AMERICAN WITH DISABILITIES ACT

Unfortunately, the American with Disabilities Act does not recognize the significance of the collective bargaining process in an employer’s attempt to find a reasonable accommodation. There are three primary areas where the duties imposed on employers by the ADA conflict with duties imposed by the National Labor Relations Act. First, while the ADA imposes a duty to hold, NLRA prohibits such “direct dealing” absent prior union authorization. Second, while the ADA requires the employer to develop a reasonable accommodation, the NLRA forbids employers from violating the terms of a collective bargaining agreement, and certain provisions of such an agreement may prevent employers from undertaking a preferred accommodation. Finally, while the ADA imposes confidentiality requirements on all medical records relating to the disability, the NLRA requires employers to discuss all relevant information with the employee representative. These three areas of conflict remain unresolved five years after passage of the ADA, and employers are often confused about their obligations. See Pritchard, Avoiding the Inevitable: Resolving the Conflicts Between the ADA and the NLRA, H LABOR LAWYER 375, 387 (Fall/Winter 1996).

These same conflicts would exist in the public sector collective bargaining. Published court decisions are limited and some of these same issues may be confronted in the arbitration forum.

1. The precept that an employer need not violate a collective bargaining agreement’s bonafide seniority provisions as a reasonable accommodation under the Americans With Disabilities Act, 42 USC 12112 was resolved in U.S. Airways, Inc. v Barrett, 535 U.S. 391 (2002). To overcome contractual seniority rights, the plaintiff must show that the seniority system already contains exceptions such that one further exception is unlikely to adversely impact the system.

2. In Kralik v Durbin, 130 F.3d 76 (3d Cir. 1997), a state employee suffered a back injury in an auto accident unrelated to her employment. She sought a reasonable accommodation of being relieved from forced overtime “as she cannot work for more than eight hours at a time” because of her injuries. The labor contract with the Teamsters included an overtime provision that as the employer, the Turnpike Commission, was a 24 hour operation, if the employer experienced difficulty in obtaining a replacement for any work shift, they would call employees using the seniority system. If no employees accept the overtime, it would be assigned to the least senior employee currently working. The plaintiff filed a claim under the ADA and the Rehabilitation Act. The Court focused its analysis on the ADA, stating this applies equally to the Rehabilitation Act.

The Court stated that the collective bargaining agreement is not necessarily decisive because the union and employer may modify the agreement as they did on a temporary basis by releasing her from forced overtime.

A requested accommodation, however, exempting an employee of mandatory overtime is unreasonable because it would require the employer to violate the labor agreement
and run the risk that the violation would entail. It is appropriate for the Union, rather than the employer to make the determination, that the infringement is justifiable by releasing the employer from its obligation to follow the seniority provisions of the collective bargaining agreement to accommodate a qualified individual with a disability. The accommodation in such cases is not by the employer but the coworker who will lose a benefit of their seniority status. See id. at 83.

3. In Bielicki v City of Chicago, 1997 US Dist Lexis 6880 (N.D.Ill. 1997), the District Court denied City’s motion to dismiss a claim where an employee was denied coverage for infertility treatments. Claims were asserted under the Americans with Disabilities Act, Title VII, Pregnancy Discrimination Act and Breach of Contract under the health insurance plan and violation of public policy. The City’s self-insurance plan denied health care coverage for infertility treatment and a subsequent pregnancy. The Court ruled that infertility was a disability as a physical impairment covered under the ADA which substantially limits the major life function of reproduction. Plaintiff could also maintain a claim for breach of health insurance contract.

4. Finally, sick leave provisions contained in collective bargaining agreements have recently come under scrutiny because of the ADA. For example, in Transport Workers Union et al. v. New York City Transit Authority, 341 F.Supp.2d 432 (S.D.N.Y. 2004), the District Court examined the Union’s challenge to the sick leave policy contained in the parties’ collective bargaining agreement. The Court held that the policy made inquiries which are prohibited by the ADA. In particular, the Court found that the policy’s inquiries “‘may tend’ to reveal disabilities or perceived disabilities” and that the policy in its broad form did not trigger the business necessity exception allowing such inquiry. Id. at 447. However, the Court also held that the policy could be applied to those in safety sensitive positions and those employees that were on the “sick leave control list” i.e. a provision governed by the collective bargaining agreement for the purpose of policing and curbing sick leave abuse. See id. at 451. As a result, the Court held that the Transit Authority could legitimately require employees to submit a sick form upon their return to work, but that the Authority could not ask the employee to state the nature of the disability resulting in the absence. See id. The Court concluded by allowing the Authority to continue to enforce the policy until the issue of whether safety concerns might justify enforcement with respect to employees other than bus operators could be determined.