

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 92-9

Date: August 7, 1992

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Jerry M. Hunter, General Counsel

SUBJECT: Americans with Disabilities Act, 42 U.S.C. 12101, et seq.

Title I of the Americans With Disabilities Act (ADA), which deals with discrimination in employment, became effective on July 26, 1992. There are potential conflicts between the requirements of the ADA and the National Labor Relations Act (NLRA). The following discussion will acquaint you with some of the issues which may arise. Due to the novel and complex issues involved, any unfair labor practice charge raising issues under the Americans with Disabilities Act must be referred to the Division of Advice for review.

I. Potential Conflicts between the Duty to Bargain under the NLRA and the Duty to Comply with the Americans with Disabilities Act

An employer's duty to bargain in good faith as defined by Section 8(a)(5) and 8(d) of the NLRA forbids an employer to change working conditions of employees represented by a union without first giving the union notice of the proposed change and an opportunity to bargain.¹ Further, during the term of a collective bargaining agreement, neither party may alter terms and conditions of employment contained in the agreement without the consent of the other party.² Moreover, Section 8(d) specifically authorizes parties to a labor agreement to refuse to "discuss or agree to any modification" during the term of the contract.

The ADA prohibits covered entities, which include employers and labor organizations, from discriminating against qualified individuals with a disability because of that disability.³ Among the forms of discrimination prohibited

¹ NLRB v. Katz, 369 U.S. 736 (1962).

² See, e.g., Oak Cliff-Golman Bakery Co., 202 NLRB 614, 207 NLRB 1063 (1973), enf'd. 505 F.2d 1302 (5th Cir. 1974).

³ ADA Section 102(a), 42 U.S.C. 12112(a).

are "not making reasonable accommodations to the known physical or mental limitations" of otherwise qualified disabled applicants or employees, unless the accommodation would impose an "undue hardship" on the operation of the business of such covered entity.⁴ However, if an employer unilaterally implements a "reasonable accommodation" for a disabled employee or otherwise alters its employment practices so as to change wages, hours or other working conditions, its action may give rise to a Section 8(a)(5) charge.⁵ Discussed below are several of the types of violations that may be alleged and the factors that may affect the consideration of whether such a charge would be found meritorious.⁶

A. Accommodation as a Section 8(d) Term or Condition of Employment

A unilateral "reasonable accommodation" would violate Section 8(a)(5) only if it effects a "material, substantial or significant" change in working conditions.⁷ Accommodations such as putting a desk on blocks, providing a ramp, adding braille signage or providing an interpreter, which allow disabled employees to perform the same job in a fashion different than other employees, generally would not be

⁴ ADA Section 102(b)(5)(A), 42 U.S.C. 12112(b)(5)(A).

⁵ As noted, the ADA prohibits employers and other covered entities from discriminating against applicants. Except in certain limited circumstances, however, an employer has no duty to bargain with a union over the application process or employee selection criteria. Star Tribune, 295 NLRB 543, 545-548 (1989). Compare Houston Chapter, Associated General Contractors, 143 NLRB 409, 411-412 (1963), enf'd 349 F.2d 449 (5th Cir. 1965) (duty to bargain over standards for hiring hall). Consequently, outside of the hiring hall context, an employer has no duty to bargain about "reasonable accommodations" for applicants with a disability, in the absence of an impact upon members of the bargaining unit.

⁶ These issues might also arise in the context of a Section 8(b)(3) charge filed by an employer that sought to bargain over a proposed accommodation and was met with a refusal to bargain. The merits of such charges are discussed in Section B, below.

⁷ See, e.g., LaMousse, 259 NLRB 37, 48-49 (1981), enf'd. (mem) 112 LRRM 3168 (9th Cir. 1983) (five minute increase in break time not material substantial and significant).

changes in terms and conditions of employment.⁸ In that case, an employer would have no duty to bargain over the implementation of such accommodations. A change that is inconsistent with an established employment practice such as a seniority system, defined job classifications or a disability plan would more likely be a change in Section 8(d) terms and conditions.⁹

B. Intervening Enactment of ADA as a Defense

The employer may argue that its obligation to comply with the ADA privileges it to act unilaterally. The Board has held that where changes in working conditions are mandated by changes in law, an employer does not violate Section 8(a)(5) by making such changes.¹⁰ But, where the change in law leaves the employer with some discretion with regard to compliance, the employer violates Section 8(a)(5) by unilaterally changing terms and conditions to bring itself into compliance.¹¹

It seems unlikely that an employer would be privileged to unilaterally change working conditions to achieve compliance with the ADA without giving a union any notice or opportunity to bargain.¹² First, the ADA explicitly recognizes that "undue hardship" is a defense to a charge that an

⁸ See, e.g., Rust Craft Broadcasting of New York, Inc., 225 NLRB 327 (1976) (change from manually completed timecards to timeclock).

⁹ See, e.g., Southern California Edison Co., 284 NLRB 1205, n.1, 1210-1211 (1987) (unilateral change in temporary work assignment practices for disabled employees); Jones Dairy Farm, 295 NLRB 113, 113-116 (1989), enf'd. 907 F.2d 1021 (7th Cir. 1990) (midterm implementation of rehabilitation program for temporarily disabled employees).

¹⁰ See, e.g., Murphy Oil USA, 286 NLRB 1039, 1042 (1987); Standard Candy Co., 147 NLRB 1070, 1073 (1964).

¹¹ Ibid.

¹² As long as the proposed modification would not constitute a mid-term modification, if an employer gives adequate notice and opportunity to bargain and the union fails to respond, the union will be deemed to have waived its right to bargain and the employer may lawfully implement. As to mid-term modifications, see discussion below.

employer has failed to make a reasonable accommodation.¹³ The legislative history makes clear that the terms of a collective bargaining agreement may be relevant, albeit not determinative, of whether a particular accommodation would cause undue hardship.¹⁴ Further, the EEOC's implementing Regulations regarding the ADA provide that it may be a defense to a charge of discrimination under the ADA that a challenged action is required or necessitated by another Federal law or regulation or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required.¹⁵ Thus, it would appear that, in most cases, an employer has sufficient discretion under the ADA to warrant requiring it to afford a union notice and an opportunity to bargain about a proposed accommodation.¹⁶

A more difficult issue is the scope of the duty to bargain, during the term of a collective bargaining agreement, over a proposed accommodation that is inconsistent with

13 ADA Section 102(b)(5)(A), 42 U.S.C. 12112(b)(5)(A); Regulations to Implement the Equal Employment Provisions of Americans with Disabilities Act, 29 C.F.R. 1630, 1630.9(a).

14 "The collective bargaining agreement could be relevant, however, in determining whether a particular accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue." House Report 101-485, Part 2 (May 15, 1990), p. 63.

15 29 C.F.R. 1630.15(e).

16 It might be argued that if a proposed accommodation is the only effective accommodation in the circumstances and is not an "undue hardship," an employer is mandated by the ADA to make that accommodation and would have no duty to bargain under the principles discussed in cases cited in n. 10, above. Before a Region submits a case that raises this defense to the Division of Advice, it should investigate whether each element of the defense is present. That is, it should attempt to ascertain all parties' positions as to whether the proposed accommodation was the only one that would be effective in the circumstances and whether that accommodation posed no undue hardship.

the provisions of that agreement. Two questions are presented:

(1) When a party to the contract (either an employer or a union) requests bargaining over such a proposed accommodation, may the other party rely on its right under Section 8(d) to refuse to discuss any modification of the agreement during the term of the contract or, alternatively, does the creation of new legal duties under the ADA impose on both employers and unions a concomitant duty under the NLRA, at least, to bargain over the proposed accommodation?

(2) If the parties are unable to reach agreement on an acceptable accommodation, does an employer violate its Section 8(d) obligation to refrain from altering the contract without the consent of the union if it implements the proposed accommodation over the union's objection?

It is beyond the scope of this Memorandum to address all the competing policy considerations presented by these questions and to state definitively how to resolve charges raising them. Certain points can be made. A party would have no right under the NLRA to insist on adherence to contract terms that are, on their face, violative of the ADA. On the other hand, if the contract provision relied on is neutral on its face, a party may argue that it should be entitled to rely on its Section 8(d) right to refuse to discuss or agree to a proposed accommodation, inconsistent with that provision, if an adequate alternative arrangement existed that would not conflict with the collective bargaining agreement.¹⁷ As to whether parties can be compelled to bargain mid-term over proposed accommodations that would violate a facially neutral contractual provision or whether an employer violates Section 8(a)(5) by implementing, over a union's objection, an accommodation that would violate such a contract provision but is also the only effective accommodation in a given

¹⁷ In an appendix to the ADA implementing Regulations, the EEOC has explained that the ADA does not require an employer to provide the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated." 29 C.F.R. Appendix Section 1630.9.

circumstance, further guidance will be forthcoming as charges raising these issues are resolved.¹⁸

C. Direct Dealing

The ADA requires that the employer consult with the disabled employee about the accommodation.¹⁹ With respect to accommodations that would change terms and conditions of employment, provisos to Section 9(a) of the NLRA authorize an employer and employee to meet and adjust grievances but only "as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: [and] further, [t]hat the bargaining representative has been given opportunity to be present at such adjustment." Thus, an employer that arranges a reasonable accommodation with an employee which would change working conditions without negotiating with an affected union may be liable for "direct dealing" with the employee.²⁰

¹⁸ Charges that turn on the interpretation of a contract will be deferred to arbitration under Collyer Insulated Wire, 192 NLRB 837 (1971). Where, however, there is no claim that the accommodation is even arguably consistent with the contract, whether the implementation of the accommodation violates an employer's duty to bargain does not turn on any underlying dispute over the terms of the contract and Collyer deferral is unwarranted. See, Oak Cliff-Golman Baking Co., 207 NLRB at 1063. 29 C.F.R. 1630.2(o)(3).

¹⁹ See, generally, Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-684 (1944). Compare e.g., United States Postal Service, 281 NLRB 1015, 1015-1018; United States Postal Service, 281 NLRB 1031, 1032 (1986), vacated and remanded 872 F.2d 1027 (6th Cir. 1989) (unpublished) (employer violated 8(a)(5) by excluding union from settlement conference regarding EEO complaints that were also the subject of grievances) and Carbonex Coal Co., 262 NLRB 1306, 1313 (1982) (employer violated 8(a)(5) by implementing change in shift hours at request of employees without giving union notice or opportunity to bargain) with Public Service Co. of Colorado, 301 NLRB No. 33, slip op. at 1, n.2 (participation in court-ordered EEO settlement discussions without affording union opportunity to be present not unlawful where employer directed employee's attorney to include union in settlement process and did not seek to settle grievance in union's absence).

D. Duty to Provide Information

The ADA obliges an employer to treat as confidential, information that it obtains regarding an applicant's or an employee's medical condition or history.²¹ This obligation may pose a conflict with an employer's duty under the NLRA to provide relevant information requested by the union. Where an employer asserts a legitimate claim of confidentiality in response to a request for relevant information, the Board balances the union's need for the information against the assertion of confidentiality.²² Before the Board engages in a full balancing of the countervailing interests, the Board will direct the parties to bargain over means to accommodate both interests.²³

II. A Union's Duty of Fair Representation under the NLRA and Its Obligations under the ADA

A union's action or inaction regarding disabled employees may give rise to two types of allegations that the union violated its duty of fair representation. First, a disabled employee may allege that a union violated that duty by, for example, discriminating in its operation of a hiring hall or apprenticeship program, by entering into facially discriminatory contract provisions or by discriminatorily responding to a request that an employer make a reasonable accommodation to the employee's disability.²⁴

Second, non-disabled employees who object to an agreement a union has entered into to accommodate a disabled

21 Section 102(c)(3) and (4), 42 U.S.C. 12112(d)(3)(4); 29 C.F.R. 1630.14.

22 See, e.g., Detroit Edison Co. v. NLRB, 440 U.S. 301, 314-320 (1979); Johns-Manville Sales Corp., 252 NLRB 368 (1980).

23 See, e.g., Minnesota Mining & Manufacturing Co., 261 NLRB 27, 32 (1982), enf'd. sub nom. Oil, Chemical & Atomic Workers v. NLRB, 711 F.2d 348 (D.C. Cir. 1983).

24 The Board has held that a union violates its duty of fair representation by discriminating against employees it represents based on "invidious" considerations such as disability. See, e.g., Independent Metal Workers Union Local No. 1 (Hughes Tool Co.), 147 NLRB 1573, 1574-1575, 1602-1604 (1964) (race discrimination); Bell & Howell Co., 230 NLRB 420, 420-423 (1977), enf'd 598 F.2d 136 (D.C. Cir. 1979) (sex discrimination).

employee might charge that the union's actions on behalf of the disabled employee violated its duty of fair representation to other employees. Regions should analyze such charges under traditional principles regarding a union's duty of fair representation in resolving potential conflicts within the bargaining unit.²⁵

III. Concerted Activities

Employees' concerted activities regarding disability issues that affect wages, hours and working conditions are protected by Section 7.²⁶ Accordingly, an employer vio-

25 A union's obligation to refrain from arbitrary conduct toward the employees it represents subjects its actions to some review for rationality. Air Line Pilots Assn. v. O'Neill, ___ U.S. ___, 111 S. Ct. 1127, 1133-1134, 136 LRRM 2721, 2725 (1991). Nevertheless, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Ford v. Huffman, 345 U.S. 330, 338 (1953). A union is held to the same standard of conduct in the negotiation of contracts as it is in the administration and enforcement of contracts. Air Line Pilots, 111 S. Ct. at 1135, 136 2725-2726.

26 Cf. Cristy Janitorial Service, 271 NLRB 857 (1984) (concerted complaints to Department of Labor protected activity). Inasmuch as Section 7 protects only concerted activities, however, the action of a single employee is not protected unless the employee acts with the authorization of other employees or with the intent to induce group action. Meyers Industries, 281 NLRB 882, 885-887 (1986), enf'd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987). Furthermore, the protected nature of employee activities that are in derogation of their collective bargaining representative must be determined under the principles of Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) and its progeny.

lates Section 8(a)(1) by retaliating against employees for engaging in such activity²⁷ or by threatening to retaliate against such activity.²⁸


Jerry M. Hunter
General Counsel

27 Cristy Janitorial Service, 271 NLRB at 857, 859-860.
28 Unico Replacement Parts, Inc., 281 NLRB 309 (1986).