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DO SENIORITY RIGHTS "TRUMP" THE ADA?: CONFLICTS BETWEEN COLLECTIVE BARGAINING AGREEMENTS AND THE DUTY TO ACCOMMODATE DISABLED WORKERS

LISA SCHUR
Rutgers University, New Brunswick, New Jersey

ABSTRACT

What happens when the duty to reassign disabled workers under the ADA conflicts with seniority provisions of collective bargaining agreements? The 1990 Americans with Disabilities Act departs from previous antidiscrimination legislation in imposing higher standards on employers and unions and specifically listing reassignment as an example of a reasonable accommodation. Nevertheless, most courts have followed earlier case law in giving precedence to the terms of collective bargaining agreements. The 1996 Seventh Circuit *Eckles* opinion has been broadly interpreted in subsequent decisions to excuse employers from the duty to reassign disabled workers when this would conflict with a collective bargaining agreement. These cases raise the larger issue of the extent to which private contracts can circumvent or nullify legislated rights.

What happens when an employer's duty to make "reasonable accommodations" under the Americans with Disabilities Act conflicts with the terms of a collectively bargained seniority system? What kind of trade-offs have been, and should be, made between the collective interests of the bargaining unit as a whole and the individual rights of employees or job applicants with disabilities?

When Congress passed the Americans with Disabilities Act (ADA) in 1990 it recognized that millions of Americans with disabilities have been unable to participate fully in society as a result of discrimination, indifference, and paternalism, and it acknowledged the high societal cost of dependency and nonproductivity among people with disabilities [1, Sec. 1(b)(2)(a)(5); 2]. According to a Harris poll, cited by Congress in the reports accompanying the ADA, "not

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working is perhaps the truest definition of what it means to be disabled" [2]. Only about half of working-age people with disabilities are employed in the United States and there is evidence that the low employment rate is at least partially due to discrimination [3]. One of the primary goals of the ADA is to end employment discrimination against people with disabilities by empowering individuals to file claims against employers and unions that violate the Act's requirements. Title I of the ADA prohibits more than intentional acts of discrimination against individuals with disabilities; it also requires both employers and unions to refrain from any action that has the *effect* of discrimination in the areas of hiring, advancement, or termination [1, Sec. 102(b)(2); 4]. Furthermore, refusal to make "reasonable accommodations" for known physical or mental limitations of an "otherwise qualified" employee or applicant with a disability is actionable under the ADA unless it would cause "undue hardship" to the operation of the business.

While courts have recently concerned themselves with the employment rights of disabled Americans, they have long recognized that collective bargaining lies at the heart of national labor policy in the United States and is vital for the promotion of industrial peace [5]. The National Labor Relations Act (NLRA), enacted in 1935, was designed to regulate the relationship between unions and employers without dictating the substantive terms of collective bargaining agreements. Among other unlawful activities, the NLRA prohibits employers from unilaterally modifying or ignoring the terms of a negotiated collective bargaining agreement or engaging in individual dealing with union members [6, Sec. 8(a)(5)]. Within the parameters established by the NLRA, courts have generally upheld collective bargaining agreements negotiated in good faith between employers and unions. Most such agreements reserve the most desirable jobs to qualified employees who have the longest continuous service with the employer. In addition to supporting collective bargaining in general, courts have ruled that seniority systems are not *per se* discriminatory and that they serve the important function of distributing employment benefits in a neutral fashion [7, at 766].

An area of potential conflict between the ADA and the NLRA concerns the reassignment of employees who become disabled. The ADA specifically lists "reassignment to a vacant position" as an example of a reasonable accommodation an employer might make [1, Sec. 101(9)(b); 8]. A key question is whether such reassignment imposes an "undue hardship" on the employer and union if it conflicts with a collectively bargained seniority system. This is not an easy issue to resolve. Deviating from the terms of the contract subjects the employer to a potential unfair labor practice charge under Section 8(a)(5) of the NLRA, and subjects the union to a potential charge that it breached its duty of fair representation [9]. On the other hand, strict adherence to the collective bargaining agreement often results in the termination of employees with disabilities who might otherwise remain gainfully employed, and may violate the requirements of the ADA.

While the ADA does not explicitly address this issue, a number of commentators have pointed to language in the ADA, its legislative history, and the EEOC regulations interpreting the Act that indicate Congress did not intend the duty to accommodate employees with disabilities to give way automatically before collectively bargained seniority systems [10]. Rather than adopting a *per se* rule, the evidence suggests that the ADA requires employers and unions to weigh the interests of the parties involved on a case-by-case basis, so that the expectations of all employees in the bargaining unit are respected without sacrificing the rights of employees with disabilities. However, when disabled workers have sued employers over the issue of reassignment, most courts have favored collective bargaining systems over the duty to provide reasonable accommodations, basing their interpretations of the ADA on several earlier antidiscrimination statutes.

This article first reviews how judges have treated similar conflicts under earlier federal antidiscrimination statutes, which continue to influence interpretations of ADA requirements. It then discusses some of the important differences between the ADA and previous antidiscrimination legislation before looking at how recent court decisions have interpreted the issue of reassignment and seniority under the ADA.

PRE-ADA ANTIDISCRIMINATION LEGISLATION

The ADA is based on two previous pieces of legislation—the 1964 Civil Rights Act prohibiting discrimination based on race, religion, gender, and ethnicity, and Section 504 of the 1973 Rehabilitation Act prohibiting discrimination against people with disabilities by federal agencies or employers receiving federal funds [11, 12].

While the ADA specifically lists "reassignment to a vacant position" as an example of a type of reasonable accommodation an employer might make, the Rehabilitation Act (before it was amended in 1992) and Title VII of the Civil Rights Act were silent on this issue. In fact, reassignment was virtually precluded under Title VII because the Act explicitly protected "bona fide seniority and merit systems" from attack even if their routine application has the effect of excluding members of a protected class.

While it did not mention reassignment, Title VII did include language making it an unfair labor practice for an employer to discriminate against employees or job applicants on the basis of religion [11, Sec. 703(a)(1)]. Subsequently, the statute was amended to require employers "to reasonably accommodate" the religious needs of employees and prospective employees unless this would create an "undue hardship on the conduct of the employer's business" [11, Sec. 701(j)]. Congress did not specify, however, what it meant by the term "undue hardship," leaving the matter open for judicial interpretation.

Before looking at how courts have treated accommodation requirements under the ADA, it is important to examine how they have analyzed Title VII

requirements regarding religious accommodations. The holdings in cases brought under Title VII do not set a precedent for claims brought under other laws. However, the Supreme Court's rationale in *TWA v. Hardison* [13] (a case brought under Title VII), has strongly influenced subsequent interpretations of accommodation requirements under both the Rehabilitation Act and the ADA.

In *Hardison,* an employee with relatively low seniority claimed he was entitled to a preferred schedule so that he could observe his Sabbath. The Supreme Court held that if such an accommodation conflicted with the terms of the collective bargaining agreement, it imposed an "undue hardship" and was not required [13, at 84]. The Court based its ruling in *Hardison* on the section of Title VII that protects "bona fide seniority and merit systems," arguing that since Title VII includes both this exception and the reasonable accommodation requirement, Congress clearly intended seniority systems to be upheld unless there was evidence they were created with the *intent* to discriminate on the basis of race, color, religion, sex, or national origin. The Court defined the term "undue hardship" in this decision, deciding that any accommodation requiring more than a "de minimis cost" posed an undue hardship to the employer's business [13, at 84].

Neither the Rehabilitation Act nor the ADA creates an exception for seniority systems. Nevertheless, in cases brought under the Rehabilitation Act courts have adopted rationales used in Title VII litigation and have consistently held that reassignment or other accommodations that would conflict with the provisions of a collective bargaining agreement automatically create an "undue hardship" and are therefore not required. A typical decision on this issue is *Jasany v. United States Postal Service* [14], which determined that the Postal Service was not required to transfer a mail sorter who had crossed eyes to another position and concluded: "An employer cannot be required to accommodate a handicapped employee by restructuring a job in a manner that would usurp the legitimate rights of other employees in a collective bargaining agreement" [14, at 1251-52]. Similar holdings have been reached in almost all other cases brought under the Rehabilitation Act, despite the fact that both job restructuring and reassignment were specifically included in the regulations interpreting the Rehabilitation Act [15].

THE ADA AND THE COLLECTIVE BARGAINING AGREEMENTS

The ADA imposes on covered entities the duty to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," and lists "reassignment to a vacant position" as one type of reasonable accommodation [1, Secs. 101(a) and 102(b)(5)(A)]. While cases decided under the Rehabilitation Act have

favored collectively bargained seniority systems over the duty to accommodate disabled workers, the legislative history clearly suggests Congress was aware of the Rehabilitation Act precedent and intended judges to apply a higher standard for employers and unions under the ADA. Along with specifically mentioning reassignment as a possible accommodation, the ADA's definition of the term "undue hardship" sets a much higher standard than minimal cost or inconvenience, the terms used in *Hardison* and its progeny. Employers and unions are excused from their duty to accommodate disabled employees only if such accommodation would impose a "significant difficulty or expense" [1, Sec. 101(10)(A)].

In addition, the House Report accompanying the ADA specifically rejects the *Hardison* standard of undue hardship as it relates to collective bargaining agreements, noting that the fact that an accommodation is inconsistent with the terms of a collective bargaining agreement "may be considered as a factor" in determining whether a proposed accommodation is reasonable but that it "*would not be determinative on the issue*" [16, at 63]. The report then suggests that employers and unions may be required to negotiate the issue of reasonable accommodation in subsequent bargaining agreements. Both parties may be obligated to "ensure 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" [16, at 63].

Furthermore, the Senate Report on the ADA, in its discussion of the relationship between contractual and statutory duty, begins by observing that the duty of an employer and union under the Act is not affected by any inconsistent term in the collective bargaining agreement [2, at 32]. Both the EEOC regulations interpreting the ADA and the agency's Technical Assistance Manual state that the terms of a collective bargaining agreement are "relevant" in determining whether an accommodation poses an undue hardship [17]. The manual adds that since the ADA requirements apply to both the employer and the union, both parties should negotiate the terms of acceptable accommodations. It then repeats the House Report's suggestion that the parties include language in the collective bargaining agreement permitting the employer to take actions necessary to comply with the ADA. While the EEOC's regulations are not binding on the courts, the Supreme Court has noted that administrative interpretations of legislation "constitute a body of experience and informed judgment to which courts and litigants may properly resort [for] guidance" [18, at 65].

In 1992 Congress amended the Rehabilitation Act, making the standards used in employment discrimination cases the same as the standards applied under the ADA [19]. Thus, the Rehabilitation Act now incorporates the ADA definition of reasonable accommodation, which includes reassignment to a vacant position, and the "de minimis" standard for determining whether an accommodation is an "undue hardship" no longer applies even in cases brought solely under the Rehabilitation Act. This is further evidence that courts should not use the

standards developed under the pre-amended Rehabilitation Act in litigation brought under the ADA.

The language of the ADA also makes clear that unions, as well as employers, have a duty to accommodate disabled employees. The term "covered entity" in the ADA includes both employers and labor organizations, which are treated identically under the rule that "no covered entity shall discriminate . . ." [1, Sec. 102(a)]. If Congress intended the duty to accommodate only to apply to employers, presumably it would have treated employers and unions separately (as in the 1964 Civil Rights Act). This suggests that unions may have an independent duty to show that a particular exception to the collective bargaining agreement would create an undue hardship to the other members of the bargaining unit. This is in line with the flexible, multifactual approach used throughout the ADA, which encourages decisions about reasonable accommodations to be made on a case-by-case basis rather than by applying fixed, *a priori* rules [20]. At a minimum, the ADA's statutory language lends weight to the proposition that unions and employers have an obligation to bargain over the issue of reasonable accommodations for disabled employees in contracts negotiated after the ADA took effect.

A recent statement by the EEOC further supports the view that employers and unions are obligated to negotiate over the reassignment of disabled employees if reassignment conflicts with seniority rules [21]. In response to a request from the National Labor Relations Board (NLRB), the EEOC drafted a letter in October 1997 on how to resolve an unfair labor practice charge involving ADA confidentiality requirements. The employer had awarded a particular position to an employee (called "John Doe") as an ADA reasonable accommodation, despite the fact that several other qualified employees with more seniority had bid for the position. An employee who was not selected for the position filed a grievance, and the union asked the employer for Doe's medical records so it could assess the matter. The employer refused, claiming such disclosure was prohibited under the ADA. The union responded by filing an unfair labor practice charge with the NLRB, claiming the employer had violated Sections 8(a)(1) and 8(a)(5) of the NLRA by refusing to provide it with information needed to process a pending grievance. In determining that the ADA permitted the employer to share Doe's medical records with the union, the EEOC wrote that when a particular accommodation conflicts with collectively bargained seniority rules, the duties of the employer and the union are "intertwined" [21, at E-15]. The EEOC noted that both employers and unions are "covered entities" under the ADA and, therefore, they both must fulfill their duties to make reasonable accommodations for disabled workers. The letter emphasized that, "When an employer seeks to provide a reasonable accommodation that conflicts with collectively bargained seniority rules, the [EEOC's] position is that the substance of a union's reasonable accommodation obligation is to negotiate with the employer to provide a variance to the [collective bargaining agreement], if no other reasonable accommodation exists

and the proposed accommodation does not unduly burden non-disabled workers or otherwise pose an undue hardship" [21, at E-14].

COURT INTERPRETATIONS OF CONFLICTS BETWEEN THE ADA AND SENIORITY SYSTEMS

Despite strong indications of legislative intent and EEOC interpretation, almost all courts that have considered the issue have held that the ADA does not require employers and unions to accommodate disabled employees if this would conflict with the terms of a collectively bargained seniority system. In fact, some court decisions have gone further and have found that the employer need not consider reassignment at all, apart from any potential conflicts with a collective bargaining agreement.

The decision in the 1995 case *Milton v. Scrivner, Inc.* [22], for example, raised doubts about whether reassignment is ever required, and also indicated that any reassignment could not conflict with a collective bargaining contract. In this case, the two plaintiffs worked in a grocery warehouse where both had previously sustained on-the-job injuries and were unable to meet new production standards when the employer implemented a work speed-up. They were terminated and subsequently sued the employer under the ADA. The Fifth Circuit Court of Appeals upheld the trial court's grant of summary judgment for the defendant, finding first that the plaintiffs were not "qualified individuals with a disability" under the ADA because the increased production rate was an "essential function" of their jobs. The court held that neither allowing the plaintiffs to bid for other jobs within the company nor lowering the production requirements was a "reasonable" accommodation. In addition, the court stated in its *dicta* that "giving plaintiffs lighter duty is also barred by the collective bargaining agreement," and that "plaintiffs' collective bargaining agreement prohibits their transfer to any other job because plaintiffs lack the requisite seniority" [22, at 1124].

Even in a nonunion workplace, a seniority system may excuse an employer from the duty to accommodate disabled workers, as held in the 1995 decision *Daugherty v. City of El Paso* [23]. In this case the plaintiff, who developed diabetes, could no longer work as a bus driver and was denied other jobs with the defendant. The Fifth Circuit Court of Appeals found that since he could no longer drive a bus he was not "otherwise qualified" and that it would be an "undue hardship" for the city to violate its own rules regarding seniority, stating, "We do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled" [23, at 700].

The interpretations given in *Milton, Daugherty,* and similar opinions nullify the employer's duty to consider reassignment at all, whether or not this conflicts with a collective bargaining agreement. As discussed, the ADA imposes on covered entities the duty to make reasonable accommodations for a "qualified individual

with a disability," and lists "reassignment to a vacant position" as one type of possible accommodation [1, Secs. 101(a), 102(b)(5)(A)]. The Act defines the term "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such an individual holds or desires" [1, Sec. 101(8)]. Logically, reassignment would be an appropriate accommodation when an employee is unable to work in his or her former job. As the House Report provides: "If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and employer from losing a valuable worker" [16, at 62-63]. The *Daugherty* and *Milton* courts, however, hold that employees who become disabled and can no longer perform their former job functions are not "otherwise qualified" under the Act and therefore the employer has no duty to accommodate them. In other words, the only time an employer needs to consider reassignment is when such an accommodation is unnecessary (because the employee is qualified to perform the current job). A number of decisions have followed this interpretation [24], which renders the duty to reassign employees with disabilities virtually meaningless, suggesting that courts are misreading the accommodation requirements imposed by Title 1 of the ADA.

While some courts appear to have mistakenly applied the standards of Title VII and the pre-amended Rehabilitation Act to cases involving reassignment under the ADA, others recognize that the ADA imposes greater obligations on employers and unions. These decisions have held that reassignment to a vacant position may sometimes be required under the ADA and that the term "otherwise qualified" can apply to positions other than the plaintiff's former job [25]. Several opinions note correctly that Congress did not intend nondisabled workers to be "bumped" from their current positions in order to accommodate disabled workers [26]. The overwhelming majority of district and circuit court decisions go further, however, holding that reassignment is never required under the ADA (even to a vacant position) if it conflicts with the terms of a collective bargaining agreement.

In the 1996 case *Nolan v. Sunshine Biscuits Inc.* [27], for example, a plaintiff who mangled his hand in an industrial accident was reassigned to various light duty positions, but subsequently injured his hand again. He first filed a grievance with his union alleging he had been assigned to a job he could not perform with his work restrictions and later (after his termination following filing of a workers' compensation claim) filed a lawsuit against the defendant alleging it had violated the ADA by assigning him to so-called "light-duty" positions that he was unable to perform with his disability. The district court granted summary judgment to the defendant, ruling that Nolan was not a "qualified individual" under the ADA because he "has not shown that with or without an accommodation he could have performed the essential functions of a position with the defendant that he is willing to accept, that he can perform, and that he is eligible for under the

collective bargaining agreement" [27, at 758]. In so doing, the court implicitly recognized that the term "otherwise qualified" could apply to positions other than the plaintiff's former job, but also indicated that such reassignment should be consistent with the collective bargaining agreement.

Even when an individual is clearly recognized as "otherwise qualified" under the ADA and reassignment may be a reasonable accommodation, courts have refused to abrogate the terms of seniority systems. In *Wooten v. Farmland Foods* [28], a 1995 case, the plaintiff injured his shoulder while working as a ham boner for the defendant. A medical examiner later determined that the plaintiff was able to work without restrictions but suggested minimal exposure to overhead reaching, which Farmland was able to accommodate. Wooten subsequently provided the defendant with a doctor's note stating that his work should be limited to activities that did not involve heavy lifting or working in a cold environment. At that time no vacant jobs were available to accommodate these limitations and Wooten was terminated. In upholding the district court's grant of summary judgment for the defendant, the Eighth Circuit Court of Appeals stated that Farmland Foods had no obligation to fire other employees or to "violate a collective bargaining agreement in order to accommodate Wooten, even if it perceived him to have a substantial impairment" [28, at 385; 29].

Similarly, in the recent 1997 case, *Scheer v. City of Cedar Raids* [30], the Iowa district court held that the defendant had not violated the ADA when it failed to transfer Scheer to another position after it removed him from the job of airport safety officer because his epilepsy made it unsafe for him to drive a vehicle. The court noted that under the ADA an employer may be obligated to reassign an employee who becomes disabled, but cited *Wooten* to support its conclusion that "[a]n employer has no obligation to terminate other employees or violate a collective bargaining agreement in order to accommodate the disabled employee" [30, at 1502].

In another case, *Benson v. Northwest Airlines* [31], the plaintiff worked as a mechanic until he suffered a relapse of a rare neurological disorder that caused pain, weakness, and numbness in his arm and shoulder. He was transferred to the recycling unit, where employees with job-related injuries worked until they were able to return to their former jobs or find alternative positions, but he was then "bumped" by a more senior employee. Benson was subsequently placed on an unpaid leave of absence and told to find another position with Northwest or face termination. Benson contended that a foreman's position had opened up in the recycling department, but that the department manager had refused the transfer. Benson unsuccessfully sought engineering positions and was fired when his unpaid leave expired.

In reversing the trial court's grant of summary judgment for the defendant, the Eighth Circuit Court of Appeals held that Benson had created a genuine issue of material fact as to whether Northwest had existing *vacant* recycling and engineering positions available. While stating in its *dicta* that "[t]he ADA does not require

that Northwest take action inconsistent with the contractual rights of other workers under a collective bargaining agreement," the court found that "reassignment to a vacant position is a reasonable accommodation under the ADA" and that if Northwest "had a vacant, existing position for which Benson qualified, Benson's assignment to the position might have been a reasonable accommodation" [31, at 1114].

The protection of collectively bargained seniority systems was strongly affirmed in the 1996 opinion *Eckles v. Consolidated Rail Corporation* [32]. The plaintiff in this case worked in a rail yard and sought reassignment to a ground-level office due to his epilepsy, which precluded his working in a tower. The employer and union initially agreed and allowed Eckles to "bump" a more senior employee. They later, however, allowed Eckles to be "bumped" in turn by another employee who had more seniority, and Eckles filed an ADA discrimination claim.

In affirming the district court's decision to grant summary judgment for Consolidated Rail, the Court of Appeals for the Seventh Circuit held that "the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees" [32, at 1051]. The court was unconvinced by the plaintiff's argument that the ADA, unlike Title VII, does not contain language exempting bona fide seniority systems from its definitions of unlawful employment practices. The court stated the lack of such an express exemption does not mean the ADA should "trump" seniority systems and noted the Rehabilitation Act contains no exception for seniority systems but courts have unanimously concluded that reasonable accommodation under that Act does not include infringing on seniority rights [32, at 1049]. The *Eckles* court reasoned that since the ADA lists both "job restructuring" and "reassignment to a vacant position" as examples of reasonable accommodations, Congress did not intend other employees to lose their positions in order to accommodate a disabled worker [32, at 1047].

The *Eckles* court also rejected the EEOC's contention that employers and unions have a duty "to negotiate in good faith a variance from collectively bargained seniority rules" [32, at 1051]. Apparently unaware of the discussion in the House Report and the Technical Assistance Manual on the duty of employers and unions to negotiate reasonable accommodations, the court found that "This approach is admirable in its desire for moderation and compromise (not to mention its creativity). We find, however, that it lacks any foundation in the text, background, or legislative history of the ADA" [32, at 1051].

The specific facts of *Eckles* concerned a disabled employee who "bumped" a more senior worker from his position, which is not considered a "reasonable accommodation" under the ADA. The court stated, however, "the legal question at issue has little to do with the specific facts in this case" [32, at 1043], suggesting it intended the holding to apply more generally. Subsequent legal opinions have certainly interpreted *Eckles* very broadly, relying on the opinion to find a

collective bargaining agreement can completely excuse an employer from accommodating disabled employees.

For example, in the 1996 case, *Taylor v. Food World, Inc.* [33], the Alabama District Court cited *Eckles* to support its finding that reassignment would have been a promotion in conflict with a collective bargaining agreement, and asserted flatly that "As a matter of law, an accommodation that forces an employer to violate a collective bargaining agreement is not 'reasonable' " [33, at 941; 34].

Similarly, in *Collins v. Yellow Freight System, Inc.* [35], the district court in Missouri upheld the defendant's refusal to transfer the plaintiff to a light-duty position after he injured his back while working on defendant's tractor trailer rigs, stating that the defendant "was not required to contravene this provision of the collective bargaining agreement in order to accommodate plaintiff" [35, at 453; 36].

The Fifth Circuit has followed the precedent set by *Eckles* in three 1997 decisions. In *Daigre v. Jefferson Parish School Board* [37], the plaintiff, a teacher, was shot in the leg by one of her students and later suffered from post-traumatic stress disorder. The school board refused her request for a permanent transfer to a safer school because it would have conflicted with the terms of its contract with the teachers' union. The plaintiff sued the school board alleging that it had violated the ADA. The district court granted summary judgment for the defendant, relying on *Eckles* as well as *Benson* and *Wooten* in holding that the ADA does not require accommodations that violate the terms of collective bargaining agreements. The Fifth Circuit Court of Appeals affirmed the district court's decision without a published opinion.

In another recent case, *Foreman v. Babcock and Wilcox* [38], the plaintiff worked for the defendant for over twenty-two years, and was working as an expeditor when he underwent surgery and had a pacemaker installed to correct a heart condition. Foreman's doctor informed the defendant that the plaintiff was medically restricted from working within six feet of any welding equipment because of possible electromagnetic interference with the pacemaker. Foreman asked the defendant to modify his job so that it would not bring him near welding equipment, or else to reassign him to another job with comparable pay. Instead the defendant transferred Foreman to a janitorial position and the plaintiff sued the employer under the ADA for failure to make reasonable accommodations. In upholding the trial court's grant of judgment as a matter of law for the defendant, the Fifth Circuit relied on *Eckles* and *Benson* to hold that the ADA does not obligate employers to disregard the terms of collective bargaining agreements [39]. The court went on to cite *Daugherty* and stated that even if there were no collective bargaining agreement in place, Babcock and Wilcox had no duty to reassign the plaintiff because the ADA does not require "affirmative action in favor of individuals with disabilities" [38, at 810].

In *Duckett v. Dunlop Tire Corp.* [40], the Fifth Circuit also gave priority to collective bargaining agreements. This case involved a plaintiff who worked for

the defendant for seventeen years and held a supervisory position when he was hospitalized for dangerously high blood pressure. The employer subsequently informed Duckett that his old position was available and asked him to return to work. Duckett told the employer that his doctor had not yet released him for work and that therefore he could not return to his old position. The defendant then fired him and Duckett sued Dunlop Tire under the ADA. The Fifth Circuit upheld the trial court's grant of summary judgment for the defendant, stating again that the employer had no duty to violate a collective bargaining agreement in order to accommodate a disabled worker.

The most recent appellate court decision to follow *Eckles* was *Kralik v. Durbin* [41], decided in December 1997. In this case the plaintiff worked as a turnpike toll collector, and asked that she not be required to work mandatory overtime because she had injured her back in a car accident. The employer refused on the grounds that the collective bargaining contract required employees to work mandatory overtime in the order of reverse seniority if not enough workers volunteered for these shifts. Kralik sued the employer in district court for failing to make reasonable accommodations. The Third Circuit affirmed the district court's grant of summary judgment for the defendant, cited *Eckles* as a "compelling precedent" and held that Kralik's requested accommodation was not reasonable because it would infringe on the seniority rights of other employees and would expose the employer to potential union grievances [41, at 14-15]. The dissent in *Kralik* argued that the statutory language of the ADA, its legislative history, and the EEOC regulations interpreting the act strongly suggest that a requested accommodation is not *per se* unreasonable where it conflicts with the seniority provisions of a collective bargaining agreement [41, at 19-27; 42].

Only two federal courts have ruled that collectively bargained seniority systems are not determinative on the issue of employee reassignment. In a 1995 case, *Emrick v. Libbey-Owens-Ford Co.* [43], the plaintiff was diagnosed with multiple sclerosis but informed his employer that he could continue in his present position. When the defendant later reduced its workforce, it offered Emrick other positions which he declined because his condition had worsened and he was unable to perform his previous physical activities. The district court for the Eastern District of Texas denied summary judgment for the employer on the grounds that a genuine issue of material fact existed regarding the defendant's efforts to reassign the plaintiff to a vacant position. The court stated that, "[R]ather than adopting the *per se* rule allowing a collective bargaining agreement to prevail under the Rehabilitation Act, decisions under the ADA should weigh any conflict with a collective bargaining agreement as merely another factor in examining the reasonableness of the proposed accommodation" [42, at 496].

While subsequent opinions have never explicitly overruled *Emrick,* few have followed its balancing approach, and the Appellate Court's decision in *Daugherty* casts doubt as to whether the approach taken in *Emrick* is still valid in its own district [44].

The 1997 opinion in *Aka v. Washington Hospital Center* [45] was the only appellate court decision to depart from the trend favoring seniority systems over the duty to accommodate disabled workers. In this case the plaintiff worked as an orderly for twenty years, maintaining a good employment record and also earning Bachelor's and Master's degrees. Aka took a medical leave giving diabetes as the reason, but then was hospitalized four days after he returned to work for a heart condition. When he returned to work his doctor advised him to avoid strenuous activities, and Aka sought a new position with the defendant. Although Aka was covered by a collective bargaining agreement that provided for the reassignment of disabled employees, he was informed by the hospital that no jobs were available, and was placed on a "job search leave" [45, at 878; 46]. Aka then applied and interviewed for a job as a central pharmacy technician, but it was given to another employee with less education and seniority. Aka also applied for a number of other jobs (including file clerk positions) but was not offered any of them.

The District of Columbia Court of Appeals reversed the trial court's grant of summary judgment for the defendant. The court found that the provision in the collective bargaining agreement regarding reassignment was valid and had not "atrophied" for lack of use, even though the hospital had never reassigned any of its employees who became disabled [45, at 893]. The court then determined that despite the provision in the collective bargaining agreement, conflicts still existed between the terms of the contract and the requirements of ADA. The majority rejected the argument that employers cannot be mandated to provide accommodations when doing so would conflict with the terms of a collective bargaining agreement [47]. The court found that the ADA, its legislative history, and the EEOC regulations implementing it "indicate the inquiry into whether a particular accommodation may be required by the ADA must be made in light of the specific nature of the requested accommodation and of the employer's business, including (but not limited to) the degree to which the accommodation might disrupt the work force by upsetting settled expectations created by the collective bargaining agreement, or by undermining the operational structure instituted by the agreement" [45, at 895]. The opinion quoted the section of the Congressional report accompanying the ADA that says the terms of a collective bargaining agreement "may be considered as a factor" in deciding whether the accommodation is reasonable but "would not be determinative on the issue" [45, at 895].

The court noted that its approach diverged from the analysis applied by other circuit courts, most notably by the Seventh Circuit's decision in *Eckles*. It explicitly rejected the *Eckles* court's reasoning, stating:

> we would misconstrue the ADA's "reasonable accommodations" requirement if we were to allow any and all "conflicts" between requested accommodations and the terms of collective bargaining agreements to stand as per se bars to disabled employees' claims of entitlement to these accommodations under

> the ADA. We likewise think it inappropriate to draw blanket conclusions regarding whether the ADA can "trump" provisions in collective bargaining agreements [45, at 896].

The opinion added that "the ADA's 'reasonable accommodation' provision requires us to bear in mind that conflicts between accommodations to disabled employees and the terms of applicable collective bargaining agreements exist on a continuum, rather than functioning like an 'on/off switch' " [45, at 896; 48].

Judge Henderson's partial dissent in *Aka* sharply criticized most of the court's findings, claiming that "the majority takes a spectacular wrong turn in its opinion" [45, at 898]. Most of the dissent was based on an issue which is beyond the scope of this article; namely the standard of evidence to be used in discrimination cases [49]. Henderson also objected, however, to the majority's decision even to address the issue of conflicts between the ADA and collective bargaining agreements. She argued that since the collective bargaining agreement between Washington Hospital and the union provided for the reassignment of disabled workers, "the majority's entire discussion of the balancing of rights under the ADA and a collective bargaining agreement [is] dictum and, like all dictum, carrying the same baggage—unintended consequences in unknown circumstances" [45, at 903].

It appears that at least some of Judge Henderson's objections were shared by other members of the D.C. Court of Appeals. The *Aka* decision was vacated on September 5, 1997 and will be reheard *in banc* at a later date.

Aka was the only federal appellate court decision to favor a balancing approach for resolving conflicts between seniority systems and ADA requirements. After the case is reheard by the full court, the D.C. Circuit may continue to favor this balancing approach. It is very possible, however, that the court will either follow the example set by other circuits and give precedence to collective bargaining agreements, or else follow the approach taken in Judge Henderson's dissent and decline even to consider the issue. No matter how the court finally decides the issues in *Aka,* the stage is clearly set for resolution by the Supreme Court since so many courts appear to be misinterpreting the ADA's statutory requirements. The Supreme Court declined to review *Daugherty* and *Eckles,* suggesting that the majority may agree with the holdings and rationales in these opinions and would overrule the balancing approach advocated in *Aka.* As noted, however, the specific issue decided in *Eckles* was whether a disabled employee could "bump" a nondisabled employee, which clearly is not considered a reasonable accommodation under the ADA. While the *Eckles* court articulated a broad rule favoring collective bargaining agreements that some subsequent courts have followed, the Supreme Court may reject this standard in favor of a balancing approach when presented with a case directly involving reassignment to a vacant position.

CONCLUSION

A close reading of the ADA, its legislative history, and the relevant regulations shows that Congress intended both employers and unions to balance nondisabled employees' rights under collective bargaining agreements against the rights of employees and job applicants with disabilities. Trends in case law, however, indicate some courts have failed to distinguish between the requirements imposed by the ADA and those imposed by the earlier Rehabilitation Act and Civil Rights Act and have deferred automatically to collective bargaining agreements. Other decisions, including *Eckles,* recognize that the ADA imposes higher standards on employers and unions, but have also held that seniority systems still "trump" the duty to accommodate disabled workers. The only appellate court exception was the recent 1997 *Aka* decision, which declined to follow case precedents on the issue of reassignment. *Aka* was recently vacated, however, and it remains to be seen how the full court will consider this issue.

Since virtually all courts that have ruled on this issue appear to have misinterpreted the standards and requirements of the ADA, it may be left to the Supreme Court to resolve the issue of conflicts between the ADA and collectively bargained seniority systems (as well as whether reassignment is ever required under the ADA). While it is understandable that many courts would prefer a clear, unambiguous rule to the careful, case-by-case analysis required by the ADA, the "unwieldiness" that the *Eckles* court deplored does not excuse the failure to follow the act's requirements [50]. It is certainly troubling that so many federal judges appear to have misread the ADA and one hopes that the Supreme Court can provide clarity on this issue. Although it is uncertain how the Court would rule, the denial of certiorari in *Eckles* and *Daugherty* may imply tacit approval for seniority systems over the obligation to accommodate disabled workers. If the Supreme Court were to follow the majority of federal court opinions, this would effectively erase the ADA's reassignment language for employees in unionized workplaces. Such a result would significantly weaken the power of the ADA to secure employment opportunities for workers who become disabled on the job, and would make it even harder for individuals with disabilities to achieve economic parity with nondisabled Americans.

The prevailing trend raises larger issues about conflicts between legislated rights and private contracts. The fact that seniority systems exist and have received court protections indicates that they play an important role in the workplace: not only can they provide valuable protections for workers, but they can enhance workplace performance through encouraging on-the-job training and minimizing workplace conflicts with established rules for employment decisions. While seniority systems may clearly benefit the contracting parties, do those benefits always justify overriding the legislated rights of disabled employees? Taken to its extreme, such an approach could be used to justify private contracts

that effectively nullify environmental regulations or health and safety rules, which would significantly limit the scope and impact of public policies.

Justice Marshall dissented from the *Hardison* decision that favored a collective bargaining contract over the duty to accommodate employees' religious needs, noting that "[I]f an accommodation can be rejected simply because it involves preferential treatment, then the regulation and the statute, while brimming with 'sound and fury' ultimately 'signify nothing' " [13, at 87]. The ADA, for all its "sound and fury," would be greatly undermined if the Supreme Court followed the precedent set by the majority of circuit court decisions allowing private parties to contract away their duty to accommodate disabled workers.

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* * *

Lisa Schur is an Assistant Professor in Labor Studies and Employment Relations at Rutgers University, and an Ed Roberts Scholar at the World Institute on Disability in Oakland, California. She received a J.D. from Northeastern University Law School in 1987 and Ph.D. in Political Science from the University of California, Berkeley in 1997. Her research focuses on disability, politics, and law, particularly legal interpretations of ADA requirements, and political participation among individuals with disabilities.

ENDNOTES

1. *Americans with Disabilities Act of 1990* (ADA), Pub. L. No. 101-336, 1990 U.S.C.C.A.N. (104 Stat.) 327.
2. S. REP. No. 101-116, 101st Cong., 1st Sess. 9 (1989).
3. United States Department of Commerce, *Americans With Disabilities: 1991-92.* Current Population Reports, Household Economic Studies, P70-33 (Washington, D.C.: Government Printing Office, 1993); W. G. Johnson and M. Baldwin, The Americans with Disabilities Act: Will It Make A Difference? *Policy Studies Journal, 21*:4, pp. 771-778, 1993.
4. The Senate Report states that the ADA incorporates "a disparate impact standard to ensure that the legislative mandate to end discrimination does not ring hollow" [2].
5. See, for example, *NLRB v. Jones and Laughlin Steel Corp.,* 301 U.S. 1 (1937).
6. *National Labor Relations Act,* 49 Stat. 449 (1935), as amended by 61 Stat. 136 (1947), 65 Stat. 601 (1951), 72 Stat. 945 (1958), 73 Stat. 541 (1959), 88 Stat. 395 (1974).
7. See, for example, *Franks v. Bowman Transp. Co.,* 424 U.S. 747 (1976).
8. The ADA provides that the term "reasonable accommodation" may include "(A) making existing facilities used by employees readily accessible to and useable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, *reassignment to a vacant position,* acquisitions or modification of

equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities" (emphasis added).

9. Under the Labor Management Relations Act (LMRA) employees are entitled to file charges against unions that fail to provide fair and nondiscriminatory representation to all persons in a bargaining unit [6, as amended in 1947].
10. J. J. Ervin, Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990, *Detroit College of Law Review, 3,* pp. 925-972, 1991; B. A. Lee, Reasonable Accommodation and the Unionized Employer: Reassignment of Workers with Disabilities, *Human Resource Management Review, 2*:3, pp. 183-194, Fall 1992; R. Cyr, Note: The Americans with Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees, *Brooklyn L. Rev. 57,* Winter 1992; M. K. Melbey, The Americans with Disabilities Act and Collective Bargaining Agreements: Reasonable Accommodations or Irreconcilable Conflicts? *Kentucky Law Journal, 82,* pp. 219-248, 1993-94; A. C. Hodges, The Americans with Disabilities Act in the Unionized Workplace, *University of Miami Law Review, 48*:511, pp. 567-625, 1994; H. S. Mars, An Overview of Title I of the Americans With Disabilities Act and its Impact Upon Federal Labor Law, *Hofstra Labor Law Journal, 12,* pp. 251-309, Spring 1995; M. G. Zagrodsky, Special Issue on the Americans with Disabilities Act: When Employees Become Disabled: Does the Americans with Disabilities Act Require Consideration of a Transfer as a Reasonable Accommodation? *South Texas Law Review, 38,* pp. 939-963, 1997; W. J. McDevitt, Seniority Systems and the Americans with Disabilities Act: The Fate of "Reasonable Accommodation" After Eckles, *St. Thomas Law Review, 9,* pp. 359-374, Winter 1997; R. Pritchard, Avoiding the Inevitable: Resolving the Conflicts Between the ADA and the NLRA, *The Labor Lawyer, 11,* pp. 375-414, 1995.

    Several commentators, however, have argued that the ADA does not generally require employers to accommodate disabled workers at the expense of the seniority rights of other employees. See, e.g., C. A. McGlothlen and G. Savine, Eckles v. Consolidated Rail Corp.: Reconciling the ADA with Collective Bargaining Agreements: Is This the Correct Approach? *DePaul Law Review, 46,* pp. 1043-1054, Summer 1997.
11. *Civil Rights Act of 1964,* 78 Stat. 255, 42 U.S.C. Sec. 2003, *et seq.* ("Title VII").
12. *Rehabilitation Act of 1973.* Pub. L. No. 93-112, @500-504, 87 Stat. 390-94.
13. *TWA v. Hardison,* 432 U.S. 63 (1977).
14. *Jasany v. United States Postal Service,* 755 F.2d 1244 (6th Cir. 1985).
15. See, for example, *Shea v. Tisch,* 870 F.2d 786 (1st Cir. 1989) (*per curium*), *Carter v. Tisch,* 822 F.2d 465 (4th Cir. 1987), *Mason v. Frank,* 32 F3.d 325 (8th Cir. 1994), *Daubert v. United States Postal Service,* 733 F.2d 1367 (10th Cir. 1984), *Tyler v. Runyon,* 70 F.3d 1367 (7th Cir. 1995).
16. H.R. REP. No. 101-485, 101st Cong., pt. 2 (1990).
17. U.S. Equal Employment Opportunity Commission, *Interpretive Guidance on Title I of the Americans with Disabilities Act,* 29 C.F.R. app. Section 1630 (1993); U.S. Equal Employment Opportunity Commission, *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, Resource Directory,* Section 3-9, at III-16 (1992).

18. *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986).
19. As amended, the Rehabilitation Act provides that "The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act." *The Rehabilitation Act of 1973,* Section 794, Title 29, U.S.C.
20. Daly-Rooney pointed out that a flexible, multifactual approach to reassignment is consistent with the overall approach used throughout the ADA. For example, in determining "undue hardship" Congress rejected using a fixed financial formula and instead presented a list of factors that should be weighed in determining whether a specific accommodation is an undue hardship (R. Daly-Rooney, Note: Reconciling Conflicts Between the Americans With Disabilities Act and the National Labor Relations Act to Accommodate People with Disabilities, *DePaul Business Law Journal, 6,* pp. 387-416, 404-45, Spring 1994).
21. E. Vargyas, "Opinion Letter from the EEOC to the NLRB on ADA Confidentiality Requirements Pertaining to Medical Information," reprinted in *Daily Labor Report,* Bureau of National Affairs, October 1, 1997.
22. *Milton v. Scrivner, Inc.,* 53 F.3d 1118 (10th Cir. 1995).
23. *Daugherty v. City of El Paso,* 56 F.3d 695 (5th Cir. 1995) (*Cert.* denied).
24. See, for example, *Myers v. Hose,* 50 F.3d 278, 284 (4th Cir. 1995), *Cheatwood v. Roanoke Indus.,* 891 F.Supp. 1528, 1537 (N.D. Ala. 1995) (citing *Myers*), *Christopher v. Laidlaw Transit Inc.,* 899 F.Supp. 1224 (S.D. New York 1995).
25. See, for example, *Gile v. United Airlines, Inc.,* 95 F.3d 492 (7th Cir. 1996), *Stone v. City of Mt. Vernon,.* 118 F.3d 92 (2d Cir. 1997), *Haysman v. Food Lion Inc.,* 893 F.Supp. 1092, (S.D. Georgia 1995), *Pedigo v. P.A.M. Transport, Inc.,* 891 F.Supp. 482 (W.D. Arkansas 1994), *Vazquez v. Bedsole,* 888 F.Supp. 727 (E.D.N.C. 1995), *Emrick v. Libbey-Owens-Ford Co.,* 875 F.Supp. 393 (E.D. Texas 1995).
26. As the Congressional reports noted, "bumping" other employees from out of their positions to create vacancies is not required under the ADA [16 at 63; 2 at 32].
27. *Nolan v. Sunshine Biscuits Inc.,* 917 F.Supp 753 (D. Kansas 1996).
28. *Wooten v. Farmland Foods,* 58 F.3d 382 (8th Cir. 1995).
29. The *Wooten* court appears to have reached the correct decision for the wrong reasons; the ADA makes it clear that reassignment need only be to a vacant position. If no vacant positions were available, the employer was not obligated to "bump" other employees or create a new position to accommodate the plaintiff.
30. *Scheer v. City of Cedar Rapids,* 956 F.Supp. 1496 (N.D. Iowa 1997).
31. *Benson v. Northwest Airlines,* 62 F.3d 1108 (8th Cir. 1995).
32. *Eckles v. Consolidated Rail Corp.,* 94 F.3d 1041 (7th Circuit, 1996) (*Cert.* denied).
33. *Taylor v. Food World, Inc.,* 946 F.Supp. 937 (N.D. Alabama 1996).
34. In *Taylor* the plaintiff had a form of autism that caused him to speak loudly, use repetitive speech, and ask inappropriate personal questions. He worked as a clerk, bagging groceries, until he was fired for annoying defendant's customers. The court granted summary judgment for Food World on the grounds that the plaintiff was estopped from asserting that he was "qualified" under the ADA because he applied for and received SSI disability benefits which required the finding that he was unable "to do any substantial gainful activity." The court went on to state that even if Taylor were

allowed to pursue his ADA claim, he was not "qualified" for the position bagging groceries so the defendant was under no duty to accommodate him. As a further rationale, the court added that reassignment to another position would have been a promotion prohibited by the collective bargaining agreement [33, at 942].

35. *Collins v. Yellow Freight System, Inc.*, 942 F.Supp. 449 (W.D. Missouri 1996).
36. In this case several doctors who examined the plaintiff reported he would be permanently disabled. Nevertheless, Collins eventually recovered and was able to resume his former job. The court found, however, that it was reasonable for the employer to conclude that Collins would be permanently disabled. Therefore, Yellow Freight was not required to reassign him to a position for employees who had temporary disabilities because this would have violated the collective bargaining agreement. *Collins* appears to have been correctly decided for the wrong reasons. The defendant's light-duty position was designed as a temporary one, and the ADA does not require an employer to create a permanent position for a disabled employee.
37. *Daigre v. Jefferson Parish School Board,* 119 F.3d 2 (5th Circuit 1997).
38. *Foreman v. Babcock and Wilcox,* 117 F.3d 800 (5th Circuit 1997).
39. The Fifth Circuit also upheld the lower court's findings that: 1) Foreman was not disabled because his heart condition did not substantially limit his ability to work; 2) Babcock and Wilcox did not regard Foreman as being disabled; and 3) even if Foreman had a disability, he was not protected by the ADA because his heart condition made him unable to perform the essential functions of his job as expeditor [39, at 806-807].
40. *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (5th Circuit 1997).
41. *Kralik v. Durbin,* 1997 U.S. App. LEXIS 34829 (3rd Circuit 1997).
42. The dissent also pointed out that when a proposed accommodation would have a negligible effect on other employees, as may have been the case in *Kralik,* this was a factor to consider in deciding whether a proposed accommodation is an undue hardship [41, at 26].
43. *Emrick v. Libbey-Owens-Ford Co.*, 875 F.Supp. 393 (E.D. Texas 1995).
44. The *Eckles* court specifically rejected the standards applied in *Emrick,* stating that "the *Emrick* court stands alone in its balancing approach." The *Eckles* opinion pointed out that the *Daugherty* decision "raises questions about the continuing vitality" of *Emrick* even in its own district [32, at 1050].
45. *Aka v. Washington Hospital Center,* 116 F.3d 876 (District of Columbia Circuit 1997).
46. The relevant paragraph in the collective bargaining agreement provided that, "An employee who becomes handicapped, and thereby unable to perform his job, shall be reassigned to another job he is able to perform whenever, in the sole discretion of the hospital, such reassignment is feasible and will not interfere with patient care or the orderly operation of the hospital" [45, at 892].
47. The Court of Appeals upheld the grant of summary judgment for Washington Hospital in regard to the file clerk positions but determined that there was a genuine issue of material fact concerning the denial of the pharmacy position and reversed the grant of summary judgment on that issue. The hospital representative who interviewed Aka stated that she felt the other employee had more relevant pharmacy experience and showed more enthusiasm for the job. The Court decided that a factfinder should determine whether the reasons the hospital gave were pretextual given Aka's twenty

years of experience with the procedures of the pharmacy, and that such subjective criteria as "enthusiasm" should be subjected to particularly close scrutiny in employment discrimination cases. The Court added that "outward signs of 'enthusiasm' are exactly the type of traits that can be diminished by advancing age and a heart-related disability" [45, at 888].

48. The Court may have felt particularly sympathetic to Aka, given the plaintiff's twenty years of seniority and his strong job qualifications. (In contrast, the plaintiffs in most of the other cases involving reassignment had relatively low seniority.) As Ervin and Daly-Rooney have suggested, relevant factors in determining whether reassignment is a reasonable accommodation include: the disabled employee's level of seniority, and the difference in the amount of seniority between the disabled employee and non-disabled employees whose seniority rights may be adversely affected (J. J. Ervin, Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990, *Detroit College of Law Review, 3,* p. 969, 1991; R. Daly-Rooney, Note: Reconciling Conflicts Between the Americans With Disabilities Act and the National Labor Relations Act to Accommodate People with Disabilities, *DePaul Business Law Journal, 6,* pp. 1298-1299, Spring 1994.
49. Judge Henderson claimed that the *Aka* majority erred in its interpretation of the Supreme Court decision, *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), which holds that in order to survive a defendant's motion for summary judgment, a plaintiff must provide evidence of discrimination, not merely evidence that the employer's stated reasons for its actions were pretextual [45, at 898-899].
50. The *Eckles* court complained about the "unwieldiness" of the balancing approach used in the *Emrick* decision [32, at 1051].

Direct reprint requests to:

Lisa Schur
Department of Labor Studies and Employment Relations
Rutgers University
Ryders Lane and Clifton Avenue
New Brunswick, NJ 08903