Navigating between a Rock and a Hard Place: An Employer’s Obligation to Reasonably Accommodate the Disabled in the Unionized Workplace

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NAVIGATING BETWEEN A ROCK AND A HARD PLACE: AN EMPLOYER'S OBLIGATION TO REASONABLY ACCOMMODATE THE DISABLED IN THE UNIONIZED WORKPLACE

Peter is a production employee with many years of service with his current employer. Over the years Peter performed his duties well. Unfortunately, an accident left Peter with a physical impairment which inhibits his ability to perform his current job duties. Peter’s employer considered several options to accommodate Peter’s disability and allow him to remain in his current position. Without an accommodation, Peter’s inability to do his job would result in his termination. Unfortunately, Peter’s employer was unable to accommodate Peter’s disability through modification of his job tasks or the work area. The employer’s inability to accommodate Peter, within his current position, was based on the inefficiency, financial costs, and/or the impact of the proposed modifications on other employees.

Peter requested a transfer to an open front desk position where his disability would not inhibit performance of job tasks. Because front desk positions are highly sought after, the collective bargaining agreement between Peter’s employer and the labor organization that represents Peter and his co-workers limits the front desk position to employees who obtain a minimum level of seniority. Because Peter does not meet this seniority requirement, the employer refuses Peter’s transfer.

Peter, who is now faced with unemployment, files a complaint alleging discrimination under the Americans with Disabilities Act of 1990 (ADA). Peter argues that the ADA requires his employer to take reasonable steps to accommodate his disability. Peter interprets the ADA’s accommodation provisions to require reassignment, even if the employer would violate the terms of its collective bargaining agreement with the union.

Peter’s employer is aware that accommodating a requested transfer contravenes the collective bargaining agreement’s seniority provisions. The employer believes this reassignment, without a union waiver, would constitute a unilateral modification of the collective bargaining agreement, which is prohibited under the National Labor Relations Act.

Peter’s employer believes the binding terms of a valid collective bargaining agreement supersede its obligation to provide an accommodation under the ADA. The Equal Employment Opportunity Commission (EEOC) does not share the employer’s interpretation of the ADA accommodation requirement. The EEOC interpretation is similar to Peter’s. Consequently, Peter’s employer is caught between two competing federal statutory obligations. These dueling obligations consist of the duty to accommodate a disabled employee under the ADA and the prohibition against unilateral contract modification under the NLRA. To accommodate Peter, the employer may violate the NLRA, whereas not accommodating Peter may violate the ADA.

As disabled employees become better informed of their rights under the ADA, the fact pattern presented will become more of a reality. Both the ADA and NLRA serve compelling interests and protect legitimate constituent concerns. Adherence to one, while violating the other, could subject an employer to expensive fines, sanctions, and attorney fees.

The employer’s dilemma is the result of contrary interpretations of the ADA’s reasonable accommodation requirement by the EEOC and the National Labor Relations Board (NLRB). These agencies are unwilling or unable to agree on the precise impact that collective bargaining agreements have on an employer’s duty of accommodation. Therefore, employers and employees are forced to look to the courts for guidance in interpreting the ADA and NLRA obligations.

An employer’s accommodation of an employee’s disability through reassignment, either without the consent of the union, or in violation of the terms of the labor agreement, violates several provisions of the NLRA. A federal labor policy that seeks to encourage labor stability and the historic deference accorded seniority rights prompted several circuits to override the rights of unionized disabled employees as outlined in the ADA and to find that accommodations that violate the provisions of a collective bargaining agreement are unreasonable. Some

4. See generally 42 U.S.C. §§ 12117(a), 12205; see also 29 U.S.C. §§ 162, 187 (violating statutory provisions could result in fines, sanctions, attorney fees).
6. See, e.g., Eckles v. Consolidated Rail, 94 F.3d 1041 (7th Cir. 1996); see also Kralik v. Durbin, 130 F.3d 76 (3rd Cir. 1997); Foreman v. Babcock & Wilcox
courts argue that a per se bar to accommodation through reassignment is necessary to protect the collectively bargained rights of all employees. This application of a per se bar is not universal. A minority of courts held that seniority provisions, which conflict with an accommodation under the ADA, are only one factor in determining the reasonableness of that accommodation.

This Comment rejects the use of a per se bar to accommodation when such an accommodation violates the seniority provisions of a collective bargaining agreement. Instead, this Comment argues that the courts should apply a balancing test that evaluates the interests of employees, employers, and the public's interest in labor stability and eradication of workplace discrimination.

Section I is an introduction to the Americans with Disabilities Act and the National Labor Relations Act. The summary of the ADA focuses on the employment discrimination provisions in Title I, including definitions of a reasonable accommodation and undue hardship. This section also focuses on the EEOC's interpretation of the ADA's reasonable accommodation provisions, and reviews the applicable statutory language of the NLRA, including employer obligations under the Act, potential conflicts between those obligations and the provisions of the ADA, and the position the National Labor Relations Board adopts with regard to any conflicts between the ADA and NLRA. Section I concludes with a brief analysis of similar conflicts under analogous statutes.

Section II of this Comment undertakes a review and analysis of the two leading cases that articulate the rationale for and against the per se rule for determining employer accommodation obligations under the ADA, Eckles v. Consolidated Railways Corp., and Aka v. Washington Co., 117 F.3d 800 (5th Cir. 1997); Benson v. Northwest Airlines, 62 F.3d 1108 (8th Cir. 1995); Milton v. Scrivner, 53 F.3d 1118 (10th Cir. 1995) (determining that reassignment would violate the seniority rights of other employees).

7. See supra note 6 and accompanying text.


9. See id. Other factors include the potential disruption to the employer's workforce and/or operational structure. See 29 C.F.R. § 1630 & app. (1998); Aka, 116 F.3d at 895.

10. 94 F.3d 1041 (7th Cir. 1996).
Finally, section III rejects the use of collective bargaining agreements as a bright line test for determining the reasonableness of an accommodation under the ADA. Instead, section III proposes a balancing test that analyzes the accommodation's actual infringement on seniority rights, its associated employer costs, and the public's concern for labor stability. These factors are balanced against the ADA's strong social policy which makes it unlawful to discriminate against the disabled. A balancing test is more in line with Congress's intent that multiple factors be considered.

I. STATUTORY REQUIREMENTS AND AGENCY GUIDANCE: EMPLOYER OBLIGATIONS UNDER THE ADA AND NLRA

A. The ADA: Protecting and Enlarging Employment Opportunities for the Disabled

The Americans with Disabilities Act of 1990 ensures "equality of opportunity, full participation, independent living and economic self-sufficiency" for disabled individuals. The ADA prohibits discrimination against a disabled individual in four areas: (1) employment, (2) housing, (3) public accommodations, and (4) transportation. The ADA extends the rights, which are guaranteed disabled individuals under section 504 of the Rehabilitation Act (Rehabilitation Act) to the private sector. The Rehabilitation Act prohibits discrimination against handicapped individuals "by federal agencies, private employers with federal contracts and recipients of federal funds." It also "imposes an obligation on federal employers and contractors to undertake affirmative action on behalf of the handicapped." The ADA extends this federal sector protection to the private sector.

11. 116 F.3d 876 (D.C. Cir. 1997).
13. See generally 42 U.S.C. §§ 12101 - 12117 (providing that subchapter one addresses employment, subchapter two addresses housing, subchapter three addresses public accommodations, and subchapter four addresses transportation).
15. Id.
16. Id.
Title I of the ADA addresses employment. Title I prohibits employers from discriminating against disabled individuals in "hiring, advancement, or discharge" or any other "terms, conditions and privileges of employment." The ADA requires an employer who is aware of an employee's disability to take reasonable measures to accommodate that disability. The ADA requires the employer to identify possible accommodations and evaluate the reasonableness of the accommodation, including any possible negative effects on the employer. The ADA defines a reasonable accommodation as "any change in the work environment or in the way a job is typically performed which will enable the [disabled] individual to enjoy equal employment opportunities."

For Title I protection under the ADA, an employee must qualify as an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." When a qualified employee requests an accommodation, the employer must consider that request. Once an employee submits a request, the employer undertakes a multi-step process to determine whether an accommodation is reasonable. An accommodation includes, but is not limited to, modification of the work site, position restructuring, modification of the work schedule, acquisition of special equipment or devices to assist the employee, or reassignment to

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18. A covered entity under the ADA is "an employer, employment agency, labor organization or joint labor management committee." See id. § 12111(2).
19. Id. § 12112(a).
20. See id. § 12112(b)(5)(A).
22. See 42 U.S.C. § 12111(9).
25. See id. The review process involves four steps: (1) the employer in conjunction with the employee must identify and distinguish the essential aspects of the job; identify the abilities and limitations of the employee as well as barriers to performing the essential job functions, (2) the employer must identify, again in conjunction with the employee, possible accommodations, (3) the reasonableness of the identified accommodations must be weighed, and (4) the selected accommodation is implemented. See id.
a vacant position if accommodation in the employee's current position proves unfeasible. An employer's failure to accommodate "the known physical or mental limitations of an otherwise qualified individual," when it is reasonable to do so, is a violation of the ADA.

In defense of a decision not to grant an accommodation, an employer may argue that the accommodation would result in undue hardship. Undue hardship is defined as "an action requiring significant difficulty or expense." The undue hardship defense protects employers from undertaking accommodations that may result in a detrimental economic impact on business operations. An accommodation that is "extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business" could result in undue hardship. The ADA requires consideration of several factors when determining whether an accommodation creates an undue hardship. These factors include the nature and cost of the accommodation, the overall financial resources of the facility making the accommodation, and the operational structure of the facility. However, these factors are not exclusive. No one factor is determinative of whether an accommodation will result in undue hardship.

In attempting to comply with the ADA, an employer may find that an accommodation violates federal labor law. This may occur when the accommodation sought by the employee violates the terms of a collec-

27. See id. § 12112(b)(5)(A).
28. See id. § 12111(10)(A); see also 29 C.F.R.§ 1630.15(d) (1998).
31. See id.
33. See id.
34. See id. This factor would also include the accommodation's impact on the operation of the facility. See id.
35. See id. § 12111(10)(B)(iv).
tive bargaining agreement. The language of the ADA does not specifically address collective bargaining agreements and its effect on the employer's obligation to accommodate. This omission in the statutory language led to divergent interpretations and court decisions concerning collective bargaining agreements and seniority provisions. When promulgating the ADA, Congress did not clearly express a per se rule favoring collective bargaining agreements over the employer obligations to the disabled mandated in Title I. In addition, Congress also failed to state that the employer obligations of the ADA would supersede employer requirements under collective bargaining agreements. Administrative agencies, experts, and courts have been left to fashion individual interpretations of the impact of collective bargaining agreements on the reasonableness of accommodations under the ADA.

B. The EEOC Interpretative Guidelines

The Equal Employment Opportunity Commission devises regulations and guidelines to administer and enforce the provisions of the ADA. The EEOC views the ADA as similar to other civil rights laws that prohibit discrimination in employment. As with other civil rights laws, the ADA does not require preferences favoring protected disabled employees over other employees. To accommodate a disabled employee however, the EEOC interprets the ADA as allowing employers to reassign the disabled employee to a vacant position over more senior

39. See, e.g., Kralik v. Durbin, 130 F.3d 76 (3rd Cir. 1997); Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997); Aka v. Washington Hospital Center, 116 F.3d 876 (D.C. Cir. 1997), vacated pending rehearing en banc, 124 F.3d 1302 (D.C. Cir. 1997), rehearing en banc, 1998 No. 96-7089, WL 698396, renaended, (D.C. Cir. Oct. 9, 1998); Eckles v. Consolidated Rail, 94 F.3d 1041 (7th Cir. 1996); Benson v. Northwest Airlines, 62 F.3d 1108 (8th Cir. 1995); Milton v. Scrivner, 53 F.3d 1118 (10th Cir. 1995); Buckingham v. United States, 998 F.2d 735 (9th Cir. 1993) (analyzing whether an accommodation of reassignment was permissible if it violated the terms of a seniority agreement).


41. See generally Eckles, 94 F.3d 1041 (holding seniority provision is a bar to accommodation); Aka, 116 F.3d at 895 (holding seniority provision is only one of several factors to be considered).

42. See Aka, 116 F.3d at 894-95. See generally 42 U.S.C. § 12101.

43. See 42 U.S.C. § 12101.


46. See id.
employees.\textsuperscript{47}

Under the EEOC’s interpretation, collective bargaining agreements are only one consideration in determining whether the accommodation is a hardship.\textsuperscript{48} According to the EEOC, more than a de minimis impact on the employer is necessary to qualify the accommodation as an undue hardship.\textsuperscript{49} While collective bargaining agreements and/or seniority rights are relevant, and should be given strong consideration, they should not alone bar accommodation of disabled employees.\textsuperscript{50} The EEOC suggests that labor organizations and employers negotiate modifications to collective bargaining agreements when these agreements interfere with the only available accommodation.\textsuperscript{51} However, practitioners have rejected this solution as unworkable.\textsuperscript{52} The EEOC’s interpretation is in conflict with the National Labor Relations Board.

\textbf{C. The NLRA: Valuing Collectively Bargained Employment Rights}

The NLRA regulates the relationship between employers and labor organizations.\textsuperscript{53} The objective of promulgating federal labor law is to eliminate obstructions to the free flow of commerce caused by “strikes and other forms of industrial unrest.”\textsuperscript{54} The NLRA attempts to achieve this goal by encouraging and regulating the collective bargaining process.\textsuperscript{55} The NLRA enables employees to select an agent, usually a union,


\textsuperscript{48} See id. § 1630. App.

\textsuperscript{49} Id. “[T]o demonstrate undue hardship pursuant to the ADA and this part an employer must show substantially more difficulty or expense than [under Title VII].” Id. Under Title VII, requiring an employer to bear more than a de minimis cost is an undue hardship. Trans World Airlines v. Hardison, 424 U.S. 63, 84 (1976).

\textsuperscript{50} See Labor Pact Held No Automatic Bar to Employer’s Disabilities Act Claim, DAILY LAB. REP. (BNA), June 25, 1997, at AA-1.

\textsuperscript{51} See EEOC Would Require Negotiations, DAILY LAB. REP. (BNA), Apr. 9, 1996, at A-3.

\textsuperscript{52} See id.


\textsuperscript{54} Id. § 151 (1994).

\textsuperscript{55} See id. (the United States seeks to eliminate obstructions to commerce “by encouraging the practice and procedure of collective bargaining . . .”).
to represent their interests before an employer. The NLRA assumes collective bargaining over the terms and conditions of employment is the best method of protecting the interest of employees in the workplace.

The National Labor Relations Board (NLRB or Board) has the authority to "make, amend, and rescind" rules and regulations necessary to carry out the provisions of the NLRA. The Board has a corresponding duty to interpret labor laws and regulations in a manner that avoids conflict with the stated objectives of other federal laws. When an employer's actions, taken in order to comply with another federal law, such as the ADA, conflicts with the employer's duty under the NLRA, the employer may offer the conflicting law as a defense to NLRA violations.

In evaluating this defense, the Board inquires into whether the action demanded by the conflicting federal statute is discretionary for an employer, or whether the conflicting federal law mandates that an employer take a specific action. Theoretically, an employer may defend against a violation of federal labor law by establishing that the action undertaken was mandated by an opposing federal law. However, if the Board determines an employer has discretion in complying with the opposing law, the employer may not defend its action with the conflicting statute. The NLRB has rejected compliance with the ADA as a defense to a violation of the NLRA.

Employers who are subject to collective bargaining agreements should

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56. See id. § 157; see also Estella J. Schoen, Note, Does the ADA Make Exceptions in a Unionized Workplace? The Conflict Between the Reassignment Provision of the ADA and Collectively Bargained Seniority Systems, 82 Minn. L. Rev. 1391, 1396 (1998).


61. See id. at 90.

62. See id.

63. See id.

64. See id.
exercise caution when seeking to modify any aspect of the employment relationship.65 Accommodation of an employee’s disability, without the consent of the employee representative or labor union, may subject the employer to an “unfair labor practice” (ULP) charge.66 The employer’s duty to bargain in good faith prohibits implementing changes in working conditions or terms of employment, without providing notice to the employee’s representative and/or an “opportunity to bargain” over that change.67 That does not imply that all modifications to the terms of employment result in an ULP. A unilateral change in working conditions must be substantial, material, and significant to violate section 8(a)(5) of the NLRA, and qualify as an unfair labor practice.68

A “within position” accommodation is most likely not a material contract alteration, and therefore not subject to collective bargaining restraints.70 A “within position” accommodation is a change in the manner in which a job is performed, such as a restructuring of job responsibilities or physical changes to the worksite.71 An “outside position” accommodation, however, is material and therefore subject to collective bargaining.72 An “outside position” accommodation alters the terms of employment as defined in the collective bargaining agreement.73 A reassignment that is inconsistent with an established employment practice, such as a seniority system, would most likely qualify as an “outside position” accommodation.75 The reassignment may constitute a violation of the NLRA if the employer imposed it

65. See generally 29 U.S.C. § 158 (1994) (listing activities, such as unilateral contract modification, that are violations of the NLRA).
66. See id. § 158(a), (d) (1994).
67. See N.L.R.B. Memorandum, supra note 60, at 90.
68. See id; see also 29 U.S.C. § 158(a)(5).
69. “A within-position accommodation . . . permits a disabled employee to perform all of the essential functions of the position for which he is hired through a change in the manner in which the job is done.” Richard McAtee, The Americans with Disabilities Act and the NLRA: A Unionized Employment Roadmap to Reasonable Accommodation, 33 DUQ. L. REV. 105, 109 (1994).
70. See id. at 109-10.
71. See id.
72. “An outside position accommodation entails reassignment to a position where the employee can perform all the essential functions . . . .” Id. at 109.
73. See id. at 110.
74. See id. at 109.
75. See N.L.R.B. Memorandum, supra note 60, at 89-90.
without bargaining, and/or over the opposition of the union.\textsuperscript{76}

The General Counsel of the NLRB recognized that implementing the terms of the ADA could result in conflicts between an employer's obligations under the NLRA and the ADA.\textsuperscript{77} As a result, the General Counsel drafted guidelines for the NLRB staff when confronted with conflicting statutory requirements under the ADA and NLRA.\textsuperscript{78}

\textbf{D. NLRB: An Administrative Response to the ADA}

According to the General Counsel of the National Labor Relations Board, the ADA does not mandate preemption of the terms of the collective bargaining agreement when a reassignment is requested due to disability.\textsuperscript{79} Therefore, if an employer commits an "unfair labor practice" by making a unilateral change in conditions of employment, such as an unauthorized reassignment; the ADA cannot be argued as a defense.\textsuperscript{80} The General Counsel bases the employer's obligation to accommodate under the ADA on several factors. These factors include the employer's defense of undue hardship,\textsuperscript{81} the absence of a per se rule in the statutory language, the legislative history of the ADA, and the EEOC interpretative guidelines.\textsuperscript{82} Due to these factors, the General Counsel interprets an employer's obligation to accommodate through reassignment as discretionary, not mandatory.\textsuperscript{83} Therefore, under the General Counsel's analysis, the ADA is no defense to a ULP for unilateral contract modification.

The NLRB ratified the position of the NLRB's General Counsel.\textsuperscript{84} An employer's failure to obtain the union's consent to a change in employee job descriptions, in order for the job descriptions to comply with the

\textsuperscript{76} See id.
\textsuperscript{77} See id. at 90.
\textsuperscript{78} The duties of the General Counsel include supervising and directing staff attorneys of the N.L.R.B. See 29 U.S.C. § 157 (1994).
\textsuperscript{79} See N.L.R.B. Memorandum \textit{supra} note 60, at 89.
\textsuperscript{80} See id. at 90.
\textsuperscript{81} See id. The undue hardship defense allows the employer an alternative route other than violating the terms of the collective bargaining agreement; therefore the employer has discretion. See \textit{generally id.}
\textsuperscript{82} See id.; see also 29 C.F.R. § 1630.15(e) (1997) (stating the EEOC allows other federal law as possible defense).
\textsuperscript{83} See N.L.R.B. Memorandum, \textit{supra} note 60, at 90.
\textsuperscript{84} See Bozeman Deaconess Found. v. Montana Nurses Ass'n, 322 N.L.R.B. 1107, 1119 (1997).
ADA, was a material change in working conditions, and violated section 8(d) of the NLRA. The Board held that "the employer has a duty to bargain with the labor organization regarding reasonable accommodations and may not make unilateral changes that result in significant workplace changes."\(^{86}\)

With this decision, the NLRB clearly expressed its position that the terms of a collective bargaining agreement are impenetrable.\(^{87}\) The terms may not be breached by competing federal laws, notwithstanding the compelling public policy concerns of those other laws.\(^{88}\) The NLRB firmly believes that collectively bargained employee rights take precedence over individual employment rights.\(^{89}\)

The EEOC and the NLRB formulated a procedure to collectively address claims that arise simultaneously under both the ADA and the NLRA.\(^{90}\) The agreement allows each agency to direct its own investigation, but withholds discharge of a complaint until each agency has completed its investigation.\(^{91}\) The agreement also directs the agencies to consult one another when a charge involves interpretation of the other's statute.\(^{92}\) However, this NLRB and EEOC Procedural Memorandum of Understanding only addresses procedural issues and does not address conflicts that arise out of the opposing statutory obligations, and does not offer guidance for how employers confronted with the conflict should proceed.\(^{93}\)

E. Resolution of Seniority Rights Conflicts under Analogous Civil Rights Statutes

The struggle between federal anti-discrimination laws and labor law is not new.\(^{94}\) In fact, case law under the Rehabilitation Act and Title VII of

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85. See id.
86. Id.
87. See id.
88. See id.
89. See Bozeman Deaconess Found., 322 N.L.R.B. at 1119.
91. See id.
92. See id.
93. See id.
the Civil Rights Act of 1964 (Title VII) has addressed this same issue.95

1. The Rehabilitation Act

The Rehabilitation Act is the precursor to the ADA.96 It prohibits discrimination against handicapped individuals by "federal agencies, private employers with federal contracts and [other] recipients of federal funds."97 Case law uniformly holds that the rights conferred by the Rehabilitation Act cannot prevail over rights created by a bona fide seniority system.98 In Daubert v. United States Postal Service,99 the court determined that seniority provisions under a collective bargaining agreement were a "legitimate business reason" to deny the reassignment of a disabled employee who was unable to meet the seniority requirements of the position.100 Daubert, and similar rulings, established a bar to accom-


96. See Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1046 (7th Cir. 1996); see also Ervin, supra note 14, at 926.


98. See Daubert, 733 F.2d at 1369-70; see also Carter, 822 F.2d at 467; Jansany, 755 F.2d at 1251-52.

99. 733 F.2d at 1367. Plaintiff was fired from her position because of a disability that prevented her from performing the duties of the position. See id. at 1369. Plaintiff alleged that she was illegally terminated due to her handicap. See id. The district court held that although the plaintiff had established a prima facie case of discrimination, the employer had presented a legitimate business reason for the discrimination. See id. Employer-defendant argued that the provisions of the national contract prohibited it from modifying the requirements of the plaintiff's current position or, in the alternative, reassigning her to a light duty position requiring a level of seniority the plaintiff did not possess. See id. The Tenth Circuit reviewed whether the employer should be allowed to rely on the collective bargaining agreement as a defense to plaintiff's dismissal. See id.

100. See id. at 1370.
accommodation under the Rehabilitation Act when such accommodation conflicted with the terms of a collective bargaining agreement.101

2. **The Civil Rights Act of 1964**

The purpose of Title VII is to eliminate discrimination in the workplace based on "race, sex, religion and national origin."102 Additionally, Title VII requires employers to provide some form of accommodation for employees protected by the statute.103 Much like the ADA, Title VII provides little guidance for determining the degree of accommodation required.104

In *Franks v. Bowman*,105 job applicants who successfully demonstrated discrimination in hiring sought seniority as part of the remedy for the employer's past discrimination.106 The employer and union argued against awarding retroactive seniority.107 The employer and union argued that to grant retroactive seniority to newly hired employees would displace the economic interest of other employees, who were innocent bystanders to the employer's illegal conduct.108 The Supreme Court disagreed, holding that to disallow the award of retroactive seniority would undermine the remedial provisions of Title VII.109 Absent statutory language or legislative history indicating remedial limits, the award of retroactive seniority was a proper exercise of judicial power, even though it interfered with the rights of other employees.110

In *Trans World Airlines, Inc. v. Hardison*,111 however, the Supreme Court stated that "without a clear and express indication from Congress,"112 there is no requirement for employers to sacrifice collectively bargained seniority rights to accommodate the religious beliefs of an

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104. *See id. at 74*.
106. *See id. at 750*.
107. *See id. at 773*.
108. *See id*.
109. *See id. at 774*.
110. *See Bowman*, 424 U.S. at 774.
112. *Id. at 79*. 
employee. In Hardison, an employee argued that his employer was required to accommodate his religious practice not to work Saturdays, even if the accommodation required displacing employees protected by a seniority agreement. The employee’s claim was based on the 1972 amendments to Title VII, which required an employer “to make reasonable accommodations to the religious needs of employees.” In justifying its preference for seniority rights over the rights of an employee protected by Title VII, the Court relied on the Title VII provisions that allow for seniority programs that are not part of illegal discriminatory conduct. The Court also stated that collective bargaining agreements, including seniority provisions, are to be held in high regard because they are important mechanisms for maintaining labor stability. Collective bargaining agreements allow workers and employers the opportunity to determine the terms and conditions of employment without resorting to costly and disruptive labor strikes.

Perhaps the Bowman Court was willing to displace the interests of innocent employees due to the pervasive discriminatory conduct of the employer, and the effect of that conduct on a large class of individuals. This was not the case in Hardison, where the discrimination could be classified as inadvertent and affecting only one individual. Nonetheless, the Supreme Court’s decision in Bowman indicates that economic interests and rights of employees, such as seniority, may be displaced to advance an important social policy.

II. JUDICIAL INTERPRETATION OF REASONABLE ACCOMMODATION UNDER THE ADA

A recourse to an employer’s refusal to accommodate an employee’s disability, may be to allege discrimination under the ADA. Until re-

113. See id. at 74-75, 79.
114. See id. at 66-69.
115. Id. at 66 (quoting 29 C.F.R. § 1605.1 (1968)).
116. See Hardison, 432 U.S. at 81-82.
117. See id. at 79.
118. See id.
119. See generally Franks v. Bowman, 424 U.S. 747 (1975). In Bowman there were several classes of plaintiffs who successfully established a pattern of long term employment discrimination. See id.
120. See generally Hardison, 432 U.S. 63 (1977).
121. See Bowman, 424 U.S. at 778.
ently, courts held that if an accommodation violates the provisions of a seniority clause of a collective bargaining agreement, it is a per se unreasonable accommodation, and not required under the ADA. From these decisions, it was impossible for a disabled employee plaintiff to survive a summary judgment motion when a valid collective bargaining agreement was in force.

Recently however, a small minority of courts held that the presence of a collective bargaining agreement is only one factor for determining the reasonableness of an accommodation. These courts instruct that reasonableness should be made on a case-by-case basis. In addition, the courts charge the trier of fact with the duty to determine whether reassignment is a reasonable accommodation given the provisions of the collective bargaining agreement.

A. Support for a “Per se” Bar: Eckles v. Consolidated Rail Corporation

The leading case in support of the per se bar is Eckles v. Consolidated Rail Corp. In Eckles, an epileptic employee sought an accommodation for his disability through reassignment from the night shift to the day shift. The employer refused, arguing that to place Eckles on the day shift was impossible because it was a violation of the collective bargaining agreement’s seniority provisions. Therefore, the reassignment could not occur without the consent of the union. On appeal, the Seventh

124. See supra note 6 and accompanying text.
126. See supra note 125 and accompanying text.
127. See id.
128. 94 F.3d 1041 (7th Cir. 1996).
129. See id. Eckles argued the day shifts were less stressful and allowed him a routine more conducive to avoiding epileptic seizures. See id.
130. See id.
131. See id. The district court granted the employer summary judgment
Circuit held that the ADA does not require a preemption of seniority provisions. Therefore, any accommodation that violated the terms of a seniority provision was per se unreasonable.

The appeals court began its analysis with the text of the ADA. The court noted that the term "reasonable accommodation" was borrowed from the Rehabilitation Act. Under the Rehabilitation Act case law, violations of seniority provisions under collective bargaining agreements, in order to accommodate the disability of a qualified employee, are per se unreasonable, and therefore not required of the employer.

The court also considered established case law under Title VII, that held "absent a clear and expressed statement" on the part of the legislature, seniority rights under a collective bargaining agreement are not to be forsaken in the face of a conflicting civil rights statute. In other words, the court believed collectively bargained seniority rights are given preference over individual employee rights. The court acknowledged that the precedents that previously evolved were not dispositive on the issue of whether the ADA trumped seniority rights. Nevertheless, the court gave considerable weight to the Rehabilitation Act and Title VII case law, stating that the case law was an important factor in recognizing a bar to accommodation, due to the two statutes' similarities in purpose and terminology.

The court also relied heavily on the anti-bumping provisions of the holding that the ADA did not require the employer to violate the terms of the collective bargaining agreement to make an accommodation. See id. Therefore, the accommodation was not reasonable. See id.

132. See id. at 1042. Eckles argued that the employer's obligations under the ADA trumped the employer's obligations under its collective bargaining agreement. See id. at 1045. The employer, joined by the union, again presented the argument that the ADA did not require an infringement on seniority rights of other employees to accommodate the disability of one. See id.

133. See id. at 1047.
134. See Eckles, 94 F.3d at 1045.
135. See id. at 1047.
136. See supra note 98 and accompanying text; see also Eckles, 94 F.3d at 1047.
137. See Eckles, 94 F.3d at 1048-49.
138. See id. at 1048.
139. See id. at 1051.
140. See id.
141. See id.
Bumping is the displacement of one employee from a position by another. While the statute specifically forbids bumping a non-disabled employee to accommodate a disabled one, it did not specify the appropriate action to take in the event there is a vacant position. Under the court’s analysis, it is equally egregious to bump an employee from the opportunity to accept or bid for a position, as it is to bump the employee from the actual position. Therefore, the court inferred that allowing a disabled employee to bump another employee from the opportunity to bid on, or accept a vacant position, is analogous and forbidden by the ADA. The court in Eckles upheld the collective bargaining agreement as a bar to accommodation, relying on the anti-bumping provisions of the ADA, and cases interpreting the Rehabilitation Act and Title VII.

The legislative history and interpretative guidelines of the ADA specify that collective bargaining agreements are only a relevant factor in the determination of reasonableness, not a dispositive one. The fact that the court does not address this aspect of the legislative history or the agency guidelines weakens the court’s reasoning as a whole. Furthermore, ignoring Congress’s intent that the reasonableness of an ADA accommodation be evaluated on a case-by-case, totality of the circumstances analysis, further discredits the court’s argument.

The court’s rejection of the legislative history is important because it is here that Congress’s intent that select ADA issues, such as collective bargaining agreements and seniority rights, be analyzed in a manner different from the Rehabilitation Act or Title VII. It is also here that Congress manifests its intent that reassignment is a viable accommodation option.

Unfortunately, the misguided analysis of Eckles has created a legal concept that subsequent courts adopted mechanically, and without fur-
ther scrutiny.\textsuperscript{149} Only a small number of courts have rejected the Eckles
court's reasoning for a per se bar.\textsuperscript{150}

\textbf{B. Aka v. Washington Hospital Center: A Balanced and
Rational Interpretation of Employer Obligation
under the ADA and NLRA}

Not all courts adopted the rule espoused in Eckles.\textsuperscript{151} The Court of
Appeals for the District of Columbia in Aka v. Washington Hospital
Center,\textsuperscript{152} rejected the per se rule in favor of an analysis that considers
collectively bargained seniority rights as one of many factors that should
be used to determine whether a reassignment is a reasonable accommo-
dation.\textsuperscript{153} In Aka, when a medical condition left the plaintiff unable to
perform his job responsibilities, he claimed his employer violated the
ADA by failing to accommodate his request for transfer to a light duty
position.\textsuperscript{154}

The employer argued that the ADA did not require the plaintiff's reas-
signment because the accommodation would violate provisions of the
employer's collective bargaining agreement.\textsuperscript{155} The employer relied on
case law from other circuits and the Rehabilitation Act to support the
argument that employers cannot be compelled to accommodate an em-
ployee when the accommodation would violate seniority clauses of col-
clective bargaining agreements.\textsuperscript{156} The employer argued that the existence
of a valid collective bargaining agreement was a complete defense to the
plaintiff's allegation of discrimination.\textsuperscript{157}

\textsuperscript{149} See, e.g., supra note 6 and accompanying text.
\textsuperscript{150} See supra note 125 and accompanying text.
\textsuperscript{151} See Aka v. Washington Hospital Center, 116 F.3d 876 (D.C. Cir.
1997), vacated pending rehearing en banc, 124 F.3d 1302 (D.C. Cir. 1997), re-
hearing en banc, No. 96-7089, 1998 WL 698396, remanded, (D.C. Cir. Oct. 9,
1998).
\textsuperscript{152} 116 F.3d 876 (D.C. Cir. 1997), rehearing en banc, No. 96-7089, 1998
\textsuperscript{153} See id. at 894. A full panel subsequently determined that the issue of
a conflict was premature given the evidence did not establish a conflict between the
collective bargaining agreement terms and the ADA. Aka v. Washington Hospital
\textsuperscript{154} See Aka, 116 F.3d at 878-79.
\textsuperscript{155} See id. at 892.
\textsuperscript{156} See id. at 893.
\textsuperscript{157} See id. at 892.
On appeal, the court rejected this argument, holding that collectively bargained seniority provisions were relevant, but not dispositive, in determining whether an accommodation was reasonable. The "presence of a collective bargaining agreement could undermine the employee's argument that the requested accommodation was reasonable or it could strengthen the employer's claim of undue hardship." The court noted that the fact finder must weigh the presence of a collective bargaining agreement when considering the reasonableness of an accommodation. In rejecting a per se rule, the court deferred to the statutory language of the ADA, its legislative history, and the EEOC's interpretative guidelines.

The Aka court determined that the language of the ADA allows reasonable accommodation to include reassignment to a vacant position, absent undue hardship. The court also recognized that the ADA's legislative history emphasizes Congress's intent that a conflict between a reassignment and collective bargaining terms should be considered, but that this conflict is not dispositive on the issue of reasonableness. This legislative intent, the court noted, manifests itself in the EEOC's interpretative guidelines, which state that collective bargaining agreements are only relevant in determining unreasonableness or undue hardship.

In addition, the court noted that potentially all reasonable accommodations specified by the ADA could conflict with the terms in most collective bargaining agreements. If the court accepts a per se rule, whereby the terms of a collective bargaining agreement trump the ADA, it would nullify the law's purpose of empowering the disabled in the unionized workplace.

Based on this analysis, the court held that a per se bar to employee accommodation through reassignment is an incorrect interpretation of the purpose and intent of Title I of the ADA. In its decision, the court

158. See id. at 894-96.
159. Aka, 116 F.3d at 894-96.
160. See id. at 894.
161. See id. at 894-95.
162. See id. at 895-96.
163. See id.
164. See Aka, 116 F.3d at 895-96.
165. See id.
166. See id.
167. See id. at 895-96.
also rejected a per se rule permitting an employer to accommodate a
disabled employee by preempting the collectively bargained seniority
rights of the other employees.\textsuperscript{168} The court’s decision rejected a blanket
rule that classifies either disabled or non-disabled interests as more de-
serving of federal protection.\textsuperscript{169} The reasoning of the court in this in-
stance is sound, and the statutory language, legislative record, and ad-
iministrative interpretative guidelines support it.\textsuperscript{170}

This decision was vacated pending review \textit{en banc}.\textsuperscript{171} On rehearing,
the court determined there was insufficient evidence in the record to
establish a conflict between the ADA and the terms of the employer’s
collective bargaining agreement.\textsuperscript{172} Therefore, it was premature to ad-
dress the issue of conflict or to determine the appropriate analysis for
such a conflict.\textsuperscript{173} The court remanded to the district court to determine
the scope of the collective bargaining agreement and whether there is
any true conflict with the proposed reassignment and the collective bar-
gaining agreement.\textsuperscript{174} If the district court determines that a conflict ex-
ists, the initial appellate court’s rationale and conclusion, that there is no
per se rule barring accommodations that contravene collective bargain-
ing agreements, would support a similar outcome on remand. The initial
appellate court’s reasoning was in keeping with the legislative intent of
reasonableness under the ADA.\textsuperscript{175}

III. THE MISTAKE OF ECKLES: WHY A FACT-SPECIFIC
CONSIDERATION OF ALL FACTORS IS PROPER

The purpose of the ADA is to eradicate the pervasive discrimination

\textsuperscript{168} \textit{See id.}

\textsuperscript{169} \textit{See Aka}, 116 F.3d at 896. The court remanded the issue for a
determination of whether a failure to find a position for the plaintiff was
unreasonable, taking into consideration the seniority provisions, as well as all other
circumstances. \textit{See id.} at 897.


\textsuperscript{171} Aka v. Washington Hospital Center, 116 F.3d 876 (D.C. Cir. 1997),
vacated \textit{pending rehearing en banc}, 124 F.3d 1302 (D.C. Cir. 1997), \textit{rehearing en

\textsuperscript{172} Aka v. Washington Hospital Ctr., No. 96-7089, 1998 WL 698396 at

\textsuperscript{173} \textit{See id.}

\textsuperscript{174} \textit{See id.} at 19.

\textsuperscript{175} \textit{See generally} H.R. REP. No. 101-485 pt. 2 at 65.
against the disabled.\textsuperscript{176} Elimination of this bias is essential because the historic workplace exclusion of the disabled resulted in increased costs to the nation in the form of economic dependency and worker non-production.\textsuperscript{177} Institution of the reasonable accommodation provisions of the ADA was necessary to guarantee meaningful opportunity for participation in the employment market for those individuals with disabilities.\textsuperscript{178}

When a situation forces an employer to choose between making an accommodation or upholding the seniority provisions of its collective bargaining agreement, the conflict is not necessarily employee versus employer.\textsuperscript{179} Rather the conflict involves disabled employee versus non-disabled employee.\textsuperscript{180} Regardless of the characterization of the conflict, the employer must choose between protecting and advancing the interests of the individual or the interests of the collective group.

Collective bargaining agreements are highly valued in this country.\textsuperscript{181} Collective bargaining agreements are an effective and enforceable method of reducing workplace strife and labor uncertainty.\textsuperscript{182} These agreements allow for a more productive workforce.\textsuperscript{183} They are at the core of our national labor policy and uniformly include seniority provisions.\textsuperscript{184} Seniority provisions are a respected and neutral method of allocating scarce employment benefits.\textsuperscript{185} The Supreme Court held that only in the most egregious instances, required to remedy a past pattern of employment discrimination, will a court violate collective bargaining agreements.\textsuperscript{186}

However, concern for the employment rights of the disabled is equally

\begin{itemize}
\item \textsuperscript{176} See 42 U.S.C. § 12101(b)(1) (1994).
\item \textsuperscript{177} See id. § 12101(9).
\item \textsuperscript{178} See H.R. REP. No. 101-485 pt. 2, at 63.
\item \textsuperscript{179} See Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1046 (7th Cir. 1996).
\item \textsuperscript{180} See id.
\item \textsuperscript{182} See id. Due to the competitive advantage enjoyed by employers, protecting the rights of workers to collectively join together to address workplace issues results in less workplace strife and negative economic impact on commerce. See 29 U.S.C. § 151 (1994).
\item \textsuperscript{183} See id.
\item \textsuperscript{184} See Hardison, 432 U.S. at 79.
\item \textsuperscript{185} See Lorace v. AT&T Techs. Inc., 490 U.S. 900 (1989).
\item \textsuperscript{186} See Franks v. Bowman, 424 U.S. 747, 787-88 (1975).
\end{itemize}
compelling. As noted in the opening provisions of the ADA, the rights of the disabled have been violated to such a degree, that the economic well-being of not only the disabled employee, but the country as a whole is affected negatively.\(^\text{187}\) This is caused by the economic dependence of the disabled on welfare, disability, and social security.\(^\text{188}\)

### A. Removing the Heavy Hand of a "Per se" Bar

Adoption of a per se bar to reassignment would place seniority provisions over the rights of disabled employees. This is considerably more protection than Congress intended to give collectively bargained seniority rights.\(^\text{189}\) An alternative rule allowing the ADA to always trump collectively bargained seniority rights is also an inappropriate extension of congressional intent.\(^\text{190}\)

As was the practice under the Rehabilitation Act, Congress intended ADA issues to be determined using a fact-specific, case-by-case analysis.\(^\text{191}\) Congress based the determination of whether an accommodation is reasonable, or whether it would impose an undue hardship to the employer, on a number of factors, none of which alone are dispositive of the issue.\(^\text{192}\) A court should look to the "practical realities of the situation" before rendering a decision.\(^\text{193}\) The per se bar ignores congressional intent as embodied in the House Committee Reports, the EEOC guidelines, as well as, the specific language of the statute.\(^\text{194}\)

The House Committee Report specifically states that collective bargaining agreements are relevant in determining the reasonableness of an accommodation.\(^\text{195}\) This statement does not support the proposition that

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188. See id.


190. See id.


a collective bargaining agreement, and seniority provisions contained within, are dispositive on the issue of reasonableness.196 Furthermore, the report labels seniority rights as one factor in determining reasonableness, not the only factor.197

The EEOC’s interpretative guidelines also classify collective bargaining agreements as only relevant, not dispositive, in determining whether an accommodation is so disruptive to the workforce as to constitute undue hardship.198 Though lacking force of law, this interpretation of statutory obligations by the administrative agency authorized by Congress to interpret and enforce the ADA is persuasive.

The ADA drafters did not simply overlook inserting language detailing the precise value of collective bargaining provisions. Congress was aware of the conflicts that could arise between ADA and NLRA employer obligations.199 In acknowledging the potential conflict, Congress suggested that future collective bargaining agreements should address the problem by including a provision that allows the employer to modify its contract terms to accommodate the ADA.200 It is important to note that Congress specifically addressed this issue in other statutes, such as the Age Discrimination in Employment Act (ADEA) and Title VII, which both provide specific protection for the seniority rights of unprotected employees, but Congress nevertheless chose to remain silent on this issue within the ADA.201

Some commentators suggest that Congress’s intent was to apply Rehabilitation Act case law to the conflict between the ADA and NLRA employer obligations.202 Case law under the Rehabilitation Act may apply to identical provisions of the ADA and the Rehabilitation Act.203 However, it is difficult to apply this case law to ADA issues when the provisions are different.204 Under the ADA, job reassignment is specifically mentioned in the statute as a reasonable method of accommoda-

196. See id.
197. See id.
198. See 29 C.F.R. § 1630.15(d) (1997).
200. See id.
202. See id.
203. See Gile v. United Airlines, Inc., 95 F.3d 492, 496-97 (7th Cir. 1996).
204. See Dubault, supra note 3, at 1285.
There is no comparable language in the Rehabilitation Act specifying reassignment as a possible accommodation. Congress's intent when addressing the possible conflict should not be analyzed under Rehabilitation Act case law, because the Rehabilitation Act addresses a different legislative scheme and legal issue. The weight given any particular factor in determining reasonableness and/or undue hardship is unspecified in the ADA or the EEOC guidelines. Congress realized that in practice, relevant factors would differ from one situation to another, and the weight given any one factor was not dependent on the factor, but was dependent on the circumstances surrounding the factors.

The per se rule consists of solely one factor, the presence of a valid collective bargaining agreement, which is dispositive of the issue whether the ADA or the NLRA should prevail. The per se rule rejects legislative intent, and does not account for the actual effect that a violation of those seniority provisions would have on other employees. A balancing test that measures and accounts for: (1) the actual infringement on the collectively bargained rights of non-disabled employees, (2) the associated employer costs for that infringement, (3) the employment rights of disabled employees, (4) the legislative intent and purpose of eradicating disability discrimination and expanding employment opportunities, and (5) the strong public policies favoring labor and economic stability, would adhere to Congress's intent.

B. Balancing the Interests of All Employees

Implementing a balancing test, rather than a bright line rule, is the appropriate method for evaluating the reasonableness of an accommodation under the ADA. This balancing test measures the intrusion on the employment rights of the non-disabled, the associated costs to the employer, and the public's desire for labor stability. The balancing test weighs these factors against the rights of disabled employees to fully participate in the employment market and the public's desire for an end to disability discrimination in the workplace.


208. See Dubault, supra note 3, at 1299.
When measuring an intrusion on the rights of a disabled employee, the actual terms of a collective bargaining agreement should take precedence. A per se rule does not account for the individuality of each collective bargaining agreement where the terms and conditions of employment, as well as the structure of the employer-union relationship, may vary.\textsuperscript{209} For example, a seniority clause could mandate filling open positions with the employee who meets the minimum job requirements and is the most senior. Though most seniority provisions are more complicated, when reassigning a disabled employee into a position that is part of such a seniority provision, the actual infringement on the rights of other employees would depend in large part, on the number of employees who meet the stipulated minimum job requirement.\textsuperscript{210} The greater the number of employees who meet the minimum job requirements, the larger the number of employees the employer displaces when accommodating a disabled employee.\textsuperscript{211} The greater the displacement, the greater the weight accorded the seniority provision in determining whether to violate the collective bargaining agreement to accommodate the disabled employee.\textsuperscript{212}

In the alternative, if few employees meet the minimum job requirements, the displacement is significantly lower, especially if those displaced employees are able to secure comparable positions in a short period of time.

In determining the impact of the infringement, it is also important to consider other contract provisions that may mitigate the effect of an infringement. For example, a provision that gives the employer discretion to suspend the terms of the seniority agreement would demonstrate that an accommodation of a disabled employee is no more an infringement upon the rights of other employees than already existed under their current collective bargaining agreement.\textsuperscript{213} In \textit{Aka}, the applicable collective bargaining agreement authorized an exception to the seniority provisions that allowed the employer to fill vacancies with reassigned disabled employees.

\textsuperscript{209} See \textit{Aka}, 116 F.3d at 894-95.
\textsuperscript{210} See Dubault, \textit{supra} note 3, at 1299.
\textsuperscript{211} See \textit{id}.
\textsuperscript{212} See generally Dubault, \textit{supra} note 3, at 1298-99 (discussing infringement on employee expectation interest under collective bargaining agreements).
\textsuperscript{213} See generally \textit{Aka}, 116 F.3d at 894-95 (noting the employer opt-out provision for reassigning disabled employees).
workers. The employer is able to fill vacancies when he believes it would be "feasible" and would not interfere with patient care or the normal operation of the hospital. These provisions demonstrate that the expectations of non-disabled employees have not substantially been violated because the seniority expectations were already limited by the employer discretion provision. In these instances, courts should give little weight to the seniority clause in evaluating the reasonableness of reassignment. Evaluating the effect of seniority clauses is a superior method of analysis in comparison to the per se rule, because such an evaluation considers actual harm to the employment rights of those employees covered by the collective bargaining agreement. In contrast, the per se rule assumes every violation is a major intrusion on the collectively bargained employment rights of other employees.

Another factor that must be balanced against the disabled employee’s interest, is the employer cost associated with a reassignment that contravenes the terms of a collective bargaining agreement. Under federal labor law, an employer violates the NLRA if it allows a reassignment without the union’s consent. If an employer proceeds without the consent of the union, the employer may face substantial litigation costs and labor disputes that interfere with business operations. Such disputes may have a negative economic impact on the surrounding communities, financial markets, and related industries. These associated expenses may qualify as an undue hardship if they are costly, substantial, and disruptive. However, this will not always be the case. The collective bargaining history of the parties involved may affect how labor and management respond to labor grievances.

The final factor that impacts the balancing analysis is the public policy that encourages labor stability and the preservation of collectively bargained rights. It is this public policy that led to the promulgation of

214. See id.
215. See id.
216. See Dubaut, supra note 3, at 1299.
217. See id.
219. See supra note 4 and accompanying text.
220. See id.
221. See Dubaut, supra note 3, at 1274.
222. See generally Trans World Airlines v. Hardison, 432 U.S. 63 (1977); Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996) (discussing the importance of labor stability as a reason for giving labor agreements great
the NLRA. 223

The presence of any of the above mentioned factors, is not in itself
dispositive of the issue of whether an accommodation is reasonable or
creates an undue hardship. 224 Rather, the weight each factor is given is
based on the circumstances unique to each employment environment.
After weighing the interests on both sides, the weight of each factor will
assist the court in determining which legitimate interest should prevail.

C. Application of a Balancing Test to Aka and Eckles

The likely result of applying the balancing test in Aka, is the em-
ployee prevailing on the failure-to-accommodate claim due to the col-
lective bargaining agreement’s employer discretion provision. 225 An
accommodation through reassignment to a light duty position would be
no more burdensome on the expectations of other employees because the
employer discretion provision already created a diminished expectation. 226

In Eckles, the use of the balancing test would most likely result in a
similar outcome as under the per se bar. The accommodation sought by
the plaintiff in Eckles would have displaced not only the employee Eck-
les replaced, but also could have potentially displaced every employee
qualified for the position under the seniority agreement who desired a
transfer to the day shift. Given that day shifts were in high demand, 227 it
would be likely that Eckles’ accommodation would have displaced a
significant number of employees, depriving them of a significant em-
ployment benefit. Accordingly, the seniority clause in the collective
bargaining agreement should have tremendous weight in light of the
significant displacement. It is unlikely that an accommodation in this
situation would be reasonable. Application of a balancing test allows for
the fact specific, case-by-case analysis desired by Congress that is ab-

223. See generally 29 U.S.C. § 141 (1994) (discussing purpose of the
   NLRA).
224. See H.R. REP. No. 101-485, pt. 2, at 63; see also 29 C.F.R. § 1630
   (1997).
225. See generally Aka v. Washington Hospital Center, 116 F.3d 876, 895
   (D.C. Cir. 1997) (discussing Washington Hospital Center’s labor agreement’s opt-
   out provision that allows reassignment at the hospital’s discretion).
226. See id.
227. Eckles, 94 F.3d at 1043-44.
sent under a broad per se rule.

A disabled employee’s right to be free from discrimination in the workplace is critical, especially when coupled with society’s interest in preventing such discrimination. When a court hears a case involving a collective bargaining agreement, which inadvertently discriminates against the disabled, the court should undertake a fact-specific analysis before determining whose interests should prevail. Per se rules are overbroad because they mechanically grant disposition of the case without accurately weighing the actual infringement against the benefit gained. A balancing test, as proposed here, most closely adopts the flexible, case-by-case analysis that Congress intended.²²₈

Unfortunately, a case-by-case analysis does not address the concerns of employers faced with litigation irrespective of their grant of an accommodation. A per se rule allows employers some measure of protection against litigation if they decide not to grant a reassignment accommodation. However, the rule would still contravene the statutory intent. Ignoring the statutory language and congressional intent is an inappropriate method to address employer liability concerns. Those concerns are best addressed through cooperation between the EEOC and NLRB. These agencies should continue to work to adopt a joint interpretation for public guidance.

CONCLUSION

The options courts have when confronted with conflicts between the ADA and the NLRA are varied. Some courts adopt a per se rule that gives dispositive weight to seniority clauses. This option gives no consideration to the rights and interests of the disabled employee. Furthermore, it ignores society’s interest in the disabled person being a productive member of the workforce. In addition, the per se bar does not consider the actual infringement an accommodation in violation of seniority clauses may have on the economic interests of other employees.

Courts may also adopt a per se rule giving the reassignment provision preference over collectively bargained seniority clauses. This would allow the employer’s ADA obligations to trump its obligations under the collective bargaining agreement and the NLRA. This option ignores the strong support and sanctity that society affords collective bargaining agreements and seniority rights. It also ignores the expectations of em-

ployees who are covered by collective bargaining agreements. These expectations contribute to a stable labor environment. In both instances, a per se bar in favor of the collective bargaining agreement, or in favor of the ADA provisions, unfairly penalizes the interests represented by the ADA or the interests protected by the NLRA.

The best option is a balancing test that considers all factors in determining whether an accommodation is in fact reasonable, or whether it would cause undue hardship for the employer. In making this balanced determination, the court should look to the actual provisions of the collective bargaining agreement, the associated employer costs, and pay deference to the public policies that place a high regard on labor stability and eradication of workplace discrimination. It is the proposed balancing model that most closely mirrors congressional intent.

Kymberly D. Hankinson