Does the ADA Make Exceptions in a Unionized Workplace--The Conflict between the Reassignment Provision of the ADA and Collectively Bargained Seniority Systems

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

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In July 1997, Etim U. Aka, a 55-year-old man who had worked as an orderly for Washington Hospital for twenty years, developed heart disease and underwent a bypass surgery.¹ As an employee of Washington Hospital, Aka was a member of the Service Employees International Union Local 722 and his employment was governed by a collective bargaining agreement between the union and his employer.² Aka's position as orderly was physically strenuous and his doctor advised that he would no longer be able to continue in the position.³ Aka notified his employer of his disability, and he applied for several vacant, less strenuous positions advertised by the hospital.⁴ Despite his application, the hospital did not hire Aka for any of the positions,⁵ arguing that such a reassignment would violate the terms of the collective bargaining agreement between it and the union.⁶

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2. See id.
3. See id.
4. See id. Most of these positions were equivalent to Aka's former job in terms of pay. See id.
5. See id. For some of the positions, the employer found Aka to be less qualified than other applicants who had less seniority than Aka. Because of this fact, the employer gave the positions to applicants with less seniority than Aka. Under the collective bargaining agreement, the employer was not required to give a position to an applicant with less qualifications, regardless of the seniority of the less qualified worker. See id. at 879.
6. See id. at 892.
Aka filed suit against Washington Hospital claiming that he was discriminated against under the Americans with Disabilities Act (ADA). Specifically, he charged that the ADA required the hospital to provide “reasonable accommodations” for his disability including “reassignment to a vacant position.” The district court rejected Aka’s claim and granted summary judgment in favor of Washington Hospital. The court held the “reassignment to a vacant non-strenuous position would have violated the collective bargaining agreement” by infringing on the seniority rights of other workers who requested a reassignment to the same position. The court concluded that the ADA did not require violation of collectively bargained seniority rights as a reasonable accommodation. The D.C. Circuit Court reversed, holding that Aka had raised a legitimate claim under the ADA and that the court must order him reassigned if it determined the transfer to be a reasonable accommodation. In so holding, the court concluded that a reassignment precluded by the terms of a collectively bargained seniority system could be a reasonable accommodation under the ADA.

The Aka court was the first circuit court to adopt this interpretation of the ADA. Prior to Aka, a majority of courts, most notably the Seventh Circuit in Eckles v. Consolidated Rail Inc., granted summary judgment against disabled workers seeking reassignment in a unionized workplace. These courts held that


Aka, 116 F.3d at 879.


9. See Aka, 116 F.3d at 877.

10. Id. at 892.

11. See id.

12. See id. at 897.


14. See Aka, 116 F.3d at 897.

15. Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996). A number of circuit courts have supported this decision. See infra note 73 (listing courts that concurred with Eckles).
a reassignment request that violated collectively bargained seniority rights was not a reasonable accommodation under the ADA as a matter of law.\textsuperscript{16} Courts based this conclusion not on a finding that a reassignment in this context would constitute an undue hardship on the employer, but rather on a determination that the ADA never required an accommodation that would violate the seniority rights of other workers.\textsuperscript{17} Thus, under the majority approach, an employee will never, as a matter of law, be entitled to a reassignment that contradicts collectively bargained seniority rights.

This Note considers whether \textit{Aka} was correct in challenging the majority trend and adopting the view that the ADA requires the transfer of disabled workers notwithstanding violation of collectively bargained seniority rights. Part I provides a brief history of the ADA and the National Labor Relations Act (NLRA). Part II describes the judicial approaches to the conflict between seniority rights and statutory rights under both the ADA and Title VII. Part III argues that the \textit{Aka} court's holding that reassignment may be a viable accommodation, even if it contradicts collectively bargained seniority rights, is sound as a matter of law and policy. This Note concludes that unionized workplaces and non-union workplaces should be treated similarly and that the fact-specific "reasonable accommodation" standard should be applied to evaluate all reassignment requests under the ADA, notwithstanding a conflicting seniority system.

\section*{I. THE ADA AND THE NLRA: WORKPLACE PROTECTIONS FOR EMPLOYEES}

Congress enacted the Americans with Disabilities Act (ADA) and the National Labor Relations Act (NLRA) with the intention of increasing protections for employees.\textsuperscript{18} While the ADA is designed to protect individual disabled workers, a subset of employees who had been subject to extreme disadvantages in the workplace,\textsuperscript{19} the NLRA provides a mechanism for all employees to increase their power through collective action.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{16} \textit{See infra} note 73 (describing the majority's holding).
\item \textsuperscript{17} \textit{See infra} notes 74-84 and accompanying text (describing the majority's analysis).
\item \textsuperscript{18} \textit{See infra} notes 21-25, 46-49 and accompanying text (describing Congress's intention in enacting the NLRA and the ADA).
\item \textsuperscript{19} \textit{See infra} Part I.A.1 (describing the ADA).
\item \textsuperscript{20} \textit{See infra} notes Part 1.B.1 (describing the NLRA).
\end{itemize}
A. THE AMERICANS WITH DISABILITIES ACT

1. History of the ADA

On July 26, 1990, Congress passed the Americans with Disabilities Act (ADA)\(^{21}\) to address the problem of discrimination against disabled persons in a variety of areas.\(^{22}\) Congress intended the ADA to address the "pervasive social problem" of large numbers of disabled persons who were excluded from full participation in society because of their disability.\(^{23}\) In the area of employment, for example, studies showed that many disabled persons wanted jobs but were unable to find them despite their qualifications.\(^{24}\) Consequently, Congress enacted Title I of the


\(^{22}\) See 42 U.S.C. § 12101 (1994). The ADA contains four Titles. Title I protects individuals from discrimination in the workforce. See id. §§ 12111-12117. Title II focuses on discrimination in the provision of public services. See id. §§ 12131-12165. Title III covers stores, restaurants, theaters, and other services operated by private entities. See id. §§ 12166-12200. Title IV includes miscellaneous provisions. See id. §§ 12201-12213.

Many commentators believed that the provisions of the ADA were too vague and would result in confusion and excessive lawsuits. See, e.g., Thomas H. Barnard, The Americans with Disabilities Act: Nightmare for Employers and Dream for Lawyers?, 64 ST. JOHN'S L. REV. 229, 239-52 (1990) (arguing that many of the provisions of the ADA were so vague that they would result in lawsuits to be determined on a case-by-case basis).

\(^{23}\) See 42 U.S.C. §§ 12101(a)(2)-(9). Passage of the ADA was not Congress's first attempt to protect disabled persons in the workplace. In 1973 Congress had passed the Rehabilitation Act, which provided protection for disabled employees. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994). Its scope, however, was limited to federal employers and employers who contracted with the federal government, and its requirements were neither as detailed nor as extensive as those of the ADA. See id.

Despite the differences between the Rehabilitation Act and the ADA, many courts have considered case precedent from the Rehabilitation Act a persuasive authority in interpreting the ADA. See Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1047-49 (7th Cir. 1996). But see Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996) (arguing that courts have been mistaken in relying on Rehabilitation Act precedent in interpreting the reassignment provision of the ADA and concluding that the majority of courts find the Rehabilitation Act cases irrelevant in determining a reasonable accommodation under the ADA).

\(^{24}\) The Senate Report contained the results of a Lou Harris poll that conveyed the plight of many disabled Americans in regards to employment status. See S. REP. No. 101-116, at 9 (1989). The poll indicated that "[s]ixty-six percent of working-age disabled persons, who are not working, say that they would like to have a job" and that "[e]ighty-two percent of people with disabilities said they would give up their government benefits in favor of a full-time job." Id.
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ADA to increase the employment of qualified disabled persons by protecting them against discrimination in the workplace and in the application process.\(^{25}\)

2. Reasonable Accommodation and Undue Hardship

Title I of the ADA requires “covered entity[ies],”\(^{26}\) including employers and labor unions,\(^{27}\) not only to refrain from intentional discrimination against the disabled but also to provide disabled employees with “reasonable accommodation[s]”\(^{28}\) to enable them to enjoy equal employment opportunities.\(^{29}\) The requirement that employers take affirmative steps to accommodate a disabled worker\(^{30}\) sets the ADA apart from most other civil rights statutes, which only require an employer to treat employees

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25. See 42 U.S.C. §§ 12111-12117. At the passage of the ADA, Congress recognized the need for more detailed regulations in order to guide its interpretation. For this reason, it delayed the ADA's implementation and instructed the EEOC to promulgate regulations. See 104 Stat. 336 § 106 (codified at 42 U.S.C. § 12116) (instructing the EEOC to issue regulations within one year); id. § 108 (stating that the effective date of the ADA is 24 months after the enactment). The EEOC regulations have not clarified all of the issues that arise under the ADA.

26. 42 U.S.C § 12112(2). The statute defines a covered entity as: “an employer, employment agency, labor organization, or joint labor-management committee.” Id. § 12111(2). It provides that no “covered entity shall discriminate against a qualified individual with a disability.” Id. § 12112(a).

27. In addition to inclusion in the definition of a covered entity, labor unions are included in the Act in another section. The Act defines discrimination as including participation in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs).

Id. § 12112(b)(2).

28. See 42 U.S.C. § 12111(9) (describing the reasonable accommodation standard); id. § 12111(10) (describing the factors involved in an undue hardship analysis). “Discrimination” includes: “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operations of the business of such covered entity.” Id. § 12112(5)(A)


30. See 29 C.F.R. app. 1630.2(o), at 355 (1997) (defining reasonable accommodation as a “change in the work environment or in the way things are customarily done that enables and individual with a disability to enjoy equal opportunity”).
Equally.\textsuperscript{31} The ADA's reasonable accommodation requirement reflects Congress's recognition that the creation of equal employment opportunities for disabled workers requires, in some cases, the removal of non-essential barriers that previously have prevented otherwise qualified workers from achieving full employment.\textsuperscript{32}

Rather than provide a highly specific definition of a reasonable accommodation, the ADA includes examples of employer actions, which may be reasonable in certain circumstances, including job restructuring, reassignment to a vacant position,\textsuperscript{33} the provision of qualified readers, and other similar accommodations.\textsuperscript{34} In a particular case, however, the determination of what accommodations should be provided by an employer is evaluated in light of the particular needs of the individual and the impact of the accommodation on the employer's resources and operations.\textsuperscript{35}

The ADA limits reasonable accommodations to those which do not impose an "undue hardship" on the employer.\textsuperscript{36} An "undue hardship" is an "action requiring significant difficulty or expense" on the part of the employer.\textsuperscript{37} The Act lists factors to be

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\textsuperscript{32} See 29 C.F.R. app. 1630, at 348 (1997) ("When an individual's disability creates a barrier to employment opportunities, the ADA requires employers to consider whether reasonable accommodation could remove the barrier.").

\textsuperscript{33} The legislative history also reflects Congress's intent to require reassignment to a vacant position:

Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of a 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.


\textsuperscript{34} 42 U.S.C. § 12111(9). Reasonable accommodations may include, "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, [and] the provision of qualified readers or interpreters and other similar accommodations for individuals with disabilities." \textit{Id.}

\textsuperscript{35} See id. §§ 12111(9)-(10).

\textsuperscript{36} See id. § 12112(b)(5)(A) (stating that reasonable accommodations are required unless they would impose an undue hardship on the employer).

\textsuperscript{37} See id. § 12111(10) ("[T]he term 'undue hardship' means an action requiring significant difficulty and expense, when considered in light of the factors set forth in [the Act]."); see also Mengine v. Runyon, 114 F.3d 415, 418 (3d Cir. 1997) (holding that an employer is required to provide a reassignment unless it is an undue hardship). In evaluating an undue hardship, there are some factors which are not listed in the Act but which may be encompassed by
considered in determining whether a proposed accommodation constitutes an undue hardship, including the nature and cost of the accommodation, the financial resources of the employer, the size of the employer, the type of operation, and the impact of the accommodation on the operation of the facility. Thus, the determination of whether a proposed accommodation constitutes an undue hardship requires a fact-specific analysis.

3. Reassignment as a Reasonable Accommodation

Although the ADA and the Equal Employment Opportunity Commission (EEOC) regulations both list reassignment as a

the broad language. One of these factors is the effect on the co-workers of the disabled employee who would receive the accommodation. See Lisa E. Key, Co-Worker Morale, Confidentiality and the Americans with Disabilities Act, 46 DEPAUL L. REV. 1003, 1035-1041 (1997) (arguing that co-worker moral should be considered as a factor in an undue hardship analysis in certain circumstances).

38. 42 U.S.C. § 12111(10)(B). The statute lists the following factors to be considered in an undue hardship analysis:

(i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

39. The EEOC has expressed a clear intent that in certain cases reassignment to a vacant position is a required accommodation under the ADA. The EEOC guidelines stipulate that:

Reassignment to a vacant position is also listed as a reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. ... Employers should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified and if the position is vacant within a reasonable amount of time.


The EEOC also states that reassignment should occur regardless of any conflicting collective bargaining agreement:

The terms of a collective bargaining agreement may be relevant in determining whether an accommodation would impose an undue hardship.

For example: A worker who has a deteriorated disc condition and cannot perform the heavy labor functions of a machinist job, requests
possible reasonable accommodation, Congress, courts and the EEOC have imposed limits on the application of the reassignment provision in a variety of ways. First, an employer is not required to reassign a disabled employee when there is no vacant position available. Therefore, employers are not required to create a new position or to displace an employee from a position in order to accommodate a disabled worker. Second, employers are not required to promote a disabled worker in order to reassign. Finally, employers must attempt to accommodate an employee within the employee's current position before considering reassignment. Subject to the above limitations and the employer’s undue hardship defense, employers must reassign a disabled worker to a vacant position in order to comply with the ADA's reasonable accommodation requirement. Neither the statute nor the regulations exempt unionized workplaces from these general standards.

B. THE NATIONAL LABOR RELATIONS ACT

1. Protections for Collective Action

Enacted in 1935, the NLRA establishes obligations for both unions and employers in order to protect the rights of employees.
to take collective action to improve the terms and conditions of their employment.\textsuperscript{47} The NLRA creates a structure for employees to elect a labor union to represent their interests in collective bargaining with an employer.\textsuperscript{48} Once employees select a union to represent them, the NLRA requires the union and employer to bargain "in good faith" regarding the "terms and conditions of employment."\textsuperscript{49}

Although the NLRA requires a representative union and an employer to engage in collective bargaining, it does not require that a collective bargaining agreement contain any particular provisions or protections for employees.\textsuperscript{50} Instead, the NLRA enforces a process designed to move both parties toward an agreement. For example, the NLRA establishes certain subjects as mandatory subjects of bargaining and requires that the parties bargain on the mandatory topic at the request of either party.\textsuperscript{51} The NLRA does not require the subject to ultimately be included in the agreement, however; it merely enforces bargaining if one party requests it.\textsuperscript{52} Thus, the content of any collective bargaining agreement is determined solely by the desires of each party and reflects a compromise of each parties' interests.\textsuperscript{53} Most agreements contain some basic terms such as wages, hours, health benefits, and procedures for hiring and allocating vacant positions.\textsuperscript{54}

\begin{thebibliography}{99}
\bibitem{} See 29 U.S.C. §§ 151-69 (1994) (describing the purpose of the Act, the obligation the employer to recognize an employee elected union, the obligation of the union of fair representation, and the obligation of both the union and employer to bargain in good faith in addition to other obligations).

\bibitem{} See \textit{THE DEVELOPING LABOR LAW} 337-582 (Patrick Hardin ed., 3d ed. 1992) (describing the structure established to allow employees to elect a union under "laboratory conditions").

\bibitem{} \textit{Id.} at 599-94.

\bibitem{} See 29 U.S.C. § 158(d) (1994) (describing the obligation of the parties to bargain); \textit{HOW ARBITRATION WORKS} 667-68 (Frank Elkouri & Edna Asper Elkouri eds., 5th ed. 1997).

\bibitem{} \textit{See} \textit{HOW ARBITRATION WORKS, supra} note 50, at 667.

\bibitem{} See 29 U.S.C. § 158(d) (describing the obligation of the parties to bargain but stating that the Act does not require an agreement or any particular provision).

\bibitem{} See \textit{id.}

\bibitem{} \textit{See} BNA, \textit{BASIC PATTERNS IN UNION CONTRACTS} 28, 42, 75-76, 98 (10th ed. 1983).

\textit{In the case of a conflict between the employer and union regarding the terms of a collective bargaining agreement, one issue that arises is whether the arbitrator should consider outside law in interpreting a collective bargaining agreement. See} Robert Perkovich, \textit{Does} Gilmer v. Interstate/Johnson
2. **Seniority Rights Under Collective Bargaining Agreements**

Seniority systems are included in a majority of collective bargaining agreements. Parties to collective bargaining often choose to include seniority systems in their agreements because such systems are a means of allocating scarce benefits among employees. Under a typical agreement, employees accrue seniority status based on their length of service. An employee's seniority may be used to distribute a variety of benefits within the workplace, including the assignment of vacant positions. As certain positions may be favored, particularly those involving more stable day-time hours and lighter duties, seniority systems serve as a reliable means of allocating newly vacant positions. These agreements generally give a reassignment preference to workers with the greatest seniority, but the person with the most seniority is not guaranteed to be offered the vacant position. A seniority system may be beneficial to employees in that it prevents the employer from granting preferential treatment to favored employees and provides a reliable structure within the workplace for allocating favored positions and benefits. Courts recognize the positive impact of seniority agreements and respect them accordingly.

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55. *See Basic Patterns in Union Contracts, supra* note 54, at 74 (stating that seniority provisions are found in 89% of collective bargaining agreements).


57. *See Cooper & Sobol, supra* note 56, at 1602.

58. *See id. at* 1601-02.


60. *See Cooper & Sobol, supra* note 56, at 1604-05 (describing the reliability of seniority systems).


62. *See id. at* 864 (discussing the consideration of an employee's experience, in addition to their seniority, in determining who should be hired for a position).

63. *See Cooper & Sobol, supra* note 56, at 1604-05.

64. *See Franks v. Bowman Transp. Co., Inc.,* 424 U.S. 747, 766 (1976) (describing the statements of courts which have found seniority rights to be
II. STATUTORY RIGHTS IN A UNIONIZED WORKPLACE: JUDICIAL SOLUTIONS TO THE REASSIGNMENT DILEMMA

A. ENFORCEMENT OF THE ADA

The issue of whether the ADA requires reassignment of a disabled employee in violation of a seniority agreement has been problematic. Courts have generally sought to resolve this conflict through an interpretation of the ADA's reasonable accommodation requirements.

1. Eckles: The Majority Approach

In *Eckles v. Consolidated Rail*, the Seventh Circuit provided the most thorough articulation of the majority view that the ADA does not require reassignment in violation of collectively bargained seniority rights. The plaintiff in *Eckles* worked as a yardmaster in a rail yard in a position that required varying shifts in a tower office accessible only by stairs. Months after he began work, a doctor diagnosed Eckles with epilepsy and advised him to transfer to a shift with regular work hours and to cease working in the tower office. Although there were no vacant positions in the workplace meeting these specifications, Eckles requested that the employer "bump" another employee in order to accommodate him in a different position, a request that was consistent with the collective bargaining agreement, which allowed the employer to bump a worker to accommodate a disabled employee.

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65. *See infra* Part II.A (describing the conflict between *Eckles* and *Aka*).
66. *See infra* notes 74-84, 89-97 and accompanying text (describing the analysis in *Eckles* and *Aka*).
67. *Eckles* v. Consolidated Rail, 94 F.3d 1041 (7th Cir. 1996). The *Eckles* decision has been quite influential in its holding. *See infra* note 73 (listing the courts that relied on *Eckles*). Courts that have relied on the holding in *Eckles* have often given little or no independent evaluation of the issue or the method of reasoning in *Eckles*, but have simply cited its holding. One court that did discuss the *Eckles* holding and agreed with it was *Kralik v. Durbin*, 130 F.3d 76 (3d Cir. 1997). However, this court conducted no further inquiry and simply concurred with *Eckles*. *See id.* at 81-82.
68. *See Eckles*, 94 F.3d at 1043.
69. *See id.* The doctor was concerned that Eckles ran a risk of falling from the stairs if he continued to work in the tower office. *See id.*
70. *See id.* at 1044. In this workplace, positions were rarely vacant because the collective bargaining agreement allowed more senior employees to "bump" less senior employees from their positions. *See id.* at 1047. The collective bargaining agreement contained a provision that allowed the employer...
Although initially granting Eckles's request, the employer and union later reneged and refused to provide Eckles with a satisfactory position. Eckles filed suit alleging that the employer and union discriminated under the ADA by not allowing him a position that satisfied his doctor's specifications and by not guaranteeing him security from being bumped from his current position. The court held that the ADA did not require the employer to violate the bona fide seniority rights of other workers under the collective bargaining agreement and upheld the grant of summary judgment for the employer.

The Eckles court engaged in a statutory analysis of the ADA to determine whether Eckles's requested accommodation was required under the Act. In its analysis, the court considered

to "bump" a worker to accommodate a disabled worker. It was under this provision that the union and employer initially agreed to reassign Eckles to a new position that required displacing a more senior employee. See id. When the union and employer rescinded the initial accommodation, they allowed Eckles to be bumped from his new position. At the time he filed suit, Eckles worked in a position that he obtained with his seniority; however, he was not secure from being bumped again by a more senior employee. See id.

Other courts have concurred with the holding in Eckles. See Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997) (discussing the Eckles court's analysis and agreeing with it); Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997) (holding that seniority rights trump the ADA provision to reassign a disabled worker to a vacant position); Benson v. Northwest Airlines, 62 F.3d 1108 (8th Cir. 1995) (stating that the ADA does not require an employer to violate the seniority rights of other workers); Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) (holding that the ADA did not require a violation of collectively bargained seniority rights in order to accommodate a disabled worker); Milton v. Scrivner, 53 F.3d 1118, 1125 (10th Cir. 1995) (holding that a employee was not entitled to reassignment under the ADA in violation of the seniority rights of other workers).

In addition to the statutory analysis, the court considered the relevance of a provision in the collective bargaining agreement. Rule 2-H-1 of the collective bargaining agreements allowed for the transfer of a disabled worker in certain situations. It stated:

Subject to agreement . . . between Manager-Labor Relations and Division Chairman, a disabled employee . . . may be placed in a new position or vacancy, or position or vacancy that is under advertisement but not yet filled, or in a position occupied by another employee, without regard to seniority, provided such an employee is capable of performing the duties required.

Eckles, 94 F.3d at 1044 n.2.

The court held that this provision imposed no obligation on the employer
the plain language of the ADA, the EEOC regulations, case precedent, and legislative history. The court articulated a strong concern for the seniority rights of other workers and stated that it viewed the conflict as one between the rights of the disabled worker and his coworkers rather than a conflict between the employer and the disabled employee.

An interpretation of the ADA's legislative history was central to the Eckles court's analysis. The court focused on one section of the House Report that discusses potential conflicts between the requirements of the ADA and terms of an applicable collective bargaining agreement. The Report contained a statement that a collective bargaining agreement “may be considered as a factor in determining whether [an accommodation] is a reasonable accommodation ... but the agreement would not be determinative.” The court found that the context of this statement to reassign Eckles but “rather it simply allows for such a compromise at the option of both parties.” Id. at 1051.

The Eckles court found that the plain language of the Act was inconclusive and therefore looked to other factors. See id. at 1047.

75. See id. at 1046. The court expressed its concern at several points in the analysis. It stated, “This poses a conflict not so much between the rights of the disabled individual and his employer and union, but between the rights of the disabled individual and those of his co-workers.” Id. Additionally, in a footnote, the court stated that it did not intend for all provisions of collective bargaining agreements to trump the ADA, but only in the case of seniority rights “that establish rights in other employees.” Id. at 1046 n.9. The court also expressed concern that seniority rights of other employees would not be considered relevant in an undue hardship analysis. See id. at 1050 n.15.

Subsequent courts citing Eckles have also indicated this concern by citing the Eckles holding as protecting the rights of other workers. See Kralik, 130 F.3d at 82; Milton, 53 F.3d at 1125.

76. See id. at 1049-50.

77. See Eckles, 94 F.3d at 1049-50.

78. See id. The relevant portion of the House Report states:

The section 504 regulations provide that “a recipient's obligations to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.” 45 C.F.R. 84.11(c). The policy also applies to the ADA. Thus, an employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this Act. For example, a collective bargaining agreement that contained physical criteria which caused a disparate impact on individuals with disabilities and were not job-related and consistent with business necessity could be challenged under this Act.

The collective bargaining agreement could be relevant, however, in determining whether a given 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.
limited its application to situations in which the collective bargaining agreement contained criteria for an employment position that unfairly impacted disabled persons but that were not necessary qualifications to perform the job duties. Since the collective bargaining agreement in Eckles was a bona fide agreement, the court explained, the "relevant but not determinative" provision of the House Report was inapplicable.

The Eckles court also relied on cases decided under the Rehabilitation Act, which had uniformly held that reassignment was not a reasonable accommodation if it violated seniority rights. Unlike the ADA, the Rehabilitation Act contained no

In other situations, the relevant question would be whether the collective bargaining agreement articulates legitimate business criteria. For example, if the collective bargaining agreement lists job duties, such a list may be taken into account in determining whether a given task is an essential function of the job. Again, however, the agreement would not be determinative on the issue.

Conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodation may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation.


See supra note 23 (discussing the Rehabilitation Act). A majority of courts have held that the reassignment in violation of a collective bargaining agreement is not required under the Rehabilitation Act. See Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989) (holding that reassignment in violation of a collectively bargained seniority agreement is not required); Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985) (holding that reassign-
language suggesting that reassignment of a disabled worker was a possible reasonable accommodation. Although the court acknowledged the textual changes between the two acts, it found that Rehabilitation Act cases were relevant in determining the meaning of reasonable accommodation at the time Congress enacted the ADA. The court explained that the ADA was, "to a great extent," an extension of the Rehabilitation Act's provisions to nonfederal employers, and that Rehabilitation Act case law on reassignment was therefore persuasive.

2. Aka: The Minority Approach

The D.C. Circuit's decision in Aka v. Washington Hospital challenged the majority view that reassignment in violation of a seniority system was unreasonable as a matter of law. Although it was presented with facts similar to those in Eckles, the D.C.

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83. See Eckles, 94 F.3d at 1049.
84. The court stated:
   We also recognize that "to a great extent the employment provisions of the [ADA] merely generalize to the economy as a whole the duties, including that of reasonable accommodation, that the regulations under the Rehabilitation Act imposed on federal agencies and federal contractors." It is therefore appropriate that we look to decisions interpreting the requirements of the Rehabilitation Act for guidance in understanding the meaning of analogous requirements under the ADA.
   Id at 1047 (quoting Vande Zande v. Department of Admin., 44 F.3d 538, 542 (7th Cir. 1995)).
85. 116 F.3d 876 (D.C. Cir. 1997). This decision has been vacated and is pending en banc review by the D.C. Circuit.
86. See supra notes 1-6 and accompanying text (describing the facts in Aka). Like Eckles, the collective bargaining agreement in Aka contained a provision that allowed for transfer of disabled workers in certain cases. Paragraph 14.5 of the collective bargaining agreement provided: "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." Aka, 116 F.3d at 892. The court determined that the terms of the collective bargaining agreement may impose an obligation on the employer to reassign Aka. The court stated that, when read as a whole, the "provision authorizing the transfer of handicapped employees to vacant positions creates an exception to the otherwise-applicable [seniority procedure]." Id. Therefore, the court interpreted the provision as limiting the seniority rights of the other employees by stipulating that in some cases these rights would be abridged in order to reassign a disabled worker. See id. at 892-93.

At least one other court has held that a transfer provision for disabled workers in a collective bargaining agreement may limit the seniority rights of other workers. See Buckingham v. United States, 998 F.2d 735 (9th Cir. 1993)
Circuit overturned the lower court's grant of summary judgment to Washington Hospital\textsuperscript{87} and directed the district court on remand to evaluate the conflict between the collective bargaining agreement and the ADA in the same manner that governs other forms of reasonable accommodation—the undue hardship test.\textsuperscript{88}

Although it reached the opposite conclusion, the \textit{Aka} court considered many of the same factors as the \textit{Eckles} court. The court first determined that the plain language of the Act appeared to require a reassignment in all cases subject only to specific exceptions.\textsuperscript{89} However, the court also looked to the legislative history and the Rehabilitation Act cases to augment its analysis. First, the court considered the same passage from the House Report as \textit{Eckles}.\textsuperscript{90} However, the \textit{Aka} court did not conclude that the context of the statement limited its application. Rather, the court interpreted the Report as indicating Congress's intent to prohibit a per se rule based on a term of any collective bargaining agreement.\textsuperscript{91} The court concluded that the legislative history supported the application of a fact-specific reasonable accommodation analysis and that the seniority provision of the collective bargaining agreement should be a factor in that analysis.\textsuperscript{92}

The \textit{Aka} court also considered reassignment cases decided under the Rehabilitation Act, but it determined that these cases were not relevant to its analysis. The court found that the additional language in the ADA explicitly addressing reassignment rendered the Rehabilitation Act cases unpersuasive in interpreting the reassignment provision of the ADA.\textsuperscript{93} Therefore, the court

\textsuperscript{87} The lower court had found for the employer as a matter of law. See \textit{Aka}, 116 F.3d at 897.
\textsuperscript{88} See id.
\textsuperscript{89} See supra notes Part I.A.3 (noting the limitations of the reassignment provision).
\textsuperscript{90} See \textit{Aka}, 116 F.3d at 895-96; see also supra notes 77-80 and accompanying text (describing the \textit{Eckles} court's consideration of the Report and quoting the Report).
\textsuperscript{91} See \textit{Aka}, 116 F.3d at 895-96.
\textsuperscript{92} See id.
\textsuperscript{93} See id. at 893 ("[W]e note that although [the Rehabilitation] Act is quite similar to the ADA in most respects, the two acts diverge sharply on this particular question, because the ADA explicitly suggests 'reassignment to a vacant position' as a form of 'reasonable accommodation' that may be required of its employers." (citations omitted)).
disregarded the Rehabilitation Act cases and examined only the ADA in its interpretation.\textsuperscript{94}

Finally, the \textit{Aka} court did not emphasize the rights of the other workers like the \textit{Eckles} court did.\textsuperscript{95} The court viewed the issue of a conflict between seniority rights and the ADA as indistinguishable from any other conflict between a term of a collective bargaining agreement and ADA requirements.\textsuperscript{96} Thus, the court concluded any limits on an employer's duty to reassign derived not from any special status granted to a unionized setting but from the same provisions of the statute and regulations that govern reassignment generally.\textsuperscript{97}

B. \textbf{THE STATUS OF SENIORITY RIGHTS UNDER TITLE VII}

Although the Supreme Court has not decided a case under the ADA to date, the Court has considered the nature of seniority rights in terms of the requirements of Title VII.\textsuperscript{98} In \textit{Franks v. Bouman Transportation Co.},\textsuperscript{99} the Supreme Court determined that a remedy for race discrimination under Title VII should be

\begin{footnotesize}
\begin{enumerate}
\item See \textit{id}. The \textit{Aka} court's conclusion that the Rehabilitation Act cases are not relevant is supported by a majority of courts considering the reassignment issue in a non-unionized workplace. See Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996) (concluding that a majority of courts have determined that the Rehabilitation Act cases are not relevant to interpreting the reassignment provision of the ADA).
\item See \textit{Aka}, 116 F.3d at 896. In support of its position that a court should engage in an undue hardship test to determine whether reassignment is required under the ADA, the court pointed out that in some cases the burden on employees displaced by the reassignment would be minimal:

If one nondisabled employee entitled to a vacant position under the seniority system in the collective bargaining agreement must wait an extra day before receiving an identical assignment because the earlier vacancy was filled by a disabled employee pursuant to the ADA, would this entail the "sacrifice" of "rights" created in other employees under the agreement?

\textit{Id.}

The court also stated that the employee's seniority rights "were already limited by the handicapped-transfer provision, which prevented them from bidding for (and asserting their seniority preference in regard to) vacancies required to be given to reassigned handicapped employees under [the collective bargaining agreement]." \textit{Id.} at 897.

\item See \textit{id}. at 896.
\item See \textit{id}.
\end{enumerate}
\end{footnotesize}
granted despite its infringement upon the collectively bargained seniority rights of other workers. In this holding, the Court discussed the nature of seniority rights in the context of a civil rights statute. The Court acknowledged that the interests of other employees would be to some degree harmed by granting the plaintiffs retrospective seniority. But since neither the language of the Act nor the legislative history of Title VII prohibited this remedy, the Court held that the Act required it despite the negative impact on the rights of the other workers. The Court stated that seniority rights under the collective bargaining agreement were not "indefeasibly vested rights conferred by the employment contract." This Court, it explained, "has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." Given the strong public policy interest in enforcing a remedy for Title VII discrimination, the court held that infringement of seniority rights was required.

In Trans World Airlines, Inc. v. Hardison, the Supreme Court addressed a conflict between Title VII's requirement that

100. See Franks, 424 U.S. at 764-66. In Franks, a lower court had held that the employer had discriminated by refusing to hire black workers because of their race. The plaintiffs had requested that, in addition to an order requiring the employer to hire members of the class of workers discriminated against, the court order the employer to grant retrospective seniority status to these workers. See id. at 757. However, the lower court refused to grant the retrospective seniority status as a part of the court ordered remedy on the grounds that it would violate the collectively bargained seniority rights of other workers. See id.

101. See id. at 774-75. The Court stated:

[W]e find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act itself is directed."

Id. at 775 (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971)).

102. See id. at 774-75. The Court stated: "[A] collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement."

Id. at 778-79.

103. See id. at 778.

104. See id.

105. See id. at 779.

employer's accommodate the religious practices of their employees and collectively bargained seniority rights. The case involved an employee who requested that he be permitted to abstain from working on Saturdays in accordance with his religious beliefs.\footnote{See \textit{Hardison}, 432 U.S. at 67-68.} Allowing this accommodation would have required that the airline violate its system for allowing days off under the collective bargaining agreement, in effect granting the plaintiff a benefit reserved for employees with more seniority.\footnote{See \textit{id.} at 1049.}

In its decision, the Court first established that Title VII did not require employers to implement any accommodation that imposed more than a de minimus hardship on the employer.\footnote{See \textit{id.} at 68-69.} Applying this standard, the Court held that if a seniority system was nondiscriminatory, then it should not be violated in order to accommodate a worker's religious beliefs because this accommodation would impose more than a de minimus hardship.\footnote{See \textit{id.} at 75-76, 84 (describing the determination that more than a de minimus cost imposes an undue hardship on the employer).} The Court also emphasized that the requested accommodation would violate Title VII's requirement of equal treatment by favoring one employee because of his religion while penalizing other workers based on their religions.\footnote{See \textit{id.} at 81.} Finally, the Court concluded

\footnote{See \textit{Hardison}, 432 U.S. at 79 n.12.}
that Title VII actually prohibited an accommodation in violation
of the seniority system because the statute contained a provision
that a bona fide seniority system should not be construed as in
violation of it, as long as there was no intent to discriminate.112

III. ENFORCING THE ADA IN THE UNIONIZED
WORKPLACE: RESOLVING A CONFLICT OF RIGHTS

The conflict between the ADA and collectively bargained
seniority rights should not be resolved by granting summary
judgment on the basis that the ADA reassignment provision
does not require a violation of seniority rights as a matter of law.
Although the majority approach has appeal because it provides a
definite standard for employers, unions, and employees, it nei-
ther follows the language of the Act nor satisfies the intent of
Congress. A correct interpretation of the ADA, compelling public
policy, and important Supreme Court decisions about the nature
of seniority rights vis-à-vis statutorily created civil rights instead
support the application of the fact-specific undue hardship
analysis. This approach also has the benefit of treating disabled
workers according to the same standard whether or not they
work in a unionized workplace.

A. CRITIQUE OF THE PER SE RULE

The Eckles court's interpretation that the ADA's reassign-
ment provision should never force employers to violate collect-
tively bargained seniority rights is not supported by the Act, the
legislative history, or the EEOC regulations, and the Rehabili-
tation Act cases and Supreme Court decision upon which Eckles
relied were not relevant to the issue.

112. See id. at 81-82. The Court cited Section 703(h) of Title VII, which
provided:

Notwithstanding any other provision of this subchapter, it shall not
be an unlawful employment practice for an employer to apply differ-
ent standards of compensation, or different terms, conditions, or
privileges of employment pursuant to a bona fide seniority or merit
system... provided that such differences are not the result of an in-
tention to discriminate because of race, color, religion, sex, or na-
tional origin.

Id. at 81-82 (citing 42 U.S.C. § 2000e-2(h) (1994)).
1. Shaky Foundations: The *Eckles* Holding Misconstrued the Issues Presented

The majority approach rests on a flawed analytical premise because the *Eckles* court misconstrued the issue at hand. First, the court viewed the issue as a conflict between the rights of the disabled worker and the rights of the remaining workers rather than as a conflict between the employer and the disabled employee. By framing the issue in this way, the court’s analysis emphasized the seniority rights of other workers, and this focus may have skewed its overall analysis. In contrast, the court did not mention that the fate of the disabled worker who was refused reassignment was potential unemployment.

The court also overstepped the issue presented in the case which negatively influenced the holding. The court broadly held that reassignment to a vacant position was not required under the ADA if it conflicted with bona fide seniority rights under a collective bargaining agreement, even though this was not the issue before the court. The plaintiff in *Eckles* was an employee who argued that he should be reassigned to a non-vacant position, by displacing another employee, and that he should be protected in his position from being bumped by more senior employees. Therefore, the first issue raised in *Eckles* was whether the ADA requires an employer to “bump” an employee to reassign a disabled worker. The second issue was whether a disabled employee can be protected in his position from being displaced by a more senior employee.

As the *Eckles* court acknowledged, this issue could have been easily resolved by consulting the plain language of the ADA, the EEOC regulations, and legislative history on point. The history states that employers are not required to bump employees in order to accommodate a disabled worker and the Act

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113. See *Eckles* v. Consolidated Rail Corp., 94 F.3d 1041, 1046 (7th Cir. 1996).
114. See supra notes 74-84 and accompanying text (describing the *Eckles* court’s analysis).
115. See *Eckles*, 94 F.3d at 1051.
116. See id. at 1047.
117. See id. at 1050 (“Both the Senate and House Reports explicitly state that ‘bumping’ is not required, which would seem to clear up any remaining doubt about whether the ADA required bumping in this particular case.”).
118. See supra notes 77-80 and accompanying text (quoting the House Report and discussing the *Eckles* court’s interpretation of the Report). This statement may be determinative to the first issue raised in *Eckles*, whether
only requires "reassignment to a vacant position." Therefore, the issue presented in Eckles involved an accommodation that was clearly beyond the scope of the Act. Despite this simple solution, the Eckles court continued to examine whether seniority rights should be abridged to accommodate a disabled worker and held that seniority rights should not be abridged under the reassignment provision of the ADA.

The consequences of the Eckles court's mischaracterization of the issue are magnified by its persuasiveness to other courts, who cite it as an authority for the proposition that the ADA does not require a violation of collectively bargained seniority rights. These courts often fail to analyze the issue, instead relying on the holding in Eckles as sound. In this way, the Eckles decision has had far-reaching impact. This is problematic in that the Eckles court was not faced with a fact scenario that clearly presented the countervailing concern for a disabled employee requesting a reassignment within the scope of the ADA.

2. The Legislative History Is Inconsistent with the Majority Approach

The legislative history of the ADA nowhere indicates that seniority rights should trump a reassignment request under the ADA. In fact, the legislative history contains statements that the terms of a collective bargaining agreement should not be determinative in assessing a reasonable accommodation. The Eckles court concluded that these statements were not applicable by inter-
preventing them as limited by context, but the court did not provide any additional legislative history to directly support its holding.\textsuperscript{125}

A close examination of the House Report does not support the \textit{Eckles} court's interpretation.\textsuperscript{126} Rather, the context of the statement provides compelling support for the \textit{Aka} court's interpretation that a fact-specific analysis should be applied.\textsuperscript{127} Specifically, the statement is contained within a paragraph of the Report that begins by stating that the obligation to comply with the ADA is "not affected by \textit{any} inconsistent term of any collective bargaining agreement."\textsuperscript{128} This language indicates that a term of a collective bargaining agreement should not affect at all an employer's obligation under the ADA. When the Report subsequently states that the collective bargaining agreement could be a factor in determining whether an accommodation is reasonable, it appears to be amending this initial language by allowing a collective bargaining agreement to be relevant in determining whether an accommodation is reasonable.\textsuperscript{129} The Report even provides an example of a hypothetical case involving seniority rights, stating,

\begin{quote}
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.\textsuperscript{130}
\end{quote}

In this example, allowing a person without requisite seniority a job, while another worker with seniority is denied the position, violates the seniority rights of that worker. Therefore, the Report is clear that the terms of collective bargaining agreements, even those that specify seniority, are to be relevant but not dispositive on the issue of a reasonable accommodation.

The majority view that the terms of a collective bargaining agreement are only relevant in a reasonable accommodation analysis when the agreement includes pretextual criteria also conflicts with the scope of the ADA.\textsuperscript{131} Title I of the ADA is designed

\begin{footnotes}
\item[125] See \textit{Eckles}, 94 F.3d at 1050.
\item[126] See supra note 78 and accompanying text.
\item[127] See \textit{Aka} v. Washington Hospital, 116 F.3d 876, 895-96 (D.C. Cir. 1997).
\item[129] See \textit{id}.
\item[130] \textit{Id}.
\item[131] The \textit{Eckles} court seems to draw the conclusion that only pretextual criteria should be considered relevant in a reasonable accommodation analysis from another example listed in the paragraph. The Report lists an example in which it states that if a collective bargaining agreement reserved certain po-
\end{footnotes}
to remove barriers to employment for disabled persons regardless of whether the barriers result from intentional discrimination or from structures, policies, or procedures that have an unintended impact on disabled persons. Employers must make reasonable accommodations for a disabled employee without a showing that the employer is intentionally discriminating or has imposed unnecessary criteria for a position. These modifications to otherwise legitimate workplace duties and procedures are required under the Act. In light of the scope of the reasonable accommodation standard, it is not consistent to interpret the reassignment provision as limited in a unionized workplace to cases in which artificial barriers stand between the disabled person and the position. This interpretation alters the purpose of the ADA in a unionized workplace: while other employer must comply regardless of their intent, unionized employers are immune unless intent or unnecessary criteria are shown. Certainly there is no indication in the ADA that suggests that the duty to provide reasonable accommodation, including reassignment, applies only in a non-unionized workplace. Without such explicit indication, the majority conclusion appears in conflict with the requirements of the Act.

3. The Rehabilitation Act Cases Are Not Relevant to the Interpretation of the Reassignment Provision of the ADA

The Eckles court relied on the Rehabilitation Act as direct support for its holding that a disabled worker should not be reassigned in violation of a collective bargaining agreement.

sitions for employees with more seniority, this factor may be relevant in determining whether assigning a disabled worker to one of these reserved positions would be a reasonable accommodation. See id. The example does not mention the requirement that the seniority agreement be pretextual in order for it to be infringed upon by the ADA's requirements. Additionally, the Report concludes this section with the suggestion that collective bargaining agreements contain a section which allow for all action necessary to comply with the Act. See id. This also suggests that Congress intended for collective bargaining agreements not to be determinative.

132. See supra notes 21-38 and accompanying text (describing the purposes of the ADA and the reasonable accommodation requirement). The definition of reasonable accommodation requires employers to take affirmative action even in situations where there was no intent to exclude a disabled person. See 42 U.S.C. § 12111(9) (1994). Therefore, a perfectly legitimate job requirement could be amended in order to comply with the Act. See id.

133. See 42 U.S.C. § 12111(9).

134. See id.

135. See Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1047-49 (7th Cir. 1996).
This was the only source of direct support for the court's holding. The Rehabilitation Act cases clearly do support the Eckles holding in a Rehabilitation Act context, however, the issue is whether these cases are persuasive in interpreting the reassignment provision of the ADA in light of the significant textual changes between the two acts.

As the Aka court observed, the Rehabilitation Act, unlike the ADA, contained no language instructing employers that reassignment is a possible reasonable accommodation. This clear indication by Congress that reassignment should be considered as a reasonable accommodation has lead the majority of courts to find that the Rehabilitation Act cases are not relevant in evaluating a reassignment request in a non-unionized workplace under the ADA. The Seventh Circuit's reliance on the general applicability of Rehabilitation Act precedent to interpreting the ADA fails to recognize that the reassignment issue is one where substantive differences between the two statutes severely limit the relevance, if any, of the Rehabilitation Act case law to construing the ADA.

The court's attempt to explain away this critical difference is both unpersuasive and unsupported.

4. Supreme Court Precedent Supports Abridgment of Seniority Rights to Further Significant Public Policy Interests

As the Eckles court observed, reassignment under the ADA unquestionably reduces the value of the seniority rights of other workers. When a disabled worker is reassigned without regard to seniority, an employee who has the seniority status to

136. None of the other sources upon which Eckles relied provided support for reassignment in conflict with collective bargaining to allow a reasonable accommodation for a disabled worker.
137. See supra note 81.
138. Both Aka and Eckles identified this issue.
139. See 29 U.S.C. §§ 701-796 (1994); see also supra notes 93-94 and accompanying text (describing the Aka court's conclusion that the Rehabilitation Act cases were not relevant to interpretation of the reassignment provision).
140. See supra note 94.
141. Although the Eckles court acknowledged this textual difference between the two acts, it still found the Rehabilitation Act cases relevant to its holding. See Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1048-49 (7th Cir. 1999).
142. See Eckles, 94 F.3d at 1045-46. None of the employees claimed that their reassignment would not impact the seniority rights of other workers. The Aka court did discuss the possibility that a reassignment of a disabled worker may have a relatively small impact on the seniority rights of other workers. See Aka v. Washington Hosp., 116 F.3d 876, 896 (D.C. Cir. 1997).
qualify for the position is unable to reap the reward promised under the system. Because seniority rights are an important part of collective bargaining agreements governed by the NLRA, the abridgment of a worker's seniority rights is a concern. Although the court identified this concern, it did not explore the nature of the seniority rights as compared with rights created by the ADA. The closest the Eckles court came to evaluating these competing rights was in its consideration of the Supreme Court's decision in Hardison. Although the Court in Hardison considers seniority rights under Title VII, consideration of the case reveals that it does not lend support to the holding in Eckles. Furthermore, the Court's opinion in Franks v. Bowman Transport supports a finding that seniority rights may be abridged when important public policy concerns are at stake.

As the Eckles court noted, the Supreme Court in Hardison held that the requirement under Title VII to make a reasonable accommodation for an employee's religious beliefs did not require a violation of other employee's seniority rights. The court failed to acknowledge, however, that Hardison is distinguishable from the issue in Eckles on several significant grounds. First, although both the ADA and Title VII require an employer to make reasonable accommodations, the standards applied for each act are different. In Hardison, the Court established that employers should bear no more than a de minimus hardship in accommodating an employee's religious beliefs. In contrast, the extensive discussion of reasonable accommodation and the undue hardship standard in the ADA strongly indicates that more than a de minimus hardship is required. This position is further supported by the legislative history, which explicitly states that the reasonable accommodation standard under the ADA is to require more than the de minimus test defined in Hardison. Given the different standards of reasonable accommodation under Title VII and the ADA, Hardison cannot per-

143. See supra notes 55-64 and accompanying text.
144. See supra Part I.B.
146. See id. at 84.
147. See id. at 84.
suasively resolve the issue of whether seniority rights may be violated under the ADA's reasonable accommodation standard. The imposition of a higher reasonable accommodation standard means that employers will have to take more actions to accommodate disabled workers under the ADA than are required under Title VII.

A second distinction between Hardison and the ADA's reassignment issue is also due to the difference between the ADA and Title VII. The focus of Title VII is not to discriminate, meaning not to treat workers differently based on religion or other protected classes. Title VII's reasonable accommodation requirement, which applies only to religion, is described in one section with no specifics or examples. In contrast, the requirement of reasonable accommodation is central to the ADA's conception of nondiscrimination. Unlike Title VII, the ADA contains extensive discussion of the reasonable accommodation requirement. In Hardison, the Court expressed concern that allowing the employee an exception to the seniority system in order to accommodate his religious beliefs would be granting him preferential treatment because of his religion, while at the same time penalizing other workers based on their religious beliefs. The Court determined that this unequal treatment was contrary to the overriding concern of Title VII not to discriminate based on religion and that, to comply with the overall spirit of Title VII, the accommodation should be refused. In contrast, the ADA clearly requires employer actions that will inevitably result in preferential treatment for disabled workers. Disabled workers may be allowed special equipment, more breaks, adjusted working hours, or adjustments in procedure under the Act. These all result in different treatment for disabled persons because of their disabilities—this is the nature of the ADA. Therefore, the Court's concern in Hardison that granting an accommodation would violate the more compelling statutory focus—not to treat employees differently—is not a consideration under the ADA.

151. See id. § 2000e(j).
152. See id. § 12111(9).
154. See id.
155. See 42 U.S.C. § 12111(9) (describing the accommodations employers may be required to make under the Act).
156. See id.
Another distinction between the ADA and Title VII that limits the relevance of *Hardison* is that Title VII contains explicit instructions regarding its function when a collective bargaining agreement is in effect. Title VII states that "a bona fide seniority or merit system" should not be interpreted as unlawful as long as there was no intent to discriminate found.\textsuperscript{157} The *Hardison* Court relied on this statement to support its interpretation that the statute did not require a violation of bona fide collectively bargained seniority rights.\textsuperscript{158} In contrast, the ADA does not contain an equivalent provision, and, in fact, the legislative history of the Act indicates that Congress anticipated that collective bargaining agreements should comply with the ADA and would only be considered as a factor in a determination of the ADA's requirements.\textsuperscript{159} Furthermore, the fact that the ADA does not include a provision similar to the one in Title VII supports interpreting the ADA as not allowing a collective bargaining term to trump an ADA provision. As Congress included this provision in Title VII, it may be concluded that if it wanted to similarly limit the application of the ADA, another civil rights statute, then it would have included a like provision.

The *Eckles* court also failed to recognize the relevance of the Supreme Court's decision in *Franks* to the issue presented.\textsuperscript{160} In *Franks*, the Supreme Court held that a remedy for discrimination under Title VII should be granted regardless of the negative impact on the seniority rights of other workers.\textsuperscript{161} The significance of *Franks* lies mainly in the Court's discussion of the nature of collectively bargained seniority rights.\textsuperscript{162} The Court stated that seniority rights were not "indefeasibly vested rights" impervious to alteration but that seniority rights may be abridged to satisfy important public policy considerations.\textsuperscript{163} The Court found that the rights granted employees under Title VII

\textsuperscript{157} See id. § 2000e-2(h) (1994).
\textsuperscript{158} See *Hardison*, 432 U.S. at 81-82.
\textsuperscript{159} See supra note 78 and accompanying text.
\textsuperscript{160} See *Cyr*, supra note 99, at 1257-58 (considering *Franks* relevant to the issue of a conflict between the reassignment provision of the ADA and collectively bargained seniority rights).
\textsuperscript{162} Due to differences in the factual scenario, the holding of *Franks* is not as persuasive to the issue in *Eckles* as is the Court's discussion of the nature of seniority rights.
\textsuperscript{163} See *Franks*, 42 U.S. at 778.
could provide a basis for altering seniority rights where the rights were in conflict.\textsuperscript{164}

Rights afforded workers under the ADA are analogous to those provided under Title VII. Furthermore, overriding public policy concerns led Congress to enact the ADA,\textsuperscript{165} not as a statute which requires employers to treat disabled workers equally with other workers, but as a statute which requires affirmative acts by the employer.\textsuperscript{166} This affirmative requirement reflects Congress's strong interest in allowing the disabled to have equal opportunities in the workplace and the compelling public policy reasons to comply with the Act. Therefore, the holding in \textit{Franks} indicates that reassignment should not be rejected as an accommodation based on the effect it has on other workers' seniority rights.\textsuperscript{167} Instead, the issue should be whether there are compelling policy considerations to support the ADA's application. There appears to be ample support for concluding that compliance with the ADA presents a strong enough public policy interest to satisfy the Supreme Court's standard. However, since the seniority rights are important, the ADA does not disregard them. The legislative history indicates that they are to be a factor in a reasonable accommodation analysis\textsuperscript{168} and the statute and regulations provide ample guidance for balancing employer and employee concerns.\textsuperscript{169}

C. \textbf{PUBLIC POLICY CONSIDERATIONS SUPPORT THE APPLICATION OF A FACT-SPECIFIC TEST}

The difficulties with the \textit{Eckles} court's per se rule support the application of the fact specific test described in \textit{Aka}. In addition, public policy considerations support the minority approach and further undercut the reasoning utilized in \textit{Eckles}.

1. \textbf{The Reassignment Provision Protects All Workers}

In the initial analysis, the ADA's reassignment provision appears to benefit only the disabled worker to the exclusion of

\begin{itemize}
  \item \textsuperscript{164} See id. at 778-79.
  \item \textsuperscript{165} See supra notes 21-25 and accompanying text.
  \item \textsuperscript{166} See supra notes 27-38 and accompanying text.
  \item \textsuperscript{167} This does not mean that the seniority rights hold no meaning. The Court in \textit{Franks} is clear that seniority rights are important and that it is because of the important policy interests served that abridgment is necessary. See \textit{Franks}, 424 U.S. at 766, 778-79.
  \item \textsuperscript{168} See supra note 78 and accompanying text.
  \item \textsuperscript{169} See supra notes 39-45 and accompanying text.
\end{itemize}
the remaining employees in the workplace. The Eckles court interpreted the ADA as conferring a benefit to only the disabled worker and saw that benefit in conflict with the rights of the other employees in the workplace. The court expressed concern that without judicial intervention, the rights of these employees would never be considered in a determination of an reasonable accommodation. However, a closer examination of the reassignment provision reveals that the Eckles court was shortsighted in its concern and failed to recognize the benefit that the ADA confers on all workers.

The ADA exists to protect all disabled workers. But, since classification as a disabled employee is not an immutable characteristic, any worker may become a disabled worker and thereby qualify for ADA protection. Both Eckles and Aka were fully able employees until they developed medical problems which resulted in a limitation of their physical abilities. Prior to their disability, it is likely that neither worker suspected they would require the protection of the ADA. In this way, one function of the ADA is to act as a form of insurance for all workers by kicking in to protect a worker who wants to remain employed despite a newly developed disability.

The ADA's reassignment provision is particularly well characterized as employee insurance due to its scope. An employee is eligible for reassignment only when she becomes disabled and, as a result, must transfer to a different position to be sufficiently accommodated. This remedy is not available for new applicants. As Congress stated, reassignment for a disabled worker provides an opportunity for a "valuable worker," no longer able to perform in their prior position, to be transferred

170. See supra note 76 and accompanying text.
171. See supra note 76 and accompanying text (describing the Eckles court's concern that employees were not a factor in the undue hardship exam). Though the interests of other employees are not explicitly mentioned in the undue hardship analysis, the language is broad enough to include their consideration in the terms of what is best for the employer. See Key, supra note 37 (arguing that the effect on other employees should be a factor in an undue hardship analysis).
172. The Aka court did not acknowledge the potential benefit to all workers either.
173. See supra notes 1-6, 68-73 and accompanying text.
174. See supra notes 39-45 and accompanying text.
175. The reassignment of a disabled worker is not the first step in accommodation. First the employer must attempt to accommodate the worker within the current job classification. See supra note 43 and accompanying text.
176. See supra note 34.
within the workplace rather than be discharged. Therefore, the view that reassignment of a newly disabled worker is in conflict with the interest of her coworkers does not consider the potential benefit to any worker who develops a disability. The fact that the ADA safety net is there for everyone mitigates any immediate loss of seniority or other rights by workers.

2. A Per Se Rule Creates an Unjust Differential Between Unionized and Non-Unionized Disabled Employees

An interpretation of the ADA in which reassignment is never required in violation of a collectively bargained seniority agreement allows unions and employers an exemption from this provision of the ADA. While it may be possible for unions and employers to craft a transfer provision for disabled workers which would be upheld, it would be simple to craft a collective bargaining agreement without considering the ADA, thereby leaving disabled workers seeking reassignment with no legal remedy. Under the majority view, as long as the collective bargaining agreement is bona fide, the seniority rights will prevail over the reassignment provision regardless of the strength of the disabled employees claim or the degree of inconvenience caused to the employer and the other employees. Granting employers and unions the ability to avoid liability under the reassignment provision of the ADA is undesirable in part because it penalizes disabled workers who belong to a union. It is also undesirable simply because it treats similarly situated employers differently depending on their union status. This type of disparate treatment should not be permitted unless there is clear intent in the Act or legislative

177. See supra note 34.
178. The ADA applies to both unions and employers. See supra note 26.
179. See supra note 86 (describing the holding in Buckingham, in which the court found that a disabled transfer provision in a collective bargaining agreement should be upheld).
180. This result would be directly contrary to Congress's advisement that employers and unions include a provision that allows for all action necessary in order to comply with the ADA. See supra note 78.
181. See supra notes 74-84 and accompanying text.
182. It is not likely that this disadvantage would be noted by workers when evaluating whether or not to elect a union representative. It seems unlikely that in a union election the issue of protection under this provision would become an issue. Also, it is probable that many employees would not foresee themselves as becoming disabled and requiring ADA protection. Therefore, even if the employees did know about the disadvantage, it seems unlikely that many would be concerned.
history that it was Congress's intent. In this case, there is no indication that this was an intended or desirable result.

3. Seniority Rights Will Not Be Unduly Burdened

In evaluating the conflict of rights created by this issue, it is important to consider the effect enforcing the reassignment provision in a unionized workplace with a seniority system will have on the seniority rights of the workers. While the ADA may serve as a form of insurance as protection for the future, in the present seniority rights are being abridged. However, the reassignment provision is limited on many fronts by the language of the ADA, the legislative history, the EEOC guidelines, and court precedent. Additionally, the reasonable accommodation standard, which is defined by the undue hardship test, involves a comprehensive factspecific analysis which is designed to determine whether a requested accommodation would place too great a burden on the employer for it to be a "reasonable" accommodation. Although the analysis does not explicitly include the interests of the remaining employees, the broad language allowing for employer interests may include the effect on employees. The reassignment provision is also limited by the many other guidelines established by the EEOC and the legislative history, and most significantly is only to be applied in situations in which the employee cannot be accommodated within the original position.

These limitations do not mean that reassignment will never be found to be a reasonable accommodation. There should be cases in which reassignment is required accommodation. But the above limitations restrict this accommodation and insure that it is reserved for disabled employees who legitimately require it and that it is not granted if it imposes too great a hardship on the employer.

183. See supra notes 39-45 and accompanying text.
184. See supra note 38 and accompanying text.
185. See 42 U.S.C. § 12111(10) (1994). The issue of whether the effect on employees should be a factor in the analysis is undecided. See Key, supra note 37 (arguing that the effect of a reasonable accommodation on the disabled employee's coworkers should, in certain circumstances, be a factor in the undue hardship analysis).
186. See supra notes 39-45 and accompanying text.
D. **EMPLOYERS AND UNIONS SHOULD ACKNOWLEDGE THE CONTROLLING NATURE OF THE ADA IN THEIR AGREEMENTS**

In order to fully comply with the ADA, unions and employers should include in the terms of their collective bargaining agreements provisions which obligate both the employer and union to afford employees their civil rights under the ADA. However, the terms of these agreements must be explicit to have effect. In both *Aka* and *Eckles* the collective bargaining agreements contained a provision for the transfer of disabled workers at the employer's discretion, but neither of these agreements prevented the conflict over the requested transfer and the courts disagreed on the whether the provisions had substantive meaning. A clear statement in the collective bargaining agreement that the parties are bound by the requirements of the ADA would clarify the obligations. This approach was suggested by Congress. Additionally, in order for both parties and employees to understand the impact the reassignment provision may have on seniority systems, it may be useful to include a statement to this effect. Specifically, the agreement could state that any seniority system or other system for allocating vacant positions may be abridged if a reassignment of a disabled worker is determined to be a reasonable accommodation under an ADA analysis. In this way, all parties to the bargaining will understand that seniority rights may be abridged if the ADA conditions are met. Clearly stating that the agreement will comply with ADA requirements has the additional advantage of making it clear that the requirements of the ADA are relevant to a labor arbitrator's decision.

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187. *See supra* notes 74, 86 and accompanying text.

188. Under the *Eckles* holding, neither the union nor the employer have any motivation to include a transfer provision within a collective bargaining agreement. In fact, they have the motivation to design a seniority system, already a common provision, and to ignore the reassignment provision of the ADA altogether. This way their seniority system will allow for exemption from this provision of the ADA.

189. *See supra* note 78.

190. It will also be important for courts to enforce any provision incorporated into a collective bargaining agreement. As the *Eckles* court demonstrated, it is possible for courts to find such provisions virtually meaningless for the employee. *See Eckles v. Consolidated Rail*, 94 F.3d 1041, 1051 (7th Cir. 1996). Hopefully, a specific reference to the standards of the ADA will prevent courts from interpreting these provisions as relying completely on the discretion of the employer as to whether a reassignment is required.

191. *See supra* note 54 (describing the issue of whether arbitrators should
CONCLUSION

Congress enacted Title I of the ADA to assist disabled workers in obtaining and preserving employment opportunities. In this statute, Congress recognized that for some disabled workers employment required affirmative acts by employers to make the workplace accessible, and it required employers to make reasonable accommodations for disabled workers. Although the reasonable accommodation requirement does impose some degree of hardship on the employer and results in disparate treatment of employees, Congress determined that fostering the employment of people with disabilities was a compelling goal that warranted these measures.

As a reasonable accommodation, reassignment to a vacant position is required for workers who are no longer able to function within their current positions, subject to certain limitations including the undue hardship analysis. When a request for reassignment conflicts with a collectively bargained seniority system, the analysis should be no different. The majority's conclusion that a conflict with seniority rights warrants a per se denial of the disabled worker's request is not supported by the language of the Act, the legislative history, the EEOC regulations, or relevant case law. Additionally, since the reassignment provision serves as a safety net for all workers, there to protect anyone who becomes disabled, the negative impact of a reassignment is mitigated by the potential benefit to all workers. Therefore, courts should allow the ADA to function in all situations as it was designed by Congress, through the application of a fact-specific reasonable accommodation analysis.

consider outside law in the interpretation of collective bargaining agreements when deciding disputes between union and management).