Work Reintegration Processes, 23 J. OCCUPATIONAL REHAB. 44 (2013) (noting that an employee who is accommodated can have a ripple effect on satisfaction of co-workers); Hodges, The Americans with Disabilities Act, *supra* note 17, at 601-02 (observing that decisions under Title VII and Rehabilitation Act ruled in favor of enforcing seniority and focused on protecting expectations of other employees).

85. Harris, *supra* note 66, at 126.

86. Daly-Rooney, *supra* note 39, at 407. *See also* Matthew A. Shapiro, *Lab. Goals and Antidiscrimination Norms: Employer Discretion, Reasonable Accommodation, and the Costs of Individualized Treatment*, 32 YALE L. & POL'Y REV. 1, 14, 30 (2013) (stating that seniority systems protect against "personal retaliation or preference").

87. Douglas E. Ray, et al., Understanding Labor Law 289-90 (Lexis Nexis 4th Edition 2014).

88. *Id*. at 355.

which conflicts with an accommodation request. Acceptance of such an exception can be based on the union's recognition that the economic interests and rights of co-workers, such as under a seniority policy, may be overridden to advance an important social policy, like accommodation under the ADA.[89] For example, exceptions to a seniority provision of a CBA can be justified by the fact that absent past discrimination or the need to take leave because of their impairment, many more people with disabilities would have been in the workforce earning seniority.[90]

The reasoning of the *Barnett* Court still allows parties to a CBA to structure its provisions so as to allow for preservation of rights and privileges such as those based on seniority, while still allowing the parties to negotiate regarding the provision of reasonable accommodations. The CBA itself can be structured so as to recognize the duty to accommodate alongside other CBA rights, so that an accommodation would not in fact conflict with the CBA provision and therefore would not undermine the expectations of other employees. Secondly, if the parties engage in negotiations over requests for accommodations as part of the interactive process required by the ADA, that process can result in exceptions to the general CBA provisions. Under *Barnett's* exception for special circumstances, the parties to the CBA could then interact with the employee with a disability to ensure that his or her ADA rights are protected while still considering the interests of his or her co-workers.

B. *Lower Courts Balancing of Accommodations vs. Contractual Rights*

Lower courts have interpreted *Barnett* to address conflicts between an accommodation and CBA provisions, as well as employer policies. Many of these lower courts have applied *Barnett* broadly, finding that employers need not provide an accommodation which contradicts provisions of a CBA or any other non-discriminatory policy.[91] These attempts to interpret and apply the *Barnett* decision fail to recognize the important role of collective bargaining in the consideration of accommodation requests.

Since *Barnett* concerned a non-union operation, the undue hardship

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89. Kymberly D. Hankinson, Commentary, *Navigating Between a Rock and a Hard Place: An Employer's Obligation to Reasonably Accommodate the Disabled in the Unionized Workplace*, 15 J. OF CONTEMP. HEALTH LAW & POL'Y 245, 259 (1999).

90. Daly-Rooney, *supra* note 39, at 411; Harris, *supra* note 66, at 128, 135.

91. *See, e.g.*, Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 457 (6th Cir. 2004) (noting that an employer need not, "violate other employees' rights under a collective bargaining agreement . . . in order to accommodate a disabled individual").

only concerned the employer's own policy. Since that decision, its reasoning has been applied to unionized workplaces, giving deference to policies encapsulated in a CBA. Even though the union has obvious interests at stake in the adherence to a CBA's provisions, courts have focused on the potential that an accommodation in conflict with a CBA's provisions would cause undue hardship to the employer only.[92] This assumes that the employer has a distinct interest in the enforcement of the CBA.

Interpreting *Barnett* broadly, courts typically have not required an employer to provide any accommodation that contravenes a seniority provision.[93] Virtually all CBAs include seniority provisions,[94] which

92. *See, e.g.*, Roberts v. Kaiser Found. Hospital, No. 2:12-cv-2506-CKD, 2015 U.S. Dist. LEXIS 16169 at *19 (E.D. Cal. Feb. 10, 2015) (noting that the ADA requires reasonable accommodation to be provided "unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]").

93. Denczak v. Ford Motor Co., 215 Fed. Appx. 442, 445-46 (6th Cir. 2007) (noting that the position plaintiff sought was filled based on seniority and the ADA did not require the employer "to displace existing employees from their positions"); Dunderdale v. United Airlines, 807 F.3d 849, 855-6 (7th Cir. 2015) (finding no special circumstances existed where employer had applied seniority bidding system consistently); Toland v. AT&T, Bellsouth Telecomm. Inc., 489 Fed. Appx. 318, 320 n. 7 (11th Cir. 2012) (noting an employer does not have to breach seniority to accommodate a disabled employee); Manigan, 385 Fed. Appx. at 477 (6th Cir. 2010) (noting that shifts were assigned based on seniority under the CBA); Toronka v. Cont'l Airlines Inc., 411 Fed. Appx. 719, 725 (5th Cir. 2011) (noting that plaintiff lacked seniority for shift of position he could perform); Toland v. AT&T, Bellsouth Telecomm. Inc., 489 Fed. Appx. 318, 320 n. 7 (11th Cir. 2012) (noting an employer does not have to breach seniority to accommodate a disabled employee); King v. City of Madison, 550 F.3d 598, 600 (7th Cir. 2008) (finding that plaintiff lacked seniority to bump others in her bargaining unit); Ceska v. City of Chi., No. 13 C 6403, 2015 U.S. Dist. LEXIS 12318 *11-12(N.D. Ill. Feb. 3, 2015) (finding that plaintiff failed to present any special circumstances to justify transfer without seniority); Daughtry v. Army Fleet Support, LLC, 925 F. Supp. 2d 1277, 1283 (M.D. Ala. 2013) (determining that the position sought by plaintiff was filled by others with more seniority); Boitnott v. Corning Inc., No. 7:06-CV-00330, 2010 U.S. Dist. LEXIS 59269 at *33-34 (W.D. Va. June 15, 2010), *aff'd on other grounds*, 669 F.3d 172(4th Cir. 2012) (determining that employer did not need to change shifts assigned based on seniority); Herr v. City Of Chi., 479 F. Supp. 2d 834, 840 (N.D. Ill. 2007) (finding plaintiff was not excluded from the position because he lacked the seniority to be given day shift under the CBA); Fiumara v. President and Fellows of Harvard College, 526 F. Supp. 2d 150, 157 (D. Mass. 2007) (finding that plaintiff was not eligible for the position because it was given to a senior qualified bidder under CBA); Thomson v. Henderson, Postmaster Gen., NO. 3:02CV-224-S, 2006 U.S. Dist. LEXIS 12979 at *17 (W.D. Ky. March 21, 2006), *aff'd by* Thompson v. Henderson, 226 Fed. Appx. 466 (6th Cir. 2007) (ruling that a CBA which required that the employee be a senior bidder to transfer into permanent position was a legitimate job process); Desmond v. Gober, No. 00-6261, 2006 U.S. Dist. LEXIS 51395 at *19 (D. N.J. July 27, 2006) (determining that the accommodations plaintiff demanded were not provided under employer's seniority system); Adams v. TRW Auto. U.S. LLC, No. 3:03-1240 2005 U.S.

often play a role in promotions and transfers as well as the recall rights of laid off employees.[95] Given their commonality, this deference to seniority has a significant negative impact on requests for accommodations which arguably conflict with such a policy, including the opportunity to transfer.[96] Consequently, the claims of numerous employees with a disability have been dismissed because the employee sought a transfer into a position to which another employee claimed rights under a CBA.

The broad application of *Barnett* since 2002 has resulted in the discharge of many employees with disabilities. This deference to CBA provisions has been expanded beyond seniority to bar claims of employees who seek accommodations which limit an employer's authority or discretion which has been retained under a CBA or its own policy.[97] For example, the claim of a post office employee seeking assignment to a particular shift was dismissed based on that employer's retention of authority to assign employees to any shift under the CBA.[98] The court concluded that the accommodation would "violate" the CBA,[99] when in fact the accommodation was within the employer's discretion allowed under the CBA.

Similarly, such deference has been paid to contractual clauses giving recall or transfer preference to laid off employees.[100] These limitations have justified an employer's failure to provide an accommodation even where there was no apparent effect on the rights or interests of other employees. In one case, an employee's request to transfer to other facilities where work that he could perform was available was deemed unreasonable,

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Dist. LEXIS 39636 at *54-60 (M.D. Tenn. July 22, 2005) (determining that the position plaintiff sought as accommodation was filled by person with greater seniority); Rodgers v. Norfolk S. Corp., 304 F. Supp. 2d 961, 970 (S.D. Ohio 2003) (observing that plaintiff lacked seniority to transfer into a position she could perform).

94. Kavanaugh, *supra* note 66, at 771. *See also* Malhatra, *supra* note 47, at 123 (noting that an "overwhelming majority of collective agreements" contain a seniority provision).

95. BNA, *Basic Patterns*, *supra* note 57 at 85-87.

96. *Id*. (CBAs between Big Bear Stores Co. and Multiunion (so far as is practicable), Jacobs Vehicle Equipment Co. and Auto Workers, Smith Meter Inc. and Auto Workers, Elliott Turbo Machinery Co. and Steelworkers). *Id*. at 87. (Transfer requests consider seniority under 57% of CBAs, including 8% where seniority is sole factor, 54% as the determining factor among qualified applicants, and a secondary factor in 28%.)

97. *See, e.g*., Mattingly v. Univ. of S. Fla. Bd. of Tr., 931 F. Supp. 2d 1176, 1185-86 (M.D. Fla. 2013) (noting an employer is not required to allow an employee with disability to work a shorter shift than required by the employer's shift policy or to transfer into different position without "permanent status" as required by CBA).

98. Runkle v. Potter, 271 F. Supp. 2d 951, 952 (E.D. Mich. 2003).

99. *Id*. *See also* Murray v. AT&T Mobility LLC, No. 08-3159, 2009 U.S. Dist. LEXIS 84117 at *43 (C.D. Ill. Sept. 15, 2009) (failing to explain how use of vacation time provided by a CBA would impede the rights of other employees).

100. Kempter v. Mich. Bell Tel. Co., 534 Fed. Appx. 487, 492 (6th Cir. 2013).

based on the limitations in the CBA that only allowed transfers for current or laid-off employees, thereby excluding the plaintiff because he was not currently working due to his disability.[101] This claim was dismissed without any showing that considering him for those positions would have imposed any undue hardship on the employer or infringed on the rights of other employees.[102]

Broad applications of *Barnett* have extended to allow the denial of an accommodation based on restrictions or procedures established in a CBA, even without any demonstrated impact on the rights of other employees. For example, a request for meal breaks by an employee with a disability was deemed unreasonable because the applicable CBA provided that employees in that position were not allowed a mealtime break,[103] without any showing that his taking of breaks would cause any undue hardship for the employer or infringe on the rights or even interests of other employees. Similarly, an employer was not required to offer training to an employee with a disability which would allow him to transfer to another position he could perform, because he had not completed an "'expression of interest' form" required under the CBA.[104] There was no showing that allowing him to participate in the training, based on his verbal expression of interest, would cause any undue hardship on the employer or infringe on other employees' rights or interests.[105]

Going one step further, one court denied a plaintiff's request for an accommodation in part because that employee had failed to file a grievance in connection with her need to transfer to another position.[106] Because the applicable CBA stated that a grievance regarding job assignment "will be initiated" if management's decision conflicts with a personal physician's opinion, the court concluded that this "unwillingness to follow the proper procedure" showed that she had failed to request an accommodation, even though she had filed a grievance earlier to seek placement in a position she could perform.[107] Without a second grievance, the employer was "without authority" to transfer or reassign her, and therefore the accommodation was unreasonable because the

101. VeuCausovic v. Ford Motor Co., No. 11-15488, 2013 U.S. Dist. LEXIS 10668 at *11, *21-25 (E.D. Mich. January 28, 2013).

102. *Id*.

103. Meador v. Metro. Water Reclamation Dist. of Greater Chi., No. 06 C 2705, 2007 U.S. Dist. LEXIS 85719 at *32-34 (N.D. Ill. November 15, 2007).

104. Coppett v. Tenn. Valley Auth., 987 F. Supp. 2d 1264, 1284 (N.D. Ala. 2013).

105. *Id*. at 1284.

106. Lockard v. General Motors Corp., 128 F. Supp. 2d 458, 467-68, n. 9 (N.D. Ohio 2001)

107. *Id*.

employer was not required to violate the terms of the CBA.[108] This court's logic completely inverts the reasoning of the Court in *Barnett* that sought to protect the interests of other employees. Instead, this court allowed the employer to use the CBA as a shield against its ADA obligations, arguing that if an employee does not assert her rights under the CBA, any accommodation would be prohibited by that same CBA.

These decisions demonstrate the broad, perhaps unintended effect of the Court's *Barnett* decision. Employers have been allowed to deny any accommodation which could arguably conflict with any provision in a collective bargaining agreement, regardless of the impact of that accommodation on the rights or even the interests of other employees. This approach ignores the obligation of both employers and unions to implement the ADA, and the ability of the parties to negotiate changes to a CBA so as to address any conflicts that might arise between that CBA and a requested accommodation.

C. *An Alternative Approach*

In contrast to the dismissed claims outlined above, a small number of courts have been more hesitant in denying accommodations based on policies or CBA provisions that do not directly implicate the rights or interests of other employees.[109] One court explained that unlike rights based on seniority, other contractual rights or provisions may not "trump" the duty to provide an accommodation which conflicts with that provision, particularly if the employer cannot show that the accommodation would have an "adverse effect on the collectively-bargained promotional rights of other employees or would have interfered with or compromised the reasonable expectations of other employees under other provisions of the CBA."[110]

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108. *Id*.

109. *See* Shapiro v. Twp. Of Lakewood, 292 F.3d 356, 359-61 (3d Cir. 2002) (explaining employees seeking transfers as accommodations may not be required to follow employer's application procedures where employer is aware of disabled employee's need to transfer); *Compare* Tish v. Magee-Women's Hosp. of Univ. of Pittsburgh Med. Ctr., No. 2:06-CV-820, 2008 U.S. Dist. LEXIS 87010 at *54-55 (W.D. Pa. Oct. 27, 2008)(noting employer's failure to establish the application process for transfers prevented consideration of plaintiff's transfer as accommodation) *with* a pre-*Barnett* decision: Calvin v. Ford Motor Co., 185 F. Supp. 2d 792, 796-99 (E.D. Mich. 2002) (finding that the employee failed to submit bid for positions sought as accommodation, as required by CBA, despite letter of understanding between union and employer that parties would work together to make reasonable efforts to place medically restricted employees).

110. Doe v. Town of Seymour, No. 3:95CV1538(AHN), 1998 U.S. Dist. LEXIS 676 at *11-12 (D. Conn. Jan. 16, 1998).

The importance of such exceptions has been recognized by some lower courts interpreting *Barnett*. These courts have been reluctant to deny an accommodation based on an employer policy, other than seniority, that did not constitute a "long-standing rule that might be said to have created expectations of consistent, uniform treatment."[111] This same logic has led to a refusal to defer to an employer's determination that an employee seeking a transfer as an accommodation is "less qualified" than other applicants for an open position.[112] One circuit court explained that such a policy "does not involve the property-rights and administrative concerns (and resulting burdens) presented by the violation of a seniority policy."[113]

Courts refusing to deny a transfer as an accommodation because the employer deemed someone else to be "[more] qualified" have reasoned that an employer should not be allowed to deny an accommodation based on its own application of vague, subjective criteria,[114] where the accommodation would not thwart established employee expectations. As explained by one trial court, Congressional intent could be undermined if an employer could refuse to reassign a disabled person by always referring to a policy of hiring the most qualified person for a job, although that court went on to find that "[i]t is the province of employers, not courts, to determine which applicants are most qualifiedfor an open position."[115]

Even courts that allow an employer to deny transfer as an accommodation require that the employer establish that the position sought as an accommodation actually was filled by a better qualified applicant,[116] or that the employer would have at least considered the plaintiff's evidence

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111. Moore v. Hexacomb Corp., 670 F. Supp. 2d 621, 629-31 (W.D. Mich. 2009).

112. Smith v. Midland Brake, Inc., a Div. of Echlin, Inc., 180 F.3d 1154, 1184 (10th Cir. 1999) (*en banc*); EEOC v. United Airlines, 693 F.3d 760, 764-65 (7th Cir. 2012); Midland Brake, Inc., a Div. of Echlin, Inc., 180 F.3d at 1164-70; Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1296-98 (D.C. Cir. 1998) (*en banc*). *See also* Alston v. Washington Metro. Area Transit Auth., 571 F. Supp. 2d 77, 83-84 (D.D.C. 2008) (applying *Aka*).

113. *United Airlines*, 693 F.3d at 764.

114. Shapiro, *supra* note 86, at 44.

115. Chapple v. Waste Mgmt., Inc., No. CIV. 05-2583 ADM/JSM, 2007 U.S. Dist. LEXIS 14151 at *33 (D. Minn. Feb. 28, 2007).

116. King v. City of Madison, 550 F.3d 598,600 (7th Cir. 2008) (finding plaintiff was not most qualified for positions outside her bargaining unit, for which she was only entitled to compete under CBA); Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483-84 (8th Cir. 2007), *cert. granted in part*, 552 U.S. 1074, (2007), *cert. dismissed*, 552 U.S. 1136, (2008); Carpenter v. Ohio Health Corp., No. 2:09-CV-965, 2011 U.S. Dist. LEXIS 113067 (S.D. Ohio Sept. 30, 2011); Haynes v. AT&T Mobility, LLC, No. 1:09-CV-450, 2011 U.S. Dist. LEXIS 12066 at *14-15 (M.D. Pa. Feb. 8, 2011); Garcia v. Whirlpool Corp., No. 3:08-CV-02944, 2010 U.S. Dist. LEXIS 118409 at *17-18 (N.D. Ohio Nov. 5, 2010), *aff'd (per curium)*, 2012 U.S. App. LEXIS 7327 (6th Cir. 2012).

that he or she was more qualified than the person selected.[117] These decisions demonstrate how deference to an employer's discretion, discussed in more depth below, can allow an employer to rely on its policies or even unsubstantiated hiring preferences, to deny an accommodation. Such discretion can be limited through negotiation.

As recognized by a small number of courts, there are several reasons why an accommodation which appears to or has the potential to contradict a CBA provision is not necessarily unreasonable or the cause of an undue burden. First, the employee with a disability may not actually require an accommodation which violates or even deviates from a bargained policy so as to interfere with another employee's rights.[118] If an accommodation which does not conflict with a CBA would facilitate the employee's work, then the employer need not provide the accommodation which could potentially conflict.[119] Given a union's familiarity with not only the CBA but the work performed and the employees who perform it, negotiation could help to reveal other possible accommodations which would not create such a conflict.

Even if the only available accommodation appears to conflict with a CBA, courts should not presume that an accommodation that contradicts a seniority policy will necessarily affect the rights or interests of co-workers.[120] If the skills and knowledge which are rewarded through a seniority system are firm-specific or related to the employee's previous job, then the employee seeking a transfer based on his or her seniority should not suffer a loss due to an accommodation that prevented that transfer.[121] Under this approach, courts should only find an undue hardship based on an accommodation's actual conflict with a seniority system after understanding the purposes of that system.[122]

Courts should also consider the specific circumstances surrounding a requested accommodation before assuming that a conflict with a seniority

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117. *See* Marshall v. AT&T Mobility, 793 F. Supp. 2d 761, 768 (D.S.C. 2011) (dismissing claim because plaintiff failed to present evidence that he was most qualified for positions sought as accommodation); Jackson v. FUJIFILM Mfg. USA, Inc., No.: 8:09-1328-RBH-BHH, 2010 U.S. Dist. LEXIS 141130 at *24-25 (D.S.C. June 18, 2010) (explaining that federal courts "do not sit as a kind of super-personnel department weighing the prudence of employment decisions").

118. *See, e.g.*, Medrano v. City of San Antonio, No. SA-02-CA-1003-RF, 2003 U.S. Dist. LEXIS 21654 at *9 (W.D. Tex. Dec. 1, 2003) (observing a dispute of fact as to whether position sought as accommodation was filled by others with more or less seniority than plaintiff).

119. *Boyle*, *supra* note 37, at 1037.

120. *Harris*, *supra* note 66, at 128, 149, 155 (noting effects on co-workers in one workplace may not be the same in another, loss depends on purposes of seniority system).

121. *Id.* at 159.

122. *Id.* at 171-72.

system (or some other contractual right) causes an undue hardship. For example, if no other worker with sufficient seniority desires the position, an employer should not deny a transfer as an accommodation for an applicant or employee with a disability.[123] A few courts have recognized this absence of an actual conflict, as in a decision that returning an employee to a driver position was a reasonable accommodation despite the employer's argument that the position was subject to a negotiated seniority system, since the conflict would only arise if a more senior employee later requested that same position and was therefore "speculative."[124]

Employees seeking accommodation have also succeeded where their request did not directly conflict with a CBA or other employer policies, such as shift assignments, leave limitations or hiring the best qualified applicant for a position sought as an accommodation.[125] In some situations, the request for an accommodation may even be supported by other contractual rights, such as the claim of an employee who sought a transfer to a position that the CBA required to be filled by current or laid off employees before hiring from the outside.[126]

Negotiation between the parties to a CBA often could resolve these alleged or potential conflicts, since it may not always be obvious whether an accommodation would violate a provision of a CBA. For example, one court reviewing a request for a transfer as an accommodation found a dispute of fact as to whether a plaintiff's transfer violated the CBA, since it was unclear whether he retained his previous group level.[127] Likewise, another court found issues of material fact regarding a CBA which allegedly would be violated by an employee's placement on the first shift as an accommodation, where his plant seniority was sufficient to support this placement, despite the employer's position that shift assignments

123. Daly-Rooney, *supra* note 39, at 414.

124. Dilley v. SuperValu Inc., 296 F.3d 958, 963-64 (10th Cir. 2002). *See also* Norman v. Univ. of Pittsburgh, No. CIV.A. 00-1655, 2002 U.S. Dist. LEXIS 27694 at *45 (W.D. Pa. Sept. 17, 2002) (finding that plaintiff did not request part time work prohibited by CBA).

125. Kosakoski v. The PNC Fin. Servs. Grp., Inc., No. 12-cv-00038, 2013 U.S. Dist. LEXIS 138234 (E.D. Pa. Sept. 26, 2013) (employer did not allege that persons hired were more qualified than plaintiff); Roberts v. The Boeing Co., No. CV 05-6813 FMC (SHx), 2006 U.S. Dist. LEXIS 96660 at *29-30 (C.D. Cal. Sept. 8, 2006) (plaintiff sought return to work not extension of leave). *See also* Simmons v. Lane Transit Dist., No. 04-6344-AA, 2006 U.S. Dist. LEXIS 22289 at *7 (D. Ore. Apr. 20, 2006) (explaining requested split shift did not violate CBA).

126. EEOC v. Sharp Mfg. Co. of Am., Div. of Sharp Elecs. Corp., 534 F. Supp. 2d 797, 806-7 (W.D. Tenn. 2008).

127. Bell v. Owens-Illinois, Inc., No. 00-1518, 2002 U.S. Dist. LEXIS 26481 at *39 (W.D. Pa. Aug. 29, 2002).

should be based on departmental seniority.[128]

Bargaining may be helpful in identifying which CBA provisions incorporate the "special circumstances" recognized by the *Barnett* court as justification for requiring an accommodation that contradicts that policy. Special circumstances recognized by courts interpreting *Barnett* include an employer's past exceptions to that policy, or different application of that policy to other employees.[129] For example, one employer was unable to show that a transfer was unreasonable as an accommodation despite a policy of considering seniority among bidders whose qualifications were equal.[130] This court rejected the employer's reliance on this policy because the decision could have been made on qualifications alone, and the employer could waive the policy based on "business necessity."[131] This analysis recognizes the reality that many seniority clauses include exceptions such as super-seniority, selection of less senior employees with specialized training, and the settlement of discrimination claims.[132] Given such exceptions, the employee with a disability can show that such a policy should not be used to establish the unreasonableness or even the undue hardship caused by his or her accommodation.[133]

In the limited number of cases where the employee has demonstrated that the accommodation could be reasonable due to special circumstances, the claim has survived a motion for summary judgment.[134] For example, a request for changes in work assignments and workloads was potentially reasonable where such changes had been made in the past, despite a CBA provision prohibiting limited or part time positions.[135] Likewise, an employer failed to establish an undue hardship based on a transfer of an employee with a disability to a position she could perform, even though that position generally carried a higher job classification than previously held by that employee, where the employer had often transferred employees without changing their job classification, and other higher-

128. Hill v. Kellogg USA, Inc., No. 8:02CV436, 8:04CV60, 2005 U.S. Dist. LEXIS 39843 at *26-27 (D. Neb. Aug. 11, 2005).

129. Soone v. Kyo-Ya Co., 353 F. Supp. 2d 1107, 1115 (D. Haw. 2005).

130. E.E.O.C. v. Valu Merchandisers Co., No. 01-2224-DJW, 2002 U.S. Dist. LEXIS 15632 at *25-26 (D. Kan. Aug. 9, 2002).

131. Daly-Rooney, *supra* note 39, at 397.

132. *Id*. at 407.

133. *Barnett*, 535 U.S. at 405.

134. *See, e.g*., O'Dell v. Dep't. of Pub. Welfare Pennsylvania, 346 F. Supp. 2d 774, 787-88 (W.D. Pa. 2004) (noting lack of approval for open positions may not make transfer unreasonable).

135. Norman v. Univ. of Pittsburgh, No. CIV.A. 00-1655, 2002 U.S. Dist. LEXIS 27694 at *45, 50 (W.D. Pa. Sept. 17, 2002).

graded employees had performed that same position in the past.[136]

This consideration of "special circumstances" demonstrates that if a policy incorporates exceptions for accommodation or is not interpreted consistently among employees without disabilities, then it may not be sufficient basis for denying a particular accommodation. Therefore, the emphasis in reviewing requests for leave that goes beyond an employer's policies should focus on whether that employer has made exceptions for other employees without disabilities.[137] Courts should also consider whether a greater burden is being placed on employees with disabilities who are seeking leave compared to other employees whose requests for leave are granted without the concrete medical evidence that is often required to justify leave as an accommodation.

This allowance for "special circumstances" which could support an accommodation that conflicts with a collective bargaining agreement has drawn criticism. Even before *Barnett* was decided, an appellate court which adopted a per se rule in favor of CBA provisions that conflict with a requested accommodation worried:

> a balancing approach would leave employers too vulnerable to the possibility of guessing wrong when trying to weigh the relative benefits and burdens on disabled and non-disabled employees. The consequences of guessing wrong are especially burdensomein the context of a collectively bargained seniority system, where the employer and/or union might be subjected to grievances or lawsuits filed by workers who were "bumped," and employers would be vulnerable to charges of unfair labor practices under the NLRA.[138]

Bargaining and reliance on a grievance and arbitration system can help parties to a CBA engage in more consistent application of a CBA. Moreover, bargaining regarding individual requests for accommodation can lead to an avoidance of disputes and potential litigation focused on

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136. *Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d at 641-42 (Fed. Cir. 2004). *Compare* Droste v. Kroger Co., No. 187 F.3d 635 (6th Cir. 1999) (finding that Kroger was not required to permanently transfer employee at same rate of pay to position that paid less under CBA). *See also* Moore v. Hexacomb Corp., 670 F. Supp. 2d 621, 631 (W.D. Mich. 2009) (noting testimony that coworker would have agreed to give up position to plaintiff despite employer "policy"); Johnson v. City of Pontiac, No. 05-73924, 2007 U.S. Dist. LEXIS 23345 at *20 (E.D. Mich. Mar. 30, 2007) (observing conflicting evidence regarding policy toward permanent light duty for police officers).

137. P.J. Petesch, *EEOC Moves Toward Guidance Addressing Leave As a Reasonable Accommodation Under the ADA,* BNA Insights (June 23, 2011), http://laborandemploymentlaw.bna.com/lerc/display/story_list.adp?mode=ins&frag_id=21182889&prod=dlln [http://perma.cc/89F5-CTES].

138. Willis v. Pacific Maritime Ass'n, 244 F.3d 675, 681 (9th Cir. 2001).

which past conduct constitutes "special circumstances" recognized in *Barnett*.

III. DECISIONS ILLUSTRATING OPPORTUNITIES FOR BARGAINING

Court decisions that have recognized conflicts between requests for accommodation and provisions of a CBA demonstrate the potential for avoiding or resolving such conflicts through negotiation. Opportunities for bargaining over issues that potentially conflict with the provision of ADA accommodations include defining the essential job duties of positions, the role of seniority in awarding transfers and overtime, and contractual benefits such as leave time.

Even prior to the *Barnett* decision, the Third Circuit recognized the potential role of negotiation in providing accommodations.[139] It is interesting that this decision was often cited pre-*Barnett* to support dismissal of claims seeking accommodations that arguably conflicted with a CBA. In dismissing a claim of an employee seeking to be excused from mandatory overtime, the court focused on the absence of the union's agreement to waive the seniority provision, even though the union had temporarily agreed to not enforce the seniority provision and a union officer had indicated that such a waiver "may be possible."[140] The accommodation was deemed unreasonable in part because the employer would be exposed to potential grievances seeking to enforce other employees' seniority rights. While stating that "we cannot assume that the union's acquiescence will continue indefinitely," the court acknowledged that the union could agree in the future to waive the seniority provision for the plaintiff, which would "eliminate the basis" for the court's conclusion that the accommodation was unreasonable.[141]

As recognized by that Third Circuit decision, the *Barnett* decision left open the door for unions to play a significant role in negotiating about accommodations.[142] The need for greater coordination between employers and unions regarding claims for accommodation is illustrated by decisions in which claims for accommodation were dismissed based on prohibitive language in a CBA. In an extreme example, one court refused to require that an employer permanently assign an employee to a position with certain functions she could perform despite her disability,

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139. Kralik v. Durbin, 130 F.3d 76, 81 (3d Cir. 1997).

140. *Id*.

141. *Id*. at 83, 83 n.7.

142. *See* RUTH O'BRIEN, BODIES IN REVOLT 139 (Routledge 2005) (explaining that the *Barnett* decision empowers organized labor unions in negotiating accommodations and work conditions for its disabled members).

where the CBA supported the employer's position that was essential for employees in that job to be able to perform various functions.[143] Such an accommodation was deemed unreasonable even though the union was willing to waive the contractual requirements that she be able to perform a variety of functions.[144] This conclusion raises the question of why this issue was not recognized as a mandatory subject of bargaining, on which the union could at a minimum insist on negotiation to impasse.[145]

A union often takes the position that CBA language should control over a conflicting request for an accommodation, perhaps reflecting its obligation to represent its able-bodied membership.[146] For example, an employee whose impairment led to discharge from his previous position was not allowed to bid for a position which he could perform, based on CBA language limiting the availability of that position to internal employees.[147] This application of the CBA is particularly concerning since the impairment resulted from a work-related injury. The union could have agreed to make the position available to him but refused to do so.

As in this example, other courts applying *Barnett* to a CBA have failed to require any negotiation regarding a potential deviation from an established policy such as a seniority system. For instance, where a CBA required that vacant positions be filled based on seniority, a reviewing court stated that the employer "was not required to approach the union regarding a variance before the request [for a transfer] could be deemed unreasonable."[148] This approach flies in the face of the NLRA's duty to bargain, as well as the ADA's duty to interact. Moreover, courts frequently focus on the costs of accommodations to employers (and sometimes to co-workers), and only consider an accommodation as

143. Miller v. Dept. of Corrections of Illinois, 916 F. Supp. 863, 871 (C.D. Ill. 1996).

144. *Id*.

145. *See, e.g*., Bozeman Deaconess Pound. v. Montana Nurses Ass'n, 322 N.L.R.B. 1107, 1118-19 (1997) (adding 100-pound lifting requirement violated Section 8(a)(1) and (5) by unilaterally changing the RNs' job description prior to expiration of CBA). *See also* Judith Fornalik, *supra* note 25, at 127 (noting that a union is not obligated to bargain over terms in a current CBA and can refuse to negotiate with the employer over reasonable accommodations, however if the accommodation cannot be implemented without the assistance of the union, then the union would be in violation of the ADA.).

146. *See, e.g*., Lockard v. General Motors Corp., 128 F. Supp. 2d 458, 460 (N.D. Ohio 2001), *aff'd* 52 Fed. Appx. 782 (6th Cir. 2002) (highlighting a situation where a union took the position that plaintiff did not have enough seniority for positions sought as accommodations).

147. Wilder v. Am General, LCC, No. 3:11 CV 203, 2015 U.S. Dist. LEXIS 42593 at *5, 15 (N.D. Ind. March 31, 2015).

148. Roberts v. Kaiser Foundation Hospital, No. 2:12-cv-2506-CKD, 2015 U.S. Dist. LEXIS 16169 at *26 (E.D. Cal. Feb. 10, 2015).

beneficial to the disabled employee,[149] without recognizing the much broader benefits of negotiating over accommodations.

The *Barnett* decision allows negotiation regarding the reasonableness of a requested accommodation.[150] Thus, there are several areas of potential conflict between a CBA and a request for accommodation that could be reconciled through negotiation at the inception of the CBA or on an individualized basis, including basic limitations on the ability to discharge. Generally, a just cause provision could provide protection for an employee who is discharged based on an inability to perform his or her job duties, where that inability arises because of the employer's failure to accommodate. For example, one CBA provided that an employee could only be terminated after reasonable accommodations had been made.[151]

Beyond improvements to a CBA's just cause provision, numerous aspects of a CBA could incorporate and address potential conflicts with requests for accommodations, such as decisions often based on seniority alone. Moreover, CBA provisions could provide greater clarity on terms and conditions of employment that sometimes determine the reasonableness of an accommodation request, such as defining the essential job duties of positions covered by the CBA.

A. *Duties of the Position*

One area of dispute under the ADA is whether the employee qualifies as a person with a disability who is then entitled to accommodation, or whether an employee is able to perform the essential duties of a position.[152] These factual questions are often based on potentially conflicting information from health care providers.[153] Parties

149. *See, e.g.*, *Miller*, 916 F. Supp. at 868 (Department of Corrections could not accommodate newly-blind employee in her current role, but it was not considered that the DOC could have negotiated with the union on accommodating the employee in a full-time role that would have been beneficial to both parties).

150. 535 U.S. at 405 (employer may retain right to seniority system so that employees will not expect that system will be followed, reducing hardship from not following seniority system).

151. *See, e.g.*, Multi-Clean, Inc., 102 Lab. Arb. Rep. (BNA) 463 (1993) (Miller, Arb.) (examining a CBA that allowed for a company to unilaterally fire an employee who could no longer perform his duties as long as reasonable accommodations were made).

152. Basas, *supra* note 4, at 81-83.

153. *See, e.g.*, McAlindin v. County of San Diego, 192 F.3d 1226, 1235 (9th Cir. 1999) (using medical evidence to determine the factual question about whether the Plaintiff's impairment substantially limited his major life activities); Borgialli v. Thunder Basis Coal Co., 235 F.3d 1284, 1294-95 (10th Cir. 2000) (finding it reasonable to use medical evidence to determine if Plaintiff could return to work and not be a direct threat

to a CBA can incorporate a process to make this determination. For example, one CBA involved in arbitration awards included a process of referrals to different health care providers to arrive at a determination as to whether the employee had a disability;[154] several CBAs included a process to determine if an employee could still perform his or her duties.[155]

Related to defining essential job duties, disputes sometimes arise as to whether or not an employee can perform essential duties despite his or her disability. Negotiation can help resolve factual determinations regarding performance, such as the claim of a school employee who sought a transfer to a sedentary position because of her physical limitations.[156] The trial court had accepted the school's argument that she was not qualified for the sedentary position, even though the position was less physically demanding than her previous position, she thought she could perform the duties and the School Board had deemed her "minimally qualified."[157] Unfortunately for her, it took more than three years after she first sought an accommodation for the Court of Appeals to remand her claim after denying the school's motion for summary judgment.

Collective bargaining can help to avoid such factual disputes. For example, a CBA with a coal company specified that an employee could not be discharged or refused recall for medical reasons "without the concurrence of a majority of a group composed of an Employer-approved physician, an Employee-approved physician, and a physician agreed to by the Employer and the Employee, that there has been a deterioration in physical condition which prevents the Employee from performing his regular work."[158] Creation of such a process can help to resolve disputes over whether an employee is able to perform his or her job duties.

Beyond determining the capacity of an employee with a disability, a CBA can provide clarity on the question of whether a particular job duty is essential, which often determines whether an accommodation is reasonable.[159] Accurate identification of essential job duties has long been

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to his colleagues).

154. Noranda Aluminum, 119 Lab. Arb. Rep. (BNA) 217 (2003) (Gordon, Arb.).

155. BWXT Pantex, 120 Lab. Arb. Rep. (BNA) 385 (2004) (Jennings, Arb.); Pittsburgh & Midway Coal Mining Co., 123 Lab. Arb. Rep. (BNA) 239 (2006) (West, Arb.); CH2M-WG Idaho, 134 Lab. Arb. Rep. (BNA) 876 (2014) (DiFalco, Arb.).

156. Woodruff v. School Bd. of Seminole Cty. Fla., 304 Fed. Appx. 795, 801 (11th Cir. 2008).

157. *Id*.

158. Anderson v. Consolidation Coal Co., No. 14-2048, 2016 U.S. App. LEXIS 1011 at *18-19 (4th Cir. Jan. 21, 2016).

159. Goodman v. Unity Township PA, No. 2:03-cv-1650, 2006 U.S. Dist. LEXIS 18138

recognized as important for effective recruiting, conducting objective interviews, making informed selection decisions, and producing accurate performance appraisals.[160] Through requests for accommodation, employees with disabilities (and the unions representing them) are in a position to "scrutinize business operations" by participating in the determination of which duties are essential for their position.[161]

Determinations of the essential job duties of a position are ripe for bargaining as an alternative to litigation to resolve an employee's request for an accommodation.[162] Shortly after the ADA was adopted, an expert for the American Management Association recognized that legislators "intended that employers and unions would revisit... collective bargaining restrictions" on assignment of job tasks to "help open up more opportunities to people with disabilities."[163] Thus, a union and employer can jointly help to resolve factual questions regarding job duties, rather than leaving that determination solely to the employer's discretion or waiting for a claim to go to federal court. For example, a dispute about whether an employee was required to drive a semi-truck to haul the excavator could have been resolved through negotiation.[164] Instead, the employee's ADA claim was remanded by the circuit court more than three years after his discharge.

Like job duties of one position, the need for rotation between different duties or tasks to avoid ADA claims is also ripe for negotiation.[165] An employee with a disability may face discharge even if she can perform current job duties, where the CBA allows the employer to rotate employees into positions with different duties that the employee

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at *17 (W.D. Pa. March 30, 2006), *aff'd*. 251 Fed. Appx. 104 (3d Cir. 2007).

160. ARLENE VERNON-OEHMKE, EFFECTIVE HIRING & ADA COMPLIANCE 28 (American Management Association 1994).

161. O'Brien, *supra* note 142, at 113.

162. Dubault, *supra* note 48, at 1294 (parties can perform job analysis for each position in bargaining unit and incorporate into CBA). *See e.g*., Brickers v. Cleveland Bd. of Educ., 145 F.3d 846, 849 (6th Cir. 1998) (examining the scope of essential duties is question of fact); Goodman, 2006 U.S. Dist. LEXIS 18138 at *14-16 (looking at questions of fact regarding allegedly essential duties not referenced in CBA); EEOC v. Sharp, 534 F. Supp. 2d at 806 (examining a CBA that allowed assignment to a variety of tasks). *See also* EEOC regulations, 29 C.F.R. § 1630.2(n)(3) (showing that the terms of CBA are 1 or 7 factors for determining whether a particular function or duty is essential).

163. VERNON-OEHMKE, *supra* note 147, at 32.

164. Henschel v. Clare Cnty. Rd. Comm'n, 737 F.3d 1017, 1022 (6th Cir. 2013); *See also* Mobley v. Miami Valley Hospital, 603 Fed. Appx. 405, 411-12 (6th Cir. 2015) (regarding a dispute where the employer of an environmental technician failed to engage in a good-faith dialogue concerning his accommodation, and the case was remanded by circuit court just less than 3 years following his discharge).

165. *See, e.g.,* Turner v. Hershey Chocolate USA, 440 F.3d 604, 607, 612-13 (3d Cir. 2006).

with a disability cannot perform.[166] In some situations, courts even defer to an employer's interpretation of CBA language regarding rotation of job duties, even where the language does not clearly require rotation.[167] Based on such an interpretation, one court concluded that the requested accommodation would violate other employees' contractual rights.[168]

Negotiation could resolve some of these issues. In one case, a request for an accommodation by a Hershey line employee could have been resolved by negotiating with the union regarding her request to avoid rotating into positions she could not perform because of her disability, a duty which had not been addressed in the collective bargaining agreement.[169] Negotiation could have helped resolve Hershey's alleged concern that her failure to rotate could potentially increase the risk of injury to other employees due to repetitive motion.

These decisions demonstrate how a CBA could incorporate a process to determine objectively whether an employee with a disability is still able to perform the essential job duties of her position. Moreover, negotiation can give the union a voice in determining what duties are in fact essential as well as provide guidance as to which accommodations, regarding the performance of duties, are reasonable.

B. *Transfer as an Accommodation*

If an employee cannot perform the essential duties of her position, negotiation between the employer and the union could resolve questions surrounding the reasonableness of a transfer as an accommodation. Parties to a CBA often negotiate regarding transfers for employees who are injured on the job. For example, one CBA covering mechanics provided that employees who are injured on the job and cannot perform the duties of their position must be given preference for light duty work.[170] Similar agreements could lead to greater availability of transfers as an accommodation, which can often mean the difference between continued employment and discharge for an employee with a disability.

Potential conflicts between a request for accommodation and the

166. *See e.g.*, Nalley v. Donahoe, No. 3:11-0610, 2014 U.S. Dist. LEXIS 87736 at *23-26 (M.D. Tenn. June 27, 2014) (finding that the claim of a mail handler who requested reassignment turned on the question of whether new position required rotation through different tasks).

167. Alamer v. Ralcorp Frozen Bakery Products, Inc., No. 3:09-CV-76-H, 2011 U.S. Dist. LEXIS 98367 at *24 (W.D. Ky. Aug. 30, 2011).

168. *Id.* at *24-25.

169. Turner, 440 F.3d at, 607, 612-13.

170. Blakeley v. US Airways, Inc., 23 F. Supp. 2d 560, 563-64 (W.D. Pa. 1998).

seniority rights of others can be resolved through negotiation. The *Eckles* decision, widely relied upon and criticized before the *Barnett* decision, involved a CBA that allowed the employer and the union to agree to provide a reassignment as an accommodation without regard to seniority.[171] Despite this permissive language regarding seniority that was part of the CBA, the court declined to read this provision as requiring a non-seniority-based assignment, failing to recognize that any seniority system (or any other CBA provision) is a creature of the CBA and any limitation on that right is also an enforceable part of the contract.[172]

Similarly, the parties to a CBA could negotiate to provide clarity for determinations of whether a transfer would be a reasonable accommodation. For example, the GM–UAW national agreement has permitted, but not required, a local union and employer to waive seniority provisions in a local agreement to allow the reassignment of an employee with a disability who otherwise lacks the seniority for the requested position.[173] Even though both GM and the union were named in the claim made by an employee with a disability resulting from a work injury, who sought a position which required more seniority than he had, the court concluded that GM and the UAW "could not transfer" the plaintiff into such a position "without violating the contractual rights of other employees."[174]

A later decision involving a 1996 GM-UAW CBA likewise allowed a worker returning from an injury to displace only a less senior worker, unless the UAW agreed to the displacement of a more senior worker,[175] and another CBA for a different GM plant stated that returning employees "will be employed in other work on jobs that are operating in the plant which they can do without regard to any seniority provisions of this Agreement, except that such employees may not displace employees with longer seniority...."[176] The court reviewing these provisions concluded that a transfer was not a reasonable accommodation because "GM and the UAW are not required [to] violate the CBA by ignoring or accommodating the Plaintiff's seniority, or lack thereof, in order to facilitate her placement

171. Eckles v. Consol. Rail Corp., 94 F.3d 1041, 1044 n.2 (7th Cir. 1996) ("a disabled employee covered by this Agreement may be placed . . . in a position occupied by another employee, without regard to seniority, provided that such an employee is capable of performing the duties required.").

172. McGlothlen & Savine, *supra* note 34, at 1053.

173. Boback v. Gen. Motors Corp., No. 95-3836, 1997 U.S. App. LEXIS 297 at *12-14 (6th Cir. Jan. 3, 1997).

174. *Id*. at *14.

175. Lockard v. Gen. Motors Corp., 128 F. Supp. 2d 458, 460 (N.D. Ohio Jan. 16, 2001), *aff'd* 52 Fed. Appx. 782 (6th Cir. 2002).

176. *Id*. at 465 n.4.

in a position suited to her physical limitations."[177] As in the earlier GM-UAW case, this conclusion ignores the reality that seniority is a function of the agreement between the employer and the union, and that an agreement between those parties to the CBA could resolve any conflict with its provisions. It is therefore false to conclude that those same parties could not agree to change those contractual rights in order to provide the accommodation which would have allowed the employee with a disability to remain employed at GM.

Contractual provisions regarding transfers are ripe for negotiation to avoid or resolve conflicts between a request for accommodation and a CBA. A CBA could explicitly allow for a transfer as an accommodation despite a lack of seniority,[178] at least as a temporary solution.[179] This approach has been adopted by United Airlines in its company policy, which gives employees with disabilities preferential treatment in seeking transfers.[180] A less extreme solution can be found in CBAs providing for retention of seniority while an employee is on leave due to an illness or injury.[181] An exception to seniority could also be accomplished through case-by-case mutual agreement of the employer and the union.[182] For example, some CBAs provide that the employer and union can agree to an accommodation that might otherwise contradict other contractual rights.[183]

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177. *Id*. at 466.

178. Calvin v. Ford Motor Co., 185 F. Supp. 2d 792, 796 (E.D. Mich. 2002) (showing that a work-related injury/illness entitles placement in other work without regard to seniority). *See also* Collective Bargaining Negot. & Cont. (BNA), 120.03 (highlighting CBAs between Owens Corning and Glass and Pottery Workers (by mutual agreement), Tyler Refrigeration Corp. and Paperworkers, Allegheny Energy and Utility Workers, Wisconsin Physicians Service Insurance Corp. and Food and Commercial Workers, BF Goodrich Specialty Chemicals and Electrical Workers to show that the employer and the employee may work together to find the job best suited to the disabled parties qualifications and disability).

179. *See, e.g*., Collective Bargaining Negot. & Cont. (BNA), *supra* note 168 (examining CBAs between ICI Americas Inc. and Teamsters, Distribution Trucking Co. and Teamsters to show that when an employee is temporarily disabled, they should be temporarily relocated to accommodate their disability).

180. EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012).

181. Champion Int'l Corp. v. United Paperworkers Int'l Union, 106 Lab. Arb. Rep. (BNA) 1024 (1996) (Overstreet, Arb.).

182. *See, e.g*., Collective Bargaining Negot. & Cont (BNA), *supra* note 168 at 120.03 (examining CBAs between Inland Container Corp. and Paperworkers, Kansas City Power and Light Co. and Electrical Workers, Peabody International Corp., Peabody Galion Div. and Machinists to explain that when a disabled party is unable to fulfill the duties of his job, the employer may place that employee in any bid job without the need for posting).

183. *Eckles v. Consolidated Rail Corp*., 94 F.3d 1041, 1044 (1996); Int'l Bd. of Electrical Workers, AFL-CIO v. Employer 2012 LA Supp. 148860 (BNA) (2012) (Grossman, Arb.); Local_, Milwaukee Transp. Serv. v. Amalgamated Transit Union,

Parties to a CBA sometimes specify that an employee with a disability may be transferred regardless of seniority principles in the CBA;[184] other agreements allow displacement of another worker while others prohibit such displacement.[185] Some parties may even agree to the reservation of certain positions for employees with disabilities.[186] Other CBAs may give the employer the ability to discuss an accommodation directly with the employee, "without any obligation to disclose an employee's disability with the Union, unless the employee has made a voluntary and knowing written waiver of his rights to confidentiality under the ADA."[187] For example, an employee's request to transfer to other facilities where work that he could perform was available was deemed unreasonable, based on the limitations in the CBA that only allowed transfers for current or laid off employees, thereby excluding the plaintiff because he was not currently working due to his disability.[188]

In considering transfer as an accommodation, the ADA only requires that an employer transfer an employee with a disability to a vacant position, rather than bumping another employee.[189] But this raises the question as to when the position is actually vacant, resulting in litigation regarding the reasonableness of requests to transfer as accommodations.[190] The timing of

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Local 998, 2009 LA Supp. 119548 (BNA)(2009)(Vernon, Arb.); State of Ohio v. Ohio Civil Serv. Employees Assoc./AFSCME, Local 11, 118 Lab. Arb. Rep. (BNA) 1361 (2003) (Murphy, Arb.); Interstate Brands Corp. v. Bakery, Confectionary and Tobacco Workers Local 149, 113 Lab. Arb. Rep. (BNA) 161 (1999) (Howell, Arb.); Alcoa Bldg. Prods. v. Aluminum, Brick, & Glass Workers Int'l Union Local 117, 104 Lab. Arb. Rep. (BNA) 364 (1995) (Cerone, Arb.).

184. Collective Bargaining Negot. & Cont (BNA), *supra* note 168 at 107.45 (explaining CBA between Lockheed Martin Space Systems Co. and Machinists. to elucidate that an employee with a disability may be placed at any position regardless of seniority).

185. *Compare* Collective Bargaining Negot. & Cont (BNA), *supra* note 168 at 120.03 (showcasing CBA of IBP and Food and Commercial Workers to show that an ADA accommodation cannot result in a displacement), *with* Collective Bargaining Negot. & Cont (BNA), *supra* note 168, at 120.03 (using CBA between Harbison-Walker Refractories and Aluminum, Brick and Glass Workers to show that an employee with a disability can displace a junior, but still abled employee).

186. *See, e.g.*, Collective Bargaining Negot. & Cont (BNA), *supra* note 168 at 120.03 (examining CBA between Celotex Corp. and Paperworkers to explain that a company must designate certain jobs as handicapped jobs should the union consent).

187. *See, e.g.*, Collective Bargaining Negot. & Cont (BNA), *supra* note 168 at 120.03 (highlighting CBA between Coca-Cola Enterprises Inc., Eastern Great Lakes Div. and Teamsters to show that an employer can speak directly to the disabled employee regarding his or her disability).

188. VeuCausovic v. Ford Motor Co., No. 11-15488, 2013 U.S. Dist. LEXIS 10668 at *11, 21-25 (E.D. Mich. Jan. 28, 2013).

189. 29 C.F.R. §1630.2(o) (2012) (App); Davoll v. Webb, 194 F.3d 1116, 1131-32 (10th Cir. 1999).

190. *See, e.g.*, Johnson v. Otter Tail Co., No. 98-2237, 2000 U.S. Dist. LEXIS 20671 at

such an opening can have significant consequences for an employee seeking a transfer to a position she can perform, such as the mail clerk whose request for a transfer to a permanent vacant position was denied because she was on temporary light duty at the time.[191] Similarly, a thirty-five-year BellSouth employee might have benefitted from negotiation where he was not offered a transfer into a position he could perform because he was receiving termination pay when it became open, and he did not "inquire about the position," even though he had previously requested transfer as an accommodation.[192] That court limited the employer's obligation to accommodate to following the provisions of the applicable CBA.[193]

Negotiation could help clarify when a position is "vacant" for purposes of a transfer as an accommodation. EEOC regulations state that a transfer would be reasonable if the position will be vacant within a "reasonable amount of time"; courts have either adopted this language or held that a position should be considered for accommodation purposes if it is currently vacant or will become vacant sometime in the near future.[194] The EEOC Guidelines go on to state that a reasonable amount of time should be determined "in light of the totality of the circumstances."[195] This guidance opens the door for negotiations regarding which positions should be considered vacant for purposes of transfers as accommodations. For example, one CBA allows employees to remain eligible for transfer for three years after they are unable to perform their previous duties.[196]

These CBA provisions demonstrate that the potential for conflict between a CBA's provisions affecting transfers and a request for accommodation can be reconciled through negotiation. Such negotiation would facilitate the use of transfers to accommodate employees with disabilities that prevent their continued employment in a previous position, while still protecting the interests of other employees.

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*26-32 (D. Minn. July 24, 2000) (finding that employer did not have a duty to reassign plaintiff beyond a reasonable amount of time, and here the employee would only be able to return to work one year and three months after her original termination).

191. Simpson v. Potter, No. 07-584-SLR, 686 F. Supp. 2d 475; 2010 U.S. Dist. LEXIS 17047 at *17 (D. Del. Feb. 25, 2010). *See also* Chapple v. Waste Mgmt., Inc., No. CIV. 05-2583 ADM/JSM, 2007 U.S. Dist. LEXIS 14151 at *4 (D. Minn. Feb. 28, 2007) (examining what period of time Plaintiff applied to other open positions).

192. Meade v. AT&T Corp., No. 15-6362, 2016 U.S. App. LEXIS 14256 at *15-16 (6th Cir., Aug. 2, 2016).

193. *Id*. at *16.

194. Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175 (10th Cir. 1999) (*en banc*).

195. EEOC Guidance, *supra* note 34; Dark v. Curry Cnty., 451 F.3d 1078, 1089-1090 (9th Cir. 2006).

196. Alston v. Washington Metro. Area Transit Auth., 571 F. Supp. 2d 77, 83-84 (D.D.C. 2008)

C. *Overtime & Shifts*

Like requests for transfer, the assignment of overtime can also be negotiated to avoid any conflict with the inability of an employee with a disability to work overtime. Distribution of overtime is covered by almost three-fourths of all CBAs, including reliance on seniority and the scheduling of overtime across different job classifications.[197] In contrast, other CBAs have included a provision that an employee may refuse mandatory overtime "due to extreme personal fatigue, illness or other special circumstances."[198] Instead of suggesting or even requiring negotiation, however, one court recently held that an employee's request to avoid mandatory overtime as an accommodation was unreasonable, where the CBA provided a rotating process for assignment of overtime and one employee had complained about covering the plaintiff's overtime.[199] In this case, the court specifically found that the employer did engage in an "ongoing interactive process" with the employee to find a "mutually agreeable accommodation,"[200] yet there was no mention of any interaction between the employer and the union to resolve the issue.

Like mandatory overtime, shift assignments are often assigned based on seniority under CBAs,[201] presumably because of employees' preference for working certain shifts. Courts have concluded that variance from this provision as an accommodation for an employee with a disability would necessarily burden other employees.[202] In contrast, some parties to a CBA have given the employer the authority to change shift assignments "to accommodate an employee or to meet unexpected conditions if reasonable

197. *See, e.g.*, Collective Bargaining Negot. & Cont (BNA), *supra* note 168, at 115.305 (using CBAs between Martin-Brower Co. and Teamsters, Millar Elevator Service Co. and Teamsters to show that a more senior employee may refuse overtime if a more junior employee is available).

198. *See, e.g.*, Collective Bargaining Negot. & Cont (BNA), *supra* note 168, at 115.305 (using CBA between Washington Hospital Center and National Nurses United to show that an employee may refuse overtime due to illness).

199. Chavira v. Crown Cork & Seal USA, Inc., No. 13-1734, 2015 U.S. Dist. LEXIS 108682 at *24-26 (D. Minn. August 18, 2015).

200. *Id.* at *26.

201. BNA, *Basic Patterns, supra* note 57, at 87 (seniority used in granting transfer requests).

202. *See, e.g.*, Laurin v. Providence Hospital, 150 F.3d 52, 54-60 (1st Cir. 1998); Doe v. Town of Seymour, No. 3:95CV1538(AHN), 1998 U.S. Dist. LEXIS 676 at *4-5 (D. Conn. January 15, 1998); *See also* Collective Bargaining Negot. & Cont (BNA), *supra* note 168, at 117.233 (explaining CBAs between Akron General Medical Center and Steelworkers, General Tire Inc. and Steelworkers, Northeastern Pennsylvania Health Corp. and Pennsylvania Nurses Association to show that seniority prevails provided employee has skill & ability).

notification is provided."[203]

As seen with transfers, negotiation can help to resolve conflicts between the need to accommodate the limitations of an employee with a disability and the scheduling of overtime shifts. Such negotiation could mean the difference between retention of employment and discharge for an employee with a disability, with little or no impact on the interests of other able-bodied employees.

D. *Leave as an Accommodation*

As with the definition of essential duties and the role of seniority, leave provisions could be clarified or renegotiated in response to a need for additional leave as an accommodation. Violations of leave policies and unauthorized absences have been common grounds for discharge under CBAs.[204] CBAs almost always include some provision addressing leaves of absence,[205] but do not necessarily explicitly provide that one's disability can provide grounds for an exception to those grounds. In practice, employers often retain discretion to decide whether to approve the request for leave, often based on the employer's judgment as to whether the employee has a "good" reason for the leave.[206] Alternatively, a CBA may provide for leave for a reason that is "mutually acceptable" to the employer and the union.[207]

Both before and after *Barnett* was decided, leave often has been denied as an accommodation based on an employer's policy on how much leave is available for its employees.[208] In one case, an employee who

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203. *See, e.g.*, Collective Bargaining Negot. & Cont (BNA), *supra* note 168, at 115.252 (using CBA between BellSouth Telecommunications Inc. and Communications Workers to show that the Company may make changes to accommodate an employee).

204. BNA, *Basic Patterns supra* note 57 at 7.

205. *Id*. at 71-72.

206. *See, e.g.*, Collective Bargaining Negot. & Cont (BNA), *supra* note 168, at 116.201 (examining CBAs between Phoenix Transit System and Transit Union, McDonnell Douglas Corp. and Electrical Workers, Vickers Inc. and Electronic Workers, Safeway Stores Inc. and Food and Commercial Workers, Northwest Aluminum Co. and Steelworkers, Harley-Davidson Motor Co. and Machinists to show that an employee may be granted a leave of absence for a good and sufficient reason).

207. *See, e.g.*, Collective Bargaining Negot. & Cont (BNA), *supra* note 168 at 116.201 (explaining CBA between Chicago Pneumatic Tool Co. and Machinists, Muskegon Piston Ring Co. Inc., Wausau Div. and Machinists, Titeflex Corp. and Teamsters to highlight that a leave of absence may be granted for any reason deemed satisfactory by the company).

208. *See* Stacy A. Hickox & Joseph Guzman, *Leave as an Accommodation: When is Enough, Enough?*, 62 CLEVELAND STATE L. REV. 437, 463-71, 481-82 (2014) (discussing cases cited above); *see also* Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1235-36 (9th Cir. 2012) (finding that seven unplanned absences exceeded policy allowing five); Crano v. Graphic Packaging Corp., 65 F. App'x 705, 708 (10th Cir. 2003) (approving

could not work due to his mental health issues attempted to rely on language in the applicable CBA which stated that "[w]hen the requirements of service permit, employees... will be granted written leave of absence for a limited time...."[209] While not finding that the CBA supported the reasonableness of his request for leave, the court acknowledged that it was "conceivable that an employer could extend certain assurances to an employee regarding job security while the employee is on medical leave."[210]

In the union context, limits on leave in a CBA often justify denial of additional leave as an accommodation.[211] For example, the extension of leave beyond the six months provided under the applicable CBA was deemed unreasonable, where an extension was subject to union approval, and such an extension had not occurred during 40 years of union representation.[212] That court concluded, without explanation, that extension of leave for one employee "can be unfair to other members and can potentially result in the employer facing consequences."[213] At the same time, other courts have recognized that leave beyond what is provided under an employer's policy can be a reasonable accommodation.[214] Bargaining could help resolve the confusion that results from these different approaches to determining how much leave constitutes a reasonable accommodation.

E. *Bargaining as an Alternative*

Courts applying *Barnett* to claims involving a CBA often fail to require, or simply recognize, that bargaining could clarify, or even resolve, conflicts between the requested accommodation and the CBA. One court even specifically held that an employer's failure to initiate bargaining does not render an accommodation unreasonable.[215] In that

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discharge after one year under employer's policy). *But see* Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) (holding that leave of up to one year was reasonable where employer policy allowed one year of unpaid medical leave).

209. Quintero v. Canadian Pacific Railway, No. 13-cv-6249, 2015 U.S. Dist. LEXIS 147983 at *10 (N.D. Ill. Nov. 2, 2015).

210. *Id*. at *24.

211. *See, e.g.,* Davis v. Thomas Jefferson University, No. 14-4300, 2015 U.S. Dist. LEXIS 88975 at *19 (E.D. Pa. July 8, 2015).

212. *Id*.

213. *Id*. .

214. *See, e.g*., Ralph v. Lucent Tech.,135 F.3d 166, 172 (1st Cir. 1998) (stating leave beyond fifty-two weeks provided by employer policy could be reasonable); *see also* Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 646 (1st Cir. 2000) (holding that an employer cannot justify denial of additional leave based on policy alone).

215. Thursby v. City of Scranton, No. 3:CV-02-2355, 2006 U.S. Dist. LEXIS 33475 at

case, an employee sought a no-smoking policy as an accommodation, but that policy was rescinded based on the police chief's belief that it was obligated to bargain with the union over it.[216] The court concluded that even if the employer had an obligation to bargain over the policy, it could not establish that the requested policy would impose an undue hardship as an accommodation where the city failed to even attempt to negotiate a policy with the union, and it had negotiated other similar policies with other unions representing its employees in other departments.[217] This decision illustrates that courts hearing ADA claims are not going to push parties to a CBA to negotiate in order to help resolve conflicts between an accommodation request and a CBA.

In contrast to the narrow view taken by the decisions outlined above, a small number of courts have required that an employer engage in the requisite interactive process to promote voluntary agreements regarding the reasonableness of an accommodation. These courts have held that generally, it is the employer's duty to engage in the interactive process and "requires the employer to take some initiative."[218] This requirement has been extended to condemn an employer that denied an accommodation request after the union agreed to an accommodation involving an excuse from overtime for an employee whose disability prevented overtime work, based on the employer's claim that it would violate the collective bargaining agreement that provided for assignment of mandatory overtime based on inverse seniority.[219]

Taking this obligation to interact one step further, courts have sometimes declined to dismiss a claim for accommodation despite a union's refusal to agree to a variation from contract language.[220] For example, a UPS employee was not provided with a transfer as an accommodation, in part because the union refused to allow him to transfer his seniority from one location to another, where a position he could perform was available.[221] Despite this opposition, the court denied summary judgment for UPS, which had argued that this opposition showed that the CBA prevented the assignment of any employee from one operations center to another.[222] While still respecting the weight given to

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*21 (M.D. Pa. May 25, 2006).

216. *Id*. at *19.

217. *Id*. at *21.

218. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 315 (3d Cir. 1999).

219. Smith v. Burlington Co. of New Jersey, No. 02-5581(JEI), 2004 U.S. Dist. LEXIS 18032; at *3-4, 17-18 (D.N.J. July 27, 2004).

220. *See, e.g.,* Williams v. United Parcel Servs., Inc., No.: 2:10-1546-RMG, 2012 U.S. Dist. LEXIS 23080 at *17 (D.S.C. Feb. 23, 2012).

221. *Id*..

222. *Id*. at *20.

seniority under the CBA, the court found that the plaintiff's seniority may have entitled him to another position at another location, which would have been a reasonable accommodation.[223]

For many types of accommodations, negotiation could help to clarify the obligation to provide an accommodation under the ADA, while avoiding conflicts with preexisting rights of other employees, and even respecting the interests of both the employer and co-workers. The benefits of negotiation over accommodations, outlined below, stem from the process itself, as well as more specific benefits for employers, unions and employees with disabilities.

IV. BENEFITS OF BARGAINING FOR ALL

Collective bargaining can and should facilitate the accommodation process. First, the parties to a CBA should recognize that future requests for accommodation may come into conflict with a right or a process that is created by the CBA. As demonstrated by the decisions outlined above, CBA provisions that may conflict with an accommodation include the consideration of seniority and other processes surrounding transfers to a different position, provisions allowing paid or unpaid leave, and preference for or required overtime. The parties to a CBA can anticipate and create a process to address such potential conflicts during negotiation of the CBA. Even if a CBA does not anticipate such conflicts, parties to a CBA should negotiate over the provision of an individual accommodation which affects terms and conditions of employment of an employee with a disability or other unionized employees.

Why should the parties to a CBA bargain about accommodations? After all, if neither party requests to bargain over a topic, the NLRA does not require bargaining. This section outlines why it is in the best interest of the employer, the union, and employees with disabilities for the parties to incorporate both exceptions and a process for addressing requests for accommodation in their CBA, and to bargain over individual request for accommodation. Only where the parties fail to reach an agreement should the court reviewing the ADA claim for an accommodation "balance the disabled employee's right to a reasonable accommodation against the hardship that would result" from varying from the terms of the CBA.[224]

Negotiation allows the union to "play a constructive role in suggesting alternative accommodations while limiting adverse effects on the interests of the other workers," enabling "all employees to receive the

223. *Id*.
224. McDevitt, *supra* note 29, at 387-88.

maximum protection of both the ADA and the NLRA collective bargaining process."[225] Only with "ongoing dialogue between all affected parties—the disabled individual, the union, and the employer who has the burden to provide a reasonable accommodation—can the objectives of the ADA be effectively realized."[226] Recognizing and resolving potential conflicts between accommodations and the provisions of a CBA would protect employers from allegations of direct dealing, while providing unions with the opportunity to help craft accommodations that protect the interests of all members of the bargaining unit.[227]

Despite its potential benefits, many parties to CBAs do not routinely bargain about accommodation issues - only twelve percent of private employers have reported using unions to resolve disability issues.[228] Even so, some CBAs reflect this opportunity to bargain over accommodations for employees with disabilities. For example, one CBA qualified the hospital employer's obligation to "abide by" all state and federal nondiscrimination laws with the agreement that:

> [T]he Hospital shall be permitted to take any and all actions necessary to comply with the [ADA] and to avoid liability under the provisions of said Act. If such actions necessitate violation of a provision of this Agreement, then the parties agree to bargain with regard to the effect of such action on other bargaining unit employees.[229]

Similarly, another hospital promised to "take reasonable steps to provide reasonable accommodation to disabled workers and applicants as required by the [ADA]... [s]hould such accommodation have an effect on bargaining unit members, the Hospital shall first negotiate with the Union prior to its implementation."[230] These rare CBAs that address issues surrounding accommodation reflect an important opportunity for both employers and unions.

In contrast to labor negotiators in the United States, the International Labor Organization (ILO) has long recommended that unions defend the rights of employees with disabilities, because of their "sensitivity to the issue,... their own consciousness of all that is at stake if such groups are marginalized,... [and] their very willingness to perceive their own advocacy as central to their role as a key social partner," as well as their "knowledge

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225. O'Melveny, *supra* note 34, at 226.

226. *Id*. at 248 (emphasis omitted).

227. Pritchard, *supra* note 30, at 409.

228. Hoffman, *supra* note 77, at 324.

229. Collective Bargaining Negot. & Cont (BNA), *supra* note 168 at 106.07 (illustrating the CBA between Sacred Heart General Hospital and Oregon Nurses Association [Ind.]).

230. *Id*. (depicting CBA between Cape Cod Hospital and Service Employees).

of the field, networking capacity, weight in labour circles and their legitimacy."[231] Recognizing the potential for conflict between interests of employees with and without disabilities, ILO Convention 159 states that "[s]pecial positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers."[232]

Similarly, ILO Recommendation #168 specifically encourages employers and unions to "adopt a policy for the promotion of training and suitable employment of disabled persons on an equal footing with other workers" and "promote the integration or reintegration of disabled persons in enterprises," including the provision of rehabilitation services under the authority of collectively bargained agreements.[233] For years, CBAs in Europe have incorporated supports for employees with disabilities, with the aim of ensuring "that workers with disabilities can play their full part in the workplace, the union and society at large."[234] For example, a Norwegian union placed emphasis on opportunities for employees with disabilities to effectuate a "change in attitude... to include persons with disabilities in the workplace."[235] This same approach could go far in opening up employment opportunities for people with disabilities in the United States.

A. *Benefits of the Negotiation Process*

The ADA supports participatory justice.[236] As noted by one expert, process is so important to disability rights that "the process surrounding compliance and the expanding of what compliance actually means cannot be left to chance or individual interpretation when problems arise."[237] This

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231. *Trade Union Action: Integrating Disabled Persons into Working Life*, LABOUR EDUCATION vi, 13 (1998), http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_111497.pdf [https://perma.cc/MLC5-5BNW].

232. Convention Concerning Vocation Rehabilitation and Employment (Disabled Persons), art. 4, June 22, 1983, 1401 U.N.T.S. 235.

233. Trade Union Action, *supra* note 231, at 32-37.

234. Ian Graham, *Unions and Disability-doing MORE*, TRADE UNIONS AND WORKERS WITH DISABILITIES: PROMOTING DECENT WORK, COMBATING DISCRIMINATION, Feb. 1, 2004, at 23, 28.

235. Lene Olsen, *Inclusive Workplaces-Norway's Tripartite Agreement*, TRADE UNIONS AND WORKERS WITH DISABILITIES: PROMOTING DECENT WORK, COMBATING DISCRIMINATION, Feb. 1, 2004, at 33, 36.

236. Sharona Hoffman, *Corrective Justice and Title I of the ADA,* 52 AM. U. L. REV. 1213, 1217 (2003) [hereinafter Hoffman, *Corrective Justice*].

237. Basas, *supra* note 6, at 829. *See also* Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 591-93 (2006) (outlining various strategies that organizations use to

process of determining which accommodations are reasonable must be transparent, rather than based on "a hunch or a will that something be done or avoided."[238]

Given the importance of process, collective bargaining over individual employees' rights such as an accommodation "provides a democratic experience for workers and requires them to interact with one another creating a more communal system which benefits all of society."[239] Regardless of the outcome, a fair process to determine the reasonableness of a request for accommodation will support great acceptance of the outcome by the employee with a disability.[240]

In addition, the process used to address accommodation requests can enhance coworker acceptance of, and even support for accommodations,[241] which can be important to the future success of the person requesting the accommodation.[242] Procedural justice will more likely be perceived where the rules for accommodation decisions are in line with workplace norms and values, and are consistently applied based on accurate information, bias is suppressed, the reasons behind accommodation decisions are communicated to others, and anyone with an interest has a voice in decisions about accommodations that will affect them.[243] Procedural fairness is more evident where the parties have adhered to objective rules and organizational factors, including past provision of accommodations, job flexibility, treatment of employees as individuals and employee voice.[244] Coworker perceptions of procedural fairness can even overcome

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increase diversity, suggesting that the most useful approaches were implementing committees, formal practices, and diversity managers, rather than focusing on mere education about the elimination of bias); Hoffman, *supra* note 77, at 339 (finding that open dialogue between employees and decision makers is essential in determining appropriate accommodations).

238. Basas, *supra* note 4, at 112.

239. Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L.J. 601, 614 (2004-5) [hereinafter Hodges, *The Limits of Multiple Rights*].

240. O'Brien, *supra* note 142, at 139.

241. Lauren B. Gates, *Workplace Accommodation as a Social Process,* 10 J. OF OCCUPATIONAL REHABILITATION 85, 86 (2000); Adrienne Colella et al., *Factors Affecting Coworkers' Procedural Justice Inferences of the Workplace Accommodations of Employees with Disabilities*. 57 PERSONELL PSYCHOL. 1, 2 (2004).

242. Adrienne Colella, *Coworker Distributive Fairness Judgments of the Workplace Accommodation of Employees with Disabilities*, 26 ACAD. OF MGMT. REV. 100, 101 (2001) [hereinafter Colella, Coworker Distributive].

243. Colella et al, *supra* note 241, at 5.

244. Debra A. Dunstan & Ellen Maceachen, *A Theorhetical Model of Co-worker Responses to Work Reintegration Processes*, 24 J. OF OCCUPATIONAL. REHABILITATION 189, 193 (2014).

perceptions of some distributive unfairness.[245]

Without negotiation, procedural justice may be hard to achieve for co-workers affected by an accommodation, and co-workers have neither a legal right nor sufficient knowledge to exercise their voices in such a process.[246] Moreover, because such decisions are individualized, co-workers may not perceive a consistency in procedures and outcomes of requests for accommodation.[247] Through negotiation, union involvement in discussions regarding accommodations may be an important means of gaining greater coworker support for the accommodation by increasing their perceptions of procedural justice.[248] As explained above, the NLRA provides the right to negotiate about any accommodations which affect the organization's terms and conditions of employment that could increase co-workers' perceptions of employee voice. Even the availability of a grievance procedure to record disagreement with an accommodation can increase perceptions of procedural justice.[249]

Overall, union involvement in a relatively more formalized decision–making process increases perceptions of procedural justice.[250] Perceptions of procedural justice can also be enhanced by the involvement of union representatives with specialized knowledge about both the ADA and the particular workplace. As a repeat participant in the process of negotiating accommodations, unions can gain and apply knowledge about the right to accommodations under the ADA. Union involvement in requests for accommodation, as well as a general support for employing people with disabilities, may help co-workers to have more contact with employees with disabilities, which can in turn increase their perceptions of procedural fairness.[251] A history of flexibility in how work is performed and accommodations are provided, which could be facilitated or enhanced by bargaining, can also increase perceptions of procedural fairness, because of more positive perceptions of consistency.[252] It should be noted, however, that a union's involvement may not change the perception of procedural justice that is dependent on a coworker's perceptions of organizational support or individual level of concern for social justice.[253]

The nature of the employee's disability can be an important factor in

245. Colella et al, *supra* note 241, at 4 (explaining how procedural justice implicates moderate effects of distributive justice judgments).

246. Colella, *supra* note 242, at 102; Colella et al, *supra* note 225, at 6.

247. Colella et al, *supra* note 225, at 6.

248. Hodges, The Americans with Disabilities Act, *supra* note 17, at 610.

249. Colella et al, *supra* note 241, at 15.

250. *Id*. at 15-16.

251. *Id*. at 12.

252. *Id*. at 13-15.

253. *Id*. at 11-12.

the acceptance of accommodation for him or her,[254] and unions may be helpful in convincing co-workers that an accommodation is justified by the employee's condition. If the employee with a disability is willing to share that information with the union representative, even though they might not care to share it with others, co-workers may be more apt to believe that the accommodation is necessary and, therefore, procedurally fair.

Union representation can also increase perceptions of distributive justice among co-workers of the employee seeking an accommodation, which can be important to their acceptance and support of the accommodation.[255] The accommodations concerning the allocation of resources can seemingly undermine distributive justice. Since the union represents all other members of a bargaining unit as well as the person with a disability, their involvement can help the union members accept the fairness of the distribution of privileges or resources involved in an accommodation.

A union's involvement that expands the range of accommodations considered can also enhance distributive justice.[256] The union may suggest alternative accommodations that would not conflict with a CBA provision or would otherwise have less of an impact on the interests of other employees.[257] This potential for negotiation has been recognized by the ILO, which has stated that "unions with disabled workers should be involved in the accommodation process together with the disabled worker, the employer and other co-workers, if appropriate, to find reasonable solutions that will accommodate the worker's needs without imposing a disproportionate burden on the employer."[258]

Virtually all CBA's include a grievance and arbitration process, and most permit grievances over any interpretation or application of the contract.[259] If the duty to accommodate is clarified in a CBA, an arbitrator could resolve any specific claim by a person seeking an accommodation or

254. See the confidentiality condition for procedural justice noted by Colella, *Id*. at 3, 6 (noting that while the ADA requires confidentiality surrounding an employee's disability and accommodations, some disabilities are readily apparent in the workplace regardless; the ADA, however, provides privacy protections requiring that disability information should not be released except on a need-to-know basis, which helps to protect the rationale for the decision upon accommodation).

255. Colella, *supra* note 242, at 102.

256. Hodges, The Americans with Disabilities Act, *supra* note 17, at 609-10; Pritchard, *supra* note 30, at 404 (asserting that a union should ensure that proposed accommodations do not harm interests of other members of a bargaining unit).

257. Daly-Rooney, *supra* note 39, at 410.

258. ILO, TRADE UNIONS AND WORKERS WITH DISABILITIES: PROMOTING DECENT WORK, COMBATING DISCRIMINATION 11 (2004).

259. BNA, *Basic Patterns, supra* note 62 at 33.

another employee alleging that an accommodation infringes on his or her rights. As noted regarding the arbitration of Title VII claims, arbitration "has the potential to accommodate the competing interests of employers and employees."[260] Through arbitration, employers can avoid the costs of litigation, as well as negative public attention, and enjoy the finality of an arbitration award, since courts tend to defer to the parties' grievance and arbitration process to resolve such issues.[261]

In lieu of relying on the typical grievance/arbitration system contained in most CBA's, the parties to a CBA could agree to an alternative process to resolve issues surrounding an employee's request for an accommodation. For example, a CBA between ArcelorMittal USA and the Steelworkers provided for the creation of a civil rights committee, including two union and two management representatives to "review and investigate matters involving civil rights and attempt to resolve them."[262] More specifically, a CBA with the Pacific Maritime Association created a joint labor-management committee to determine which employees were entitled to placement preference due to their disability.[263] Regardless of its specific form, alternative dispute resolution can result in less litigation under the ADA and broader availability of accommodation for employees with disabilities.

The negotiation process, as well as reliance on alternative dispute resolution, could lead to great implementation and acceptance of accommodations without placing a burden on co-workers or the employer. Beyond these general benefits, negotiating over accommodations can provide benefits which are specific to employers, unions and employees with disabilities, as outlined below.

B. *Benefits for Employers*

In addition to the general advantages of bargaining over accommodations outlined above, employers stand to gain additional benefits from bargaining over the provision of accommodations. Employers can engage in both broad and individualized bargaining over accommodations to reduce potential liability under the ADA, helping to

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260. Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 826 (1992-93).

261. *See, e.g.*, *Soone v. Kyo-Ya Co.*, 353 F. Supp. 2d 1107 (D. Ha. 2005) (holding that courts should typically defer to arbitration decisions and review settlement mechanisms without dealing with the merits of the dispute where a CBA includes arbitration provisions).

262. BNA, *Basic Patterns*, *supra* note 62.

263. Willis v. Pac. Mar. Ass'n., 244 F.3d 675 (9th Cir. 2001).

clarify the "uncertain" scope of statutory rights.[264] Reasonable accommodation in particular has been labeled an "elusive concept," and employers are arguably left "dizzied" by its ambiguity.[265] This uncertainty stems in large part from the fact that an accommodation may be reasonable for some, but not other employers. Under the Supreme Court's case-by-case approach for ADA claims, employers face the prospect of litigation arising from every decision regarding an accommodation.[266] Consequently, employers are being "forced to spend even more time managing medical leave and accommodation issues, which drastically impacts their ability to manage day-to-day operations."[267] Given the Supreme Court's deference to CBA language in *Barnett*, negotiation of CBA language defining what is and is not reasonable in a particular workplace, as well as negotiation over an individual request for accommodation, should help insulate an employer from potential liability under the ADA.

In addition to providing clarity, negotiation over accommodations can also help address potential liability in situations where a requested accommodation potentially conflicts with a CBA provision. Without negotiation, an employer could be forced to "choose between protecting and advancing the interests of the individual or the interests of the collective group."[268] A unilateral response to such a request for accommodation could expose the employer to an unfair labor charge based on its failure to bargain.[269] If the requested accommodation potentially conflicts with a CBA provision, the employer could face liability for failing to accommodate or for violating the CBA.[270] Bargaining will help shield the employer from ADA claims,[271] particularly if the negotiation includes the employee seeking the accommodation as well as the union representing her. As noted by one commentator, "both the ADA and NLRA serve compelling interests and protect legitimate constituent concerns."[272] Adherence to one, while violating the other, could subject an

264. Rabin, *supra* note 46, at 246. *See also* Wesley A. Scroggins, *The Measurement and Structural Modeling of the Reasonableness of Workplace Accommodation*, 19 EMP. RESP. & RTS. J. 279, 280-82 (2007) (noting that courts have difficulty defining what constitutes a reasonable accommodation).

265. Basas, *supra* note 4, at 60, 75.

266. Rabin, *supra* note 46, at 273.

267. Mindy Toran, *Special Report; Courts, Employers Still at Odds over Application of ADA in the Workplace*, 19 WORKER'S COMPENSATION REP. (LRP Publ'ns., Palm Beach Gardens, Fla. Apr. 2008).

268. Hankinson, *supra* note 89, at 266.

269. Dubault, *supra* note 48, at 1292.

270. Stahlhut, *supra* note 38, at 74.

271. Hodges, The Americans with Disabilities Act, *supra* note 17, at 619.

272. Hankinson, *supra* note 89, at 246.

employer to damages and attorney fees.

Beyond avoiding liability, bargaining for clarity regarding what accommodations should be provided can help employers resolve claims more effectively. Generally, collective bargaining helps to resolve disputes without litigation, because a collective bargaining relationship allows for quick intervention, low-level resolution of problems and a long term relational view to resolving disputes.[273] Through bargaining, employers can be directed to address accommodation requests based on the facts related to the burden the accommodation would impose.[274]

Negotiation also can benefit employers because "a system of collectively negotiated benefits offers more flexibility to employers than mandated legal rights applicable to all."[275] Employers may worry that provision of an accommodation for one will inhibit flexibility in addressing future requests for accommodation. This concern can be addressed through negotiation. For example, two arbitration awards honored CBA provisions that an individual accommodation would not be precedent setting.[276]

In addition to resolving conflicts, ADA compliance through negotiation can benefit employers, since changes implemented as accommodations can also enhance the productivity, job tenure and absenteeism rates of all employees.[277] Accommodating employees with disabilities can help retain employees known to have low turnover rates, as well as equivalent absenteeism and productivity compared to non-disabled workers.[278] Moreover, negotiation over an individual accommodation can avoid the discharge of productive employees with disabilities, as well as other departure costs associated with losing the employee with a disability who cannot remain employed without the accommodation.[279]

Productivity can also be enhanced, since negotiation over accommodations should mitigate negative attitudes among other employees

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273. Ellen Dannin, *Forum: At 70, Should the National Labor Relations Act Be Retired?: NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 258-59 (2005).

274. Basas, *supra* note 4, at 110, 112 (focusing on facts removes influence of "attitudinal barriers and gut reactions to disability").

275. Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L.J. 601, 614 (2005).

276. *Interstate Brands Corp.*, 113 LA 161 (1999); *Techneglass, Inc.*, 120 LA 722 (2004).

277. Hoffman, *Corrective Justice*, *supra* note 236, at 1279.

278. *Id.*

279. Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and Their Co-workers*, 34 FLA. ST. U.L. REV. 313, 324 (2007).

who feel that an accommodation has adversely affected them. Employers may be concerned that an accommodation will be viewed as favoritism by other employees.[280] Union input prior to the provision of the accommodation should help to address a perception of unfair advantage, since the union is charged with representation of all employees. If the accommodation does not directly infringe on other employees' rights, employers should be able to address any morale issues arising from an accommodation through awareness training and supervisor oversight.[281] Acceptance of such training should be enhanced by union support.

The benefits of providing accommodations are demonstrated by the fact that at least some employers have been willing to accommodate employees who are not protected by the ADA, if the cost was sufficiently low.[282] Accommodation for one person with a disability often benefits others, particularly where the accommodation is generalizable, durable, and visible.[283] Negotiation about accommodations can help to spread their benefits among more workers, compared to individual enforcement of ADA rights, which may only affect those with the most resources, the greatest persistence or the most obviously reasonable requests.[284]

C. *Benefits for Unions*

Collective bargaining agreements can be characterized as both the source of workplace rules and as "expressions of workplace values."[285] Generally, unions can bargain for conditions of employment that fit the needs of a particular workplace, as well as negotiate necessary changes.[286] Such negotiations include flexible internal workplace systems to deal with discrimination, which can be beneficial for all employees, not just those

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280. *See* Kathy Charmaz, *Disclosing Illness and Disability in the Workplace*, 3(1/2) J. INT'L EDUC. BUS. 6-19 (2010) (discussing the dilemmas of disability disclosure for employers).

281. *See* Key, *supra* note 84, at 1034 (providing employer strategies for maintaining employee morale).

282. *See, e.g.*., Hoffman, *supra* note 77, at 326 (analyzing empirical data regarding the likelihood of employer to grant accommodation request under various circumstances).

283. *See* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 841, 846, 895 (2008) (discussing third-party benefits of granting disability accommodations in the workplace).

284. *See* Hodges, The Americans with Disabilities Act, *supra* note 17, at 615, 618 (discussing conflicts between accommodations and collective bargaining agreements).

285. Basas, *A Collective Good, supra* note 6, at 811-12 (discussing the "belief-change theory" that regulations can change norms and decision making).

286. *See* Hodges, The Americans with Disabilities Act, *supra* note 17, at 618 (explaining that, even before the enactment of the ADA, unions frequently negotiated with employers).

with disabilities.[287]

Collective representation gives relatively greater power to workers and is associated with greater individual rights, compared to a pure individual rights system.[288] A union's involvement in the ADA's interactive process "would offset the structural disadvantage that a single employee has against a large [employer]," based on its structural power and its ability to gain information through experience with other employees with disabilities.[289] As noted by Marc Blondel, Worker Member of the ILO Governing Body and former General Secretary of the French labor confederation CGT-Force, "[d]isabled workers' struggle is every worker's struggle. This is not about pity or doing good. It's about fighting for the dignity of all workers."[290]

Rights for persons with disabilities are sometimes discounted as something only needed by "someone else."[291] Both unions and employees should recognize that all employees run the risk of becoming disabled at some point, because of an injury or illness arising in the workplace or beyond.[292] In the words of Ruth O'Brien, "what benefits one helps all."[293] Problem solving for a particular group, such as employees with disabilities, "can trigger systemic changes that simultaneously address individual concerns and yield systemic improvements that benefit a broader group."[294]

More specifically, accommodations can benefit both able-bodied

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287. *See id. at 614-621* (identifying and analyzing policies that resolve the conflicts between disabled and abled employees); *see also* O'Melveny, *supra* note 34, at 220 (discussing the expansion of disability accommodations and requirements under the ADA). *See generally* Floyd D. Weatherspoon, *Incorporating Mandatory Arbitration Employment Clauses into Collective Bargaining Agreements: Challenges and Benefits to the Employer and the Union*, 38 DEL. J. CORP. L. 1025, 1035 (2014) (advocating for individuals' rights will benefit all union members).

288. *See* Hodges, The Americans with Disabilities Act, *supra* note 17, at 614.

289. O'Brien, *supra* note 142, at 132.

290. Luc Demaret, *Disability – the Human Cost of Discrimination*, TRADE UNIONS AND WORKERS WITH DISABILITIES: PROMOTING DECENT WORK, COMBATING DISCRIMINATION, 11, 16 (2004).

291. Basas, *A Collective Good*, *supra* note 6, at 843.

292. Hodges, The Americans with Disabilities Act, *supra* note 17, at 619. *See also* O'Brien, BODIES IN REVOLT, *supra* note 139, at 115 (suggesting that few workers will not experience a serious injury or illness over their lifetime).

293. O'Brien, O'Brien, BODIES IN REVOLT, *supra* note 139, at 119, 138 (arguing that accommodations represent needs that every employee may someday have).

294. Susan Sturm, Response, *Designing the Architecture for Integrating Accommodation: An Institutional Commentary*, 156 U. PA. L. REV. 11, 13-14 (2008), https://static1.squarespace.com/static/5404b603e4b0c1de72655e7e/t/540f28e6e4b03c9d357c03b9/1410279654077/Designing+the+Architecture+for+Integrating+Accommodation-+An+Institutionalist+Commentary.pdf [https://perma.cc/C5NH-2LUP] [hereinafter Sturm, *Designing the Architecture]*.

employees and employees who suffer from limitations that do not rise to the level of the ADA's coverage,[295] especially where those accommodations are generalizable, durable, and visible. For example, a request for an accommodation could prompt technological innovation or beneficial modifications to the workplace.[296] In addition, an accommodation of an employee with a disability may make others' work easier or more enjoyable.[297]

Beyond potential benefits for able-bodied employees, unions can strengthen their organizations by advocating for accommodations. To mobilize workers and impact public perception, unions need to expand beyond the narrow aspect of workers' economic identities.[298] From 1998 to as recently as 2009, discussions of unions and diversity did not acknowledge people with disabilities as having an interest deserving protection.[299]

Inclusion of disability rights in union agendas can be seen as "a way of voicing greater concerns about what counts as diversity, what it means to create life-span career paths for all workers, and how issues of health equity are intimately intertwined with both public policy and employment."[300] Moreover, allowing such employer discretion could be an effective way for an employer to undermine a union and reduce bargaining unit solidarity.[301]

The individual analysis and treatment required under the ADA necessitates the exercise of a great deal of discretion, including providing accommodations that conflict with standard policy or practice.[302] Such

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295. Emens, *supra* note 283, at 842. *See also* Colella, *supra* note 242, at 18 (stating that accommodations can have beneficial effects for coworkers).

296. *See id*., *supra* note 283, at 914 (discussing ways in which design and disclosure of accommodations affect the extent of their benefits to third parties).

297. *See* Colella, *supra* note 242, at 19 (acknowledging scenarios where the outcome of accommodation had positive outcomes for all workers).

298. Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1769 (2001) (discussing the shortcomings of unions efforts). *See also* O'Brien, BODIES IN REVOLT, *supra* note 139, at 118 (proposing that the ADA could help labor unions carve out a niche representing employees with disabilities).

299. Susan Woods, *Unions, People, and Diversity: Building Solidarity Across a Diverse Membership*, 7 DIVERSITY FACTOR 38, 40 (1998) (discussing union movements to increase diversity of membership); Michael Yates, *Race, Gender, Ethnicity, and Sexual Orientation*, WHY UNIONS MATTER 144-48 (Monthly Review Press 2009).

300. Basas, *A Collective Good*, *supra* note 6, at 845. *See also* Marion Crain, *Strategies for Union Relevance in a Post-Industrial World: Reconceiving Antidiscrimination Rights as Collective Rights*, 57 LAB. L.J. 158, 168 (2006) (advocating for individual rights that will benefit unions).

301. Woods, *supra* note 299, at 40.

302. Shapiro, *supra* note 86, at 4, 30. *See also* O'Brien, BODIES IN REVOLT, *supra* note 139, at 112 (accommodation requests undercut managerial power, including determining

discretion opens the door to decisions that reflect, express, or produce outcomes that are biased against members of protected groups.[303] Broad discretion for the employer to approve accommodations based on its interpretation of potential conflict with a CBA may not best protect the interests of the employee with a disability or other employees represented by that union.[304] While some have concluded that the ADA can only be implemented by undermining traditional labor goals, because union's goal is to limit an employer's exercise of discretion,[305] this is not necessarily true. It is a union's failure to assert its right to bargain regarding accommodations that allows employers to "deal directly with individual workers on matters vital to their economic well-being as long as some other aspect of the worker's identity protected through antidiscrimination statutes is involved."[306]

Some CBA's do nothing to limit the employer's discretion in making decisions about the reasonableness of accommodation requests. For example, an AFSCME CBA allowed the employer to determine which duties were essential,[307] which can be an important factor in determining the reasonableness of an accommodation request. Similarly, other CBA's allow the employer to unilaterally reassign an employee or provide some other accommodation, despite potential conflict with the CBA.[308] Instead of allowing the employer such discretion, the CBA could limit an employer's discretion in making such factual determinations that can in turn determine the reasonableness of an accommodation.

Unions may find it difficult to convince members of a bargaining unit that advocating for another employee's rights is in their best interest.[309] If the impact on other unit members is severe, the union may reject a proposed accommodation as "being unduly disruptive to the legitimate rights and interests of the other bargaining unit members under the

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what are essential job duties).

303. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 485 (2001) [hereinafter Sturm, *Second Generation*] (discussing the impact of employer discretion in decision making).

304. *See* Paul L. Nevin, Note, "*No Longer Caught in the Middle?": Barnett Seniority System Ruling Eliminates Managements' Dilemma with ADA Reasonable Accommodation*, 41 BRANDEIS L.J. 199, 215 (2002) (discussing how employer discretion may undermine union action).

305. Shapiro, *supra* note 86, at 4, 41.

306. Crain & Matheny, *supra* note 298, at 1769-70.

307. *AFSCME Council 14*, Lab. Arb. Rep. Supp. (BNA) 117294 (1996) (Berquist, Arb.).

308. *Maintenance & Industrial Services*, 116 Lab. Arb. Rep. (BNA) 293 (2001) (Hart, Arb.); *Commercial Cleaning Sys*., 122 Lab. Arb. Rep. (BNA) 1383 (2006) (McCurdy, Arb.).

309. *See* Weatherspoon, *supra* note 287, at 1035 (advocating for individuals' rights will benefit all union members).

collective bargaining agreement."[310] But it is the union, not the employer, who should make this initial determination. The union is in the best position to balance competing interests arising within its bargaining unit. As noted by one expert, at least some burden on other employees (who lose or delay rights under the CBA) can be justified by the ADA's goal of increasing the independence of persons with disabilities, and the benefits and efficiencies of retaining the employee with a disability.[311]

Tension between interests of employees with and without disabilities may be heightened where the requested accommodation is seen as a limitation or infringement on the rights or interests of other members of the bargaining unit.[312] Yet "[m]aking hard choices is nothing new for unions, which must constantly choose between conflicting interests.... The collective nature of the endeavor calls for the sacrifice of individual gains in the interest of the common welfare."[313] While employers tend to focus on productivity concerns,[314] unions are in the unique position to consider a variety of potentially conflicting factors such as the nature of the right at stake; the importance of seniority under the CBA, both in general and in a particular circumstance, and the relative interests of the employee with a disability and co-workers.[315] Inclusion of a union in decision-making regarding request for accommodations would also "foster a cooperative atmosphere in the workplace" and take advantage of the union's expertise in "balancing the diverse interests of their members."[316]

With union involvement, a CBA can help to define generally which accommodations will be deemed reasonable in a particular workplace. For instance, the Department of Housing and Urban Development's agreement with the American Federation of Government employees includes examples of what constitutes reasonable accommodation, including job restructuring, schedule changes, and the provision of readers and interpreters.[317] Similarly, a United Steelworkers agreement stipulated that changes in schedule may be considered to be reasonable

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310. McDevitt, *supra* note 29, at 377.

311. *See* Porter, *Martinizing Title I, supra* note 69, at 575-76 (discussing the difficulties surrounding the reassignment accommodation).

312. *See* Weatherspoon, *supra* note 287, at 1070 (explaining the difficulties in balancing rights among union members).

313. Rabin, *supra* note 46, at 253-54.

314. *See* Ida Seing, et al., *Policy and Practice of Work Ability: A Negotiation of Responsibility in Organizing Return to Work*, 22 J. OCCUP. REHAB. 553, 561 (2012) (evaluating constraints on employers when making worker accommodations).

315. *See* Daly-Rooney, *supra* note 39, at 415 (discussing multifactor tests examined by employers when considering employee accommodation requests).

316. Dubault, *supra* note 48, at 1294.

317. *Dept. of HUD*, 116 Lab. Arb. Rep. (BNA) 1364 (2002) (McReynolds, Arb.).

accommodations.[318]

In balancing the interests of the employee seeking an accommodation against the interests of other members of the bargaining unit, unions may fear that an accommodation which affects others' interests may give rise to a claim that the union has breached its duty of fair representation. There is some inherent tension between collective and individual interests.[319] One expert even went so far as to state that "[i]f the rights of the other bargaining-unit employees will be adversely affected, the union cannot agree to such a proposal without violating its duty of fair representation to those workers under the NLRA." [320] This is a broad overstatement of a union's duty of fair representation (DFR) in negotiations.

DFR only requires that a union avoid irrational or discriminatory conduct during negotiations or other representation of members of the bargaining unit.[321] An error of judgment or "mere negligence or tactical error" by the union does not establish a breach of the duty of fair representation.[322] A union need not provide the opportunity to arbitrate every grievance, even if union representatives lack the expertise to evaluate the merits of a claim.[323] Like representation of members with competing interests, bargaining necessarily requires compromise across the interests of those members.[324] The Supreme Court has noted that "[a]ny substantive examination of a union's performance must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities."[325] Given the "wide latitude" given to unions in fulfilling their responsibilities,[326] courts have given unions the discretion to refuse to pursue grievances by members with

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318. *See CH2M-WG Idaho*, 134 Lab. Arb. Rep. (BNA) 876 (2014) (DiFalco, Arb.)(addressing employee accommodations in a wrongful termination action).

319. *See* Hodges, *Protecting Unionized Employees*, *supra* note 17, at 144 (discussing conflicts of interest that may arise between employee and union).

320. O'Melveny, *supra* note 34, at 232.

321. *See, e.g.*, *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (stating, in dicta, that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith); Emswiler v. CSX Transp., Inc., 691 F.3d 782, 793 (6th Cir. 2012) (quoting *Vaca v. Sipes*).

322. Martinez v. Caravan Transp., Inc., 253 F. Supp. 2d 403, 411 (E.D.N.Y. 2003). *See also* Gorham v. Transit Workers Union of Am., No. 98 Civ. 313, 1999 U.S. Dist. LEXIS 3573, at *11 (S.D.N.Y. 1999), *aff'd without opin.*, 205 F.3d 1322 (2d Cir. 2000) (stating that "tactical errors are insufficient to show a breach of duty of fair representation").

323. *See* Hodges, *Protecting Unionized Employees*, *supra* note 17, at 145, 148-49 (expanding on the duty of fair representation).

324. *See* Air Line Pilots Assoc. Int'l v. O'Neill, 499 U.S. 65, 81 (1991) (holding that "[a] rational compromise on the initial allocation of the positions was not invidious 'discrimination' of the kind prohibited by the duty of fair representation.").

325. *Id.* at 78.

326. Spellacy v. Airline Pilots Ass'n-Int'l, 156 F.3d 120, 126 (2d Cir. 1998).

disabilities.[327] It is important to keep in mind that a DFR claim cannot arise based on rights such as those found in the ADA, which do not derive from a union's status as the exclusive representative.[328] In contrast, recent recognition that a union may be liable for discrimination under the ADA, even if it has not breached its duty of fair representation,[329] provides support for a union's attention to its obligation to represent employees who seek accommodation under the ADA.

The ability of a union to explicitly waive members' rights to pursue a statutory claim outside of arbitration provides incentive for unions to negotiate no more than a vague nondiscrimination clause, so that the individual employee's rights are not waived.[330] However, the waiver of an employee's right to a judicial forum to enforce statutory rights is not a mandatory subject of bargaining,[331] thereby preventing an employer from conditioning other CBA provisions on a union's agreement to waive employees' access to the judicial forum to enforce statutory rights.[332] This also means, however, that employers can seek such waivers without consultation with a representing union. Some have argued that "[w]here a subject of bargaining would otherwise be permissive, it may become mandatory when it is so intertwined with a mandatory subject of bargaining that it vitally affects the terms and conditions of employment of the employees."[333] Unlike discharges, however, a failure to accommodate may

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327. *See, e.g.*, Reddick v. Yale Univ., No. 3:13-cv-01140-WWE, 2015 U.S. Dist. LEXIS 157065, at *23-24 (D.D.Ct. Nov. 20, 2015) (finding that plaintiff could not show violation of CBA); Wood v. Crown Redi-Mix, Inc., 218 F. Supp. 2d 1094, 2002 U.S. Dist. LEXIS 16461, at *1107-08 (S.D. Iowa, Aug. 29, 2002), *aff'd* 2003 U.S. App. LEXIS 16137 (8th Cir. Iowa, Aug. 7, 2003) (holding that plaintiff could not show breach of CBA sufficient to justify pursuing a grievance).

328. *See* Rabin, *supra* note 46, at 174 (discussing the strains of the current legal model of union representation).

329. *See, e.g.*, Banks v. Int'l Union of Operating Eng'rs Local 99, No. 15-cv-01598 (APM), 2016 U.S. Dist. LEXIS 97902, at *10-13 (D.D.C July 27, 2016) (discussing union liability under the Title VII and the ADA); Garity v. APWU Nat'l Labor Org., No. 13-15195, 2016 U.S. App. LEXIS 12380, at *39-41 (9th Cir. July 5, 2016) (stating that a plaintiff may still have a Title VII or an ADA claim even if she cannot prove a violation of the labor laws).

330. *See* Weatherspoon, *supra* note 287, at 1035 (discussing difficulties unions face in negotiating waiver clauses with members).

331. *See*, Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc., 199 F.3d 477, 484-85 (D.C. Cir. 1999) (finding that statutory rights need not be part of the bargaining process between union and employee); *Kolman/Athey Div. of Athey Prods. Corp.*, 303 N.L.R.B. 92 (1991) (discussing the terms of employer-employee bargain).

332. Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?* 16 OHIO ST. J. ON DISP. RESOL. 513, 531-32 (2001) [hereinafter Hodges, *Arbitration of Statutory Claims*](discussing the implications for employers when employees waive their rights).

333. *Id.* at 546-47.

not be directly addressed by other provisions of the CBA.

A study of one hundred public sector CBAs found that thirteen adopted a "community stakeholder" approach, with some including specific language regarding union involvement in accommodations.[334] This sometimes included union representation for employees seeking accommodations, and the union and employer's agreement to consider accommodation requests and attempt to place that employee upon return from disability-related leave.

Union involvement in bargaining regarding accommodations can also affect the employer's undue hardship defense, which allows employers to avoid accommodating if it would impose an undue hardship on that employer.[335] Past allowance or provision of the accommodation sought can undermine an undue hardship defense, since the employer's past behavior can be seen as evidence of an absence of hardship.[336] Thus, employers "fear that fulfilling the needs of one employee with a disability could set a precedent for another employee."[337] A union's representation of the collective bargaining unit puts it in a position to bargain on behalf of the employees who may not need an accommodation now, but could need one in the future - a need which could be unfulfilled based on the employer's earlier handling of similar requests. As noted by Ruth O'Brien, "[w]hen an employer accommodates one employee, this accommodation represents a precedent that another employee might profit from in the future."[338]

Some unions have recognized the benefits of intentionally representing bargaining unit members with disabilities. For example, both "IAM Cares," sponsored by the International Association of Machinists and Aerospace Workers (IAM), and a joint effort between IAM and Boeing Aircraft work to provide retraining and related assistance to employees with disabilities arising from the workplace.[339] Under this agreement, employees are evaluated individually and provided with appropriate

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334. Basas, *A Collective Good*, *supra* note 6, at 821.

335. *See* 42 U.S.C. § 12111(10); *see also* Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1183-84 (6th Cir. 1996) (noting that the burden of proof does not shift to the employer to show lack of undue hardship).

336. *See, e.g.*, Haschmann v. Time Warner Entm't Co., L.P., 151 F.3d 591, 601-2 (7th Cir. 1998) (finding that previous leave of 6 months showed that additional leave would not impose hardship).

337. Ruth O'Brien, *Symposium: Subversive Legacies: Learning from History/Constructing The Future: A Subversive Act: The Americans with Disabilities Act, Foucault, and an Alternative Ethic of Care at the Global Workplace*, 13 TEX. J. WOMEN & L. 55, 57 (2003) [hereinafter O'Brien, Symposium].

338. O'Brien, BODIES IN REVOLT, *supra* note 139, at 117.

339. *See* O'Melveny, *supra* note 34, at 247 (arguing that benefits arise when unions represent employees with disabilities).

accommodations to enable an earlier return to work.[340] In the two-year period following the implementation of this program, both the time lost by employees with disabilities and workers' compensation costs were cut in half in one Boeing division.[341] Taking a more expansive approach, in Canada, the United Steelworkers have adopted a policy to bargain for a "commitment from the parties to accommodate employees with disabilities regardless of the cause of the disability, and regardless of whether temporary or permanent."[342]

For the foregoing reasons, unions should consider asserting the right to bargain over any accommodation that affects a term or condition of employment or otherwise conflicts with an existing CBA. Bargaining will help to sustain the union's importance as an employee representative. Bargaining over accommodations will protect the interests of all members of the bargaining unit. Moreover, bargaining to assert one employee's ADA rights may benefit other members of the bargaining unit by improving overall working conditions or establishing a standard of accommodation for the future.

D. *Benefits for Employees with Disabilities*

Unions can play a significant part in enforcing rights codified in the ADA to benefit present and future employees with disabilities.[343] Workplace policies and practices, as enumerated in a CBA, can reflect the corporate culture.[344] A culture which values diversity and emphasizes nondiscrimination has been shown to positively impact people with disabilities.[345] Therefore, inclusion of supportive language in a CBA should enhance the availability of accommodations for employees with disabilities.

Beyond its general benefits, a union's coordination of requests for

340. Jay W. Spechler, REASONABLE ACCOMMODATION: PROFITABLE COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT 46 (St. Lucie Press 1996).

341. *Id*.

342. ILO, Trade Unions and Decent Work for People with Disabilities Information Sheet, http://www.ilo.org/public/english//region/asro/bangkok/ability/download/tufact.pdf [https://perma.cc/GSJ6-SUKJ]; *USW Policy on Disability*, UNITED STEEL WORKERS, http://www.usw.ca/act/activism/human-rights/resources/opening-doors-usw-policy-on-disability-rights [https://perma.cc/6GKT-NC9A].

343. *See* Hodges, The Americans with Disabilities Act, *supra* note 17, at 625 (arguing that union participation is a significant step in eliminating disability discrimination).

344. *See* Schur, *supra* note 19, at 12-13 (discussing the impact of corporate policies on employees with disabilities).

345. Susanne Bruyere, et al., *Identity and Disability in the Workplace*, 44 WM & MARY L. REV. 1173, 1187 (2003) (discussing the importance of workplace culture in minimizing disability impact).

accommodation can strengthen those requests. As one expert observed, "a collective of workers making reasonable accommodations requests would change the environment of an entire workplace."[346] Regarding union involvement in the enforcement of Title VII, one expert noted that "[u]nions can help harmonize issues arising under the collective bargaining agreement with issues arising under employment laws to achieve the overall good of industrial peace."[347]

Bargaining may be more effective in advancing the interests of employees with disabilities than the law alone. A marriage of labor law and individual employment laws provides the best opportunity for improved working conditions.[348] Second-generation discrimination requires a proactive problem-solving approach, rather than a regulatory system.[349] In Canada, for example, the strengthening of the duty to accommodate is "primarily because of unions" because unions "have the resources and motivation to push the envelope on this issue."[350] One Canadian union outlined its responsibilities regarding accommodation to include insistence "that the employer fulfills its proactive duty to design workplace requirements and standards so that, from the outset, they do not discriminate," and modeling a "problem-solving approach to accommodation;" the employer and union also review all applicable standards, in part to assure that "flexibility and a willingness to accommodate individual needs are built in."[351]

Outside of the United States, collective bargaining has played an important role in the enforcement of rights, "particularly... where legislation or government programmes are inadequate, or where economic conditions are such that employers are reluctant to employ people they perceive as less productive."[352] As explained by Ursula Engelen-Kefer in reference to new protections for employees with disabilities, "[n]ew law does not enforce itself. The new rights must be asserted by the people for

346. O'Brien, Symposium *supra* note 337, at 89.

347. Plass, *supra* note 260, at 827-28.

348. O'Brien, *supra* note 142, at 131 (proposing solutions to improve working conditions).

349. Sturm, *Second Generation*, *supra* note 303, at 475 (discussing limitations of a rule enforcing approach to employment discrimination).

350. National Union of Public and General Employees, Duty to accommodate-big labour movement victory (Sept. 1, 2010), http://nupge.ca/content/3528/duty-accommodate-big-labour-movement-victory [https://perma.cc/E3UB-3J28].

351. National Union Primer – Duty to accommodate (Nov. 2002), http://www.nupge.ca/sites/nupge.ca/files/publications/Duty%20to%20Accommodate.pdf [https://perma.cc/33UK-LZSS].

352. *Trade Union Action*, *supra* note 231, at 47.

whom they were created."[353] At least one expert argues that the law is a limited means of affecting change, and unions should use it as an "aid to bargaining" but only as "one piece of the strategy and not the guiding light."[354] In Britain, for example, it has long been acknowledged that individual employment disputes are better managed in unionized environments.[355] Similarly, in the early days of the ADA, one study found that unionized employers were far more likely to comply with the ADA.[356]

Union representation in the accommodation process can prevent an employer from supporting only the interests of able-bodied employees who oppose an accommodation, which can be seen as "perpetuating discrimination toward persons with disabilities."[357] A stronger union role can address the ambiguity surrounding the scope of "reasonable accommodation" that has allowed both employers and courts to "consider what they find unreasonable about the ADA, people with disabilities, and their needs."[358]

Unions can assist an employee with a disability in the interactive process that the ADA requires.[359] Employees with disabilities often lose their claims challenging a failure to accommodate because they are blamed for the breakdown of that negotiation process.[360] Unions could help encourage and facilitate the continuation of the interactive process. Such a role could be particularly important for employees lacking the ability to negotiate effectively.[361] More importantly, unions can better counter an employer's "resistance strategies" used to slow down or avoid the provision of accommodations, and the potential for retaliation feared by

353. Graham, *supra* note 234, at 28.

354. Ann C. Hodges, *Avoiding Legal Seduction: Reinvigorating the Labor Movement to Balance Corporate Power*, 94 MARQ. L. REV. 889, 896 (2011) [hereinafter Hodges, Avoiding Legal Seduction].

355. *See* Anna Pollert, *The Unorganized Worker: The Decline in Collectivism and New Hurdles to Individual Employment Rights*, 34 INDUS. L. J. 217, 220 (2005) (discussing labor-related litigation in Britain).

356. SUSAN SCHURMAN, ET AL, *The Role of Unions and Collective Bargaining in Preventing Work-related Disability* 121, 143 in NEW APPROACHES TO DISABILITY IN THE WORKPLACE (Eds., Terry Thomason, et al. Indus. Relations Research Ass'n 1998).

357. O'Brien, Symposium *supra* note 337, at 86.

358. *Trade Union Action, supra* note 231, at 47.

359. Barnett v. U.S. Air, Inc. (*Barnett II*), 228 F.3d 1105, 1113 (9th Cir. 2000) (stating that the burden of establishing reasonable accommodations should be on the employer rather than the employee).

360. Craig Sullivan, *The ADA's Interactive Process,* 57 J. OF THE MO. BAR 116, 120 (2001) (stating that an employee's case will be dismissed if a negotiation breakdown is a consequence of the employee's actions).

361. Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA,* 94 GEO. L. J. 399, 463 (2004) (emphasizing the union role in the negotiation process).

employees requesting accommodations.[362]

Union representation of employees with disabilities in claims for accommodations also can have several specific advantages. Unions can be an important source of information regarding employees' individual rights.[363] Additionally, unions have access to information relevant to the claim and can identify and help produce potential witnesses because the CBA's just cause provision protects them against retaliation.[364] Unions often can make recommendations for specific accommodations.[365] Furthermore, unions can make use of the advantages of being a "repeat player" in the arbitration process.[366]

Looking at the rights of the disabled more broadly, negotiation to clarify and even expand upon available accommodations can be a way to move beyond the sometimes narrow and often confusing legal parameters of the duty to accommodate.[367] For example, Catherine Albiston notes that discussing accommodations needs through the union with other employees may reveal a larger pattern of concerns and allow for a sharing of knowledge, thus providing greater leverage in negotiations.[368]

Union involvement in discrimination claims, including requests for accommodations, may also be important because of the additional protections against discharge provided in CBAs. Studies of countries with strong protections against discharge have revealed that employers have a greater propensity to engage in discrimination in hiring, compared to countries with weaker protections.[369] Without union advocacy against

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362. *See* Sharon Harlan & Pamela Robert, *The Social Construction of Disability In Organizations: Why Employers Resist Reasonable Accommodation*, 25 WORK AND OCCUPATIONS: AN INT'L SOCIOLOGICAL JOURNAL 397, 412 (1998) (discussing the knowledge-resource differential between employer and employee).

363. *See* Shannon Gleeson, *From Rights to Claims: The Role of Civil Society in Making Rights Real for Vulnerable Workers*, 43 L. & SOC'Y REV. 669, 674 (2009) (discussing the traditional role of unions as primary advocates for employees).

364. *See* Hodges, *Protecting Unionized Employees*, *supra* note 17, at 166-68 (discussing union assistance with litigation or voluntary arbitration).

365. Trade Union Action, *supra* note 231, at 51 (explaining the approach to union work initially taken by the Public Service Alliance of Canada).

366. Hodges, *Protecting Unionized Employees*, *supra* note 17, at 167.

367. *See* Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 L. & SOC'Y REV. 1, 15 (2005) (explaining that law can be a positive force for change but also may constrain change by "narrowly defining the claims that are possible and by obscuring other avenues for action.").

368. *Id*. at 27 (explaining that social interactions about rights builds solidarity among workers).

369. Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 76, 95-97 (2007) (discussing how job security protections have exacerbated racial inequality in France).

discrimination, there is a stronger likelihood that employers who are obligated to show just cause will opt to avoid hiring applicants who could later bring a claim of discrimination.[370]

Provision of accommodations can be seen as the employer "doing right," which can then set a positive tone for addressing other employee concerns.[371] Accommodations can also promote favorable attitudes toward disability and the ADA, which is good for society at large, and good for the success of the ADA and the integration of disabled people into the workplace.[372] *Barnett* should not be interpreted as justification for ignoring the benefits of providing an accommodation, and only focusing on its costs to the employer and co-workers. Such an approach would defeat the main purpose of the ADA—to change stereotypes about the value of including people with disabilities in the workforce.[373]

CONCLUSION

People with disabilities continue to struggle with hiring into and staying employed in "able bodied" workplaces. Employers have been allowed to deny accommodations for employees with disabilities based on real or even imagined conflicts with the terms of a CBA. Instead of treating the CBA as a permanent bar to accommodation, negotiation of the nuances of providing accommodations to allow greater acceptance into and success in the workplace can help to fully realize the ADA's potential for improving opportunities for people with disabilities. Rather than focusing on potential conflict between the interests of people with disabilities and interests of other employees, the collective bargaining relationship can be an opportunity for both employers and unions to fulfill their obligations under the ADA.

Bargaining over accommodations can benefit employers, unions, and employees with disabilities. Negotiation can result in the hiring and retention of valuable employees with disabilities by identifying accommodations that best fit a particular work environment. Negotiation can help employers avoid potential litigation under the ADA and

370. *See id*. at 107, 113 (acknowledging the difficulties in completely eliminating employment discrimination); *see also* Basas, *supra* note 4, at 75 (noting that employers may choose to not hire people with disabilities because of uncertainty as to what is a reasonable accommodation).

371. *See* Sturm, *Designing the Architecture*, *supra* note 294, at 11-16.

372. *See* Emens, *supra* note 283, at 843-44, 918 (discussing the costs and benefits of employee accommodations).

373. *See* Harris, *supra* note 66, at 178-79, 182-83 (illustrating how the provision of accommodations could benefit both the employer and employee).

contractual claims from other affected employees. For unions, negotiating about accommodations can help establish value to union members while limiting the employer's discretion in making determinations about accommodations. Negotiation also has the potential to better advance the interests of employees with disabilities by pushing employers to find workable and acceptable accommodations that enable employees with disabilities to be productive members of the workforce.