Arbitration of Claims for Accommodations: A Fair Resolution?

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PEOPLE WITH DISABILITIES often require accommodations to participate in the labor market, as provided for in the Americans with Disabilities Act ("ADA"). For example, an employee whose disability prevents performance of her previous job duties may face discharge without the opportunity to transfer (as an accommodation) into an alternate position with job duties she can perform. People with disabilities who are covered by a collective bargaining agreement ("CBA") can rely on their contractual rights to support their requests for accommodation. At the same time, an employer may deem that an accommodation is unreasonable either under the ADA or because the CBA does not allow or provide for it. Such conflicts are often resolved by an arbitrator, based either on contractual rights in a CBA, the ADA, or both.

An analysis of arbitration awards addressing claims for accommodation is important for two reasons. First, these awards shed light on the conflict between the right to an accommodation under the ADA and the contractual rights of the employer, union, and coworkers. This conflict was resolved in part by the Supreme Court in its 2002 decision that an employer's seniority policy is relevant but not conclusive as to whether a transfer would be a reasonable accommodation, when another employee seeks that position based on their seniority.[1] That decision left the door open for parties to a CBA to resolve such conflicts through negotiation of more specific guidance in a CBA or an arbitrator's interpretation of a CBA.

The first section of this paper examines the role of the arbitrator as defined by the power of the parties to a CBA. The parameters of the arbitrator's role may be limited to applying CBA terms to a situation, whereas other arbitrators may be empowered to also interpret and ap-

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1. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 405–06 (2002).

ply statutory protections. Even if not explicitly empowered to enforce statutory rights, some arbitrators may look to the case law developed under the ADA to interpret CBA provisions concerning reasonable accommodation. Arbitration awards demonstrate how the parties to a CBA can choose to empower an arbitrator to resolve potential conflicts between an employee's right to accommodation under the ADA and contractual rights under a CBA. Further, these awards signal the importance of empowering an arbitrator to interpret the CBA in conformity with the obligations of the ADA. If the parties fail to give the arbitrator that authority, the employee will likely be allowed to litigate her ADA claim, and the parties will forego the benefits of arbitration.

Arbitration awards addressing claims for accommodation also shed light on the viability of arbitration as a means of resolving statutory claims, where arbitrators are empowered to interpret the ADA.[2] The legitimacy of these interpretations of the ADA is essential to the interests of employees with disabilities because courts—in interpreting similar legislation such as the Age Discrimination in Employment Act ("ADEA")—have regularly deferred to arbitration as the forum to enforce statutory rights as well as contractual rights.[3] In justifying that deference, the Supreme Court has concluded that "arbitral tribunals are capable of handling the difficult factual and legal issues that might be raised in a discrimination claim . . . ."[4] The Court supports this conclusion on the basis that "there is no reason to believe that arbitrators will not follow the law, and that the less formal arbitration forum would not interfere with the fair resolution of employment discrimination claims."[5]

In reaction to the Supreme Court's consistent deference to arbitration to resolve statutory claims of discrimination, one expert warned that arbitration "historically contributed nothing of value to the resolution of statutory or common law claims by individual employees against employers," and went so far as to predict that arbitra-

2. *See* Stuart M. Boyarsky, *Not What They Bargained For: Directing the Arbitration of Statutory Antidiscrimination Rights*, 18 HARV. NEGOT. L. REV. 221, 255–58 (2013) (reviewing court decisions deferring to labor arbitration); *see* discussion *infra* Section I.A.2 (discussion of arbitration awards that interpret statutory protections).

3. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 263–74 (2009).

4. Sarah Rudolph Cole, *Let the Grand Experiment Begin:* Pyett *Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861, 869 (2010).

5. *Id.*

tion of statutory claims would result in statutes like the ADA becoming "dead letters for unionized employees."[6]

This article draws on awards reported by Bloomberg BNA in its Labor Arbitration Reporter, dating back to 1992, when the ADA came into effect.[7] A search for relevant awards was conducted using both the Bloomberg BNA labor and employment law index[8] and Lexis-Nexis' search engine.[9] Thus, this sample excludes awards for which the parties or arbitrator agreed to confidentiality and non-publication of the award. Some arbitrators seek publication of awards that concern an open or high-profile issue or awards that concern a decision that would be useful to other employers or unions.[10] Parties may also refuse to publish awards due to the value placed on avoiding the publicity of litigation.[11] Reluctance to publish awards skews the availability of data away from more contentious issues or controversial awards.

To test the viability of arbitration as an alternative venue to resolve discrimination claims, this paper reviews 115 arbitration awards to address the following two issues: (1) whether a request for accommodation by an employee with a disability is required by the ADA and/or the CBA for an employee to be successful during arbitration, and (2) whether arbitration improperly denies the contractual rights of other employees. The analysis in these awards is compared to courts' application of an employer's duty to accommodate under the ADA.

Experts have expressed both general and more specific concerns about the rights of employees protected under the arbitration process. After the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, one expert[12] observed that arbitration "historically contributed nothing of value to the resolution of statutory or common law claims by

6. Alan Hyde, *Labor Arbitration of Discrimination Claims After* 14 Penn Plaza v. Pyett*: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 Ohio St. J. on Disp. Resol. 975, 984 (2010).

7. 42 U.S.C. §§ 12101–12213 (2012).

8. Bloomberg BNA, Labor & Employment Law Resource Center, http://laborandemploymentlaw.bna.com/lerc/ (last visited Nov. 11, 2017) [https://perma.cc/SXD4-8NKN].

9. Lexis Nexis Academic, http://www.lexisnexis.com (last visited Sept. 23, 2017) [https://perma.cc/N6H7-2YFR].

10. Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. Mich. J. L. Reform 789, 811–12 (2013).

11. *Id.* at 812 n.136.

12. *See* Rutgers Law, https://law.rutgers.edu/directory/view/hyde (last visited Oct. 20, 2017) (Alan Hyde is a "Distinguished Professor of Law and Sidney Reitman Scholar" and "expert in labor, employment, immigration law, global labor rights, and the economics of labor mobility.") [https://perma.cc/S8K9-JHB4].

individual employees against employers."[13] The expert went so far as to predict that arbitration of statutory claims would result in statutes like the ADA becoming "dead letters for unionized employees . . . ."[14] Some have expressed more specific concerns about the lack of procedural protections in arbitration,[15] including inadequate fact finding, incomplete records, the inapplicability of the rules of evidence as well as the absence of other rights, and procedures common to civil trials.[16] Arguably, the "Due Process Protocol," established in 1995 and endorsed by multiple organizations associated with labor arbitration, has assured "some measure of fairness and due process to employer-promulgated schemes for private resolution of statutory disputes."[17] The Due Process Protocol should positively affect employee win rates based on the various features and processes it recommends to make arbitration more friendly and fair to employees.[18] A 2013 study of arbitration awards resolving discrimination claims found that labor arbitration does provide at least some due process protections.[19]

Rather than focus on the process, this study considers the reasoning and outcomes in arbitration awards to determine whether arbitrators rely on the CBA, the ADA, or both in resolving grievances related to requests for accommodations. Concerns about the arbitration of discrimination claims include the labor arbitrator's focus on "the law of the shop, not the law of the land."[20] Opponents of requiring that nondiscrimination claims at least begin in arbitration have worried that an arbitrator is selected by the employer and the union based on "his knowledge and judgment concerning the demands and norms of industrial relations," rather than the ability to engage in judicial construction.[21] However, judicial construction has been deemed "neces-

13. Hyde, *supra* note 6, at 984.

14. *Id.*

15. *See* Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 830–33 (2009); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 241–42 (2012); Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 NEV. L.J. 58, 68 (2007).

16. Hyde, *supra* note 6, at 1015.

17. Am. Bar Ass'n., *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, A.B.A.: *GPSOLO* Magazine, http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/lab_emp.html (last visited Sept. 23, 2017) [https://perma.cc/T4R9-RG7V].

18. Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 97 (2014).

19. Levinson, *supra* note 10, at 817.

20. Hyde, *supra* note 6, at 1015.

21. *Id.*

sary" to the application of nondiscrimination laws because "broad language frequently can be given meaning only by reference to public law concepts."[22] More pointedly, one expert stated that "it is hard to think of a legal obligation less suitable for labor arbitration" than ADA rights, given that unions are designed to bargain on behalf of the "median worker," and generally have no expertise in representing employees with disabilities.[23] Additionally, unions face a conflict of interest in negotiating on behalf of an individual seeking an accommodation and others who will be negatively affected by that accommodation.[24]

In contrast to these concerns, other experts argue that modern arbitrators are well-equipped to interpret statutory claims.[25] Frank and Edna Elkouri, authors of a primary premier treatise on labor arbitration, concluded long ago that labor arbitrators handle statutory claims as well as, or in some cases even better than, courts.[26] Some have argued in the extreme that since discrimination claims often turn on factual issues, "an arbitrator's failure to understand the statute is unlikely to have significant impact."[27]

This analysis of arbitration awards demonstrates two important points. First, the authority given to an arbitrator under the CBA plays an important role in the resolution of a claim for accommodation. Without authority to interpret the ADA, a request for accommodation depends on the policies and procedures in the CBA alone—which can either support or undermine the request for an accommodation. When arbitrators are empowered to interpret both the CBA and the ADA, they can attempt to harmonize the ADA's duty to accommodate with the rights provided in the CBA, as the Supreme Court has deemed appropriate.[28]

22. *Id.*

23. *Id.* at 1006–07.

24. *Id.* at 1007.

25. Cole, *supra* note 4, at 876–77; *see also* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 681 (1986); Devine v. White, 697 F.2d 421, 438–39 (D.C. Cir. 1983); Stuart L. Bass, *What the Courts Say About Mandatory Arbitration*, 54(4) DISP. RESOL. J. 24, 30 (1999) (suggesting that interpretation and application of law is not outside the competence of arbitrators); Susan A. FitzGibbon, *After* Gardner-Denver, Gilmer *and* Wright*: The Supreme Court's Next Arbitration Decision*, 44 ST. LOUIS U. L.J. 833, 844–45 (2000); Christine G. Cooper, *Where Are We Going With* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 211–12 (1992).

26. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 376 (4th ed. 1985).

27. Cole, *supra* note 4, at 878.

28. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 396–98 (2002).

Second, with the authority to enforce employees' statutory rights, an arbitrator has the ability to enforce both contractual rights and the right to accommodate a person with a disability. In contrast, an arbitrator who cannot—or declines to—interpret the CBA or the statutory protections in the ADA can severely undermine an employee's ability to secure a reasonable accommodation.

This review will attempt to answer the question of whether arbitration is the best forum to resolve potential conflicts surrounding requests for accommodation for employees covered by a CBA.

Overall, the arbitration awards reviewed for this paper reveal that when arbitrators are empowered to interpret the ADA, their determinations generally comport with judiciary analysis of the ADA. When arbitrators are empowered to interpret the ADA, they do a "fair" job of protecting the rights of employees with disabilities as well as the interests of employers and coworkers—as the Supreme Court envisioned in deferring to arbitration as an alternative forum for resolving statutory claims of discrimination.

I. Arbitration Awards Address Reasonableness of Requests for Accommodation

Arbitration has the potential to resolve claims for accommodation in a unionized workplace to the benefit of the parties to the CBA as well as the employee with a disability. Compared to a court or a unilateral decision by an employer, an arbitrator arguably can recognize changes that can be made in the structural work environment, which can negatively impact the person with a disability.[29] At the same time, the rights of employees with disabilities could be severely diminished under the Supreme Court's decision in *Pyett* if arbitrators do not appropriately apply both the controlling CBA and the ADA to their claims.[30]

Of the 115 awards reviewed for this paper, 104 grievances challenged the failure to provide various types of accommodations as follows:[31]

29. Mary Crossley, *Disability Cultural Competence in the Medical Profession*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 89, 95 (2015).

30. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 271–74 (2009) (requiring CBA-mandated arbitration of an ADEA claim rather than proceeding directly to litigation).

31. *See infra* Appendix A (Tables 1–6 compiled from selected arbitration cases in Appendix A with calculations made by authors).

Table 1: Accommodations Requested

Accommodation Requested →	Job Restructure	Leave of Absence	Transfer	Light Duty	Other Right Based on Seniority
Number (%) of Cases Based on Accommodation Requested	40 (38%)	14 (13%)	32 (31%)	33 (32%)	5 (5%)
Number (%) of Cases Decided in Favor of Grievant	12 of 40 (30%)	6 of 14 (43%)	10 of 32 (31%)	12 of 33 (36%)	3 of 5 (60%)

Source: data taken from arbitration cases in Appendix A; calculations by authors.

Some grievants seek more than one type of accommodation, resulting in percentages of greater than 100%. These results demonstrate that even though an accommodation may not be required by the ADA, such as restructuring of essential job duties or provision of light duty work, a grievant with a disability may still be awarded such an accommodation based on an expansive interpretation of the ADA and/or favorable CBA language.

Of the 104 claims, in which the employee challenged the denial of a request for accommodation, often resulting in the employee's discharge, the reason for the award and the percentage decided in the grievant's favor were as follows:

Table 2: Reason for Award

Arbitrator's Reason for Award →	Health/ Safety Concerns	Seniority Rights	Leave of Absence	Essential Job Duties	Light Duty Availability	Past Practice
Number (%) of Cases Based on Reason for Award	16 (15%)	13 (12%)	9 (8%)	53 (51%)	23 (21%)	18 (17%)
Number (%) Decided in Grievant's Favor	2 of 16 (12%)	1 of 13 (8%)	5 of 9 (55%)	13 of 53 (24%)	6 of 23 (26%)	10 of 18 (56%)

Source: data taken from arbitration cases in Appendix A; calculations by authors.

The results highlight how the scope of essential job duties, often defined by the employer alone, can play a key role in an arbitrator's decision and can result in the denial of an accommodation. At the same time, a disabled employee's assertion of contractual rights, such as a leave of absence policy or a past practice, often results in a

favorable arbitration award. Additionally, 17 of the awards analyzed were decided based on a breakdown in the interactive process regarding the accommodation; 59% of which were decided in the grievant's favor because the employer failed to interact properly.[32]

One of the main factors affecting the outcome of an arbitration award concerning a request for an accommodation reflects a larger question in arbitration—does the arbitrator simply interpret the collective bargaining agreement, or does she apply external law as well? Once the arbitrator chooses an approach, the resolution of a grievance concerning a request for accommodation usually turns on one of several key factors, including the scope of the essential job duties of the grievant's position, the policy or practice regarding transfers, and the availability of leave or light duty under the CBA.

A. Resolution of Claims Under the CBA vs. ADA

Arbitrators often see themselves as no more than a "contract reader" for the parties.[33] Thus, a nondiscrimination clause in a CBA "takes on meaning only as part of the ongoing relationship between the employer and union," and means "just exactly what his union and his employer think it means."[34] While some arbitrators see themselves as only an interpreter of the CBA, others will turn to statutory protections for employees even where the CBA does not explicitly incorporate them. An arbitrator's authority depends upon the intention of the parties agreeing to arbitrate claims. If the parties limit the arbitrator's authority to the interpretation of the CBA, as opposed to applying statutory protections, arbitrators base their award on their interpretation of the CBA.[35]

If the parties include a nondiscrimination clause in the CBA that references employees with disabilities, an arbitrator may consider her-

32. *See infra* Appendix A.

33. Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMP. RTS. & EMP. POL'Y J. 123, 164 (1998) [hereinafter Hodges, *Protecting Unionized Employees*].

34. Hyde, *supra* note 6, at 989; *id.* at 995 (Hyde goes on to explain that rights in a CBA "normally contemplate definition by employers and unions through negotiation and arbitration.").

35. Ogden Maint. Co. v. Int'l Union of Operating Eng'rs Local 670, 101 Lab. Arb. Rep. (BNA) 467, 470 (1993) (Harr, Arb.); Altoona Hosp. v. AFSCME, Dist. Council 83, 102 Lab. Arb. Rep. (BNA) 650, 652 (1993) (Jones, Arb.); Jefferson-Smurfit Corp. v. Graphic Commc'ns Int'l Union Local 16-C, 103 Lab. Arb. Rep. (BNA) 1041, 1048–49 (1994) (Canestraight, Arb.); BWXT Pantex v. Metal Trades Council, 120 Lab. Arb. Rep. (BNA) 385, 392 (2004) (Jennings, Arb.). All cited arbitration decisions note the lack of authority for an arbitrator to look beyond a CBA.

self empowered to apply the ADA. For example, AT&T's inclusion of a nondiscrimination clause in its CBA was seen as an express incorporation of federal disability protections, giving the arbitrator authority to apply the ADA and require that the employer provide leave as an accommodation—rather than discharge the employee for disability-related absenteeism.[36] Interestingly, the arbitrator went on to find that AT&T had authority—otherwise known as "just cause"—to discharge the employee because she refused to return to work without the requested accommodations.[37]

A review of these 115 arbitration awards offers insight into the role of arbitration in resolving requests for accommodation. Of the cases reviewed, arbitrators interpreted only CBA language in 54 (47%) decisions, with 35 of those 54 (65%) decided in favor of the grievant.[38] Arbitrators relied solely on the ADA in 21 (18%) of the decisions, with 8 of those 20 (40%) decided in favor of the grievant.[39] In 40 (35%) decisions, the arbitrator considered both CBA language and the ADA, with 11 of those 40 (27%) decided in favor of the grievant.[40]

Of the 115 cases, the party for which the grievance was filed was considered, distinguishing between grievances filed on behalf of an employee with a disability or a coworker alleging disadvantage because of an accommodation given to another employee. Of the grievances reviewed, 11 were filed on behalf of coworkers claiming disadvantage due to the accommodation of another employee: 10 of those 11 involved reliance solely on the language of the CBA, with 9 of the 10 (90%) resolved in favor of the grieving coworker.[41]

The remaining 104 grievances were filed on behalf of employees seeking accommodation: 45 of those 104 (43%) relied solely on interpretation of the CBA,[42] and 19 (18%) relied solely on interpretation of the ADA.[43] Of the 45 cases relying solely on the CBA, 25 (55%) were resolved in favor of the grievant.[44] Of the 19 cases relying solely on the ADA, 7 (37%) were resolved in favor of the grievant.[45] The

36. AT&T Corp. v. Commc'n Workers, 2005 Lab. Arb. Supp. (BNA) 115056 (2005) (Goldstein, Arb.).

37. *Id.*

38. *See infra* Appendix A.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

remaining 39 out of 104 cases, brought on behalf of grievant's with disabilities, were decided based on interpretation of both the CBA and the ADA: with 11 of the 39 (28%) resolved in favor of the grievant.[46]

1. Reliance on the CBA Only

Some arbitrators are reluctant to apply the protections of the ADA under a CBA that does not specifically reference the federal law, even if it includes a nondiscrimination clause.[47] As one arbitrator explained, "this arbitrator is convinced of having neither inclination nor the qualification to enter the judicial quagmire of ADA determinations. Nor was such mandated by the parties."[48] An arbitrator may also be reluctant to force accommodation on an employer that has not affirmatively agreed to do so under the CBA. For example, the State of Ohio defeated a grievance by an employee who sought accommodation for his sensitivity to pesticides, where the CBA stated that the "[e]mployer may also undertake reasonable accommodation to fulfill or ensure compliance with Americans with Disabilities Act," which was read as permissive rather than a mandate.[49]

Obviously this limitation on the arbitrator's authority results in an arbitrator's failure to enforce accommodation requirements that are routinely recognized under the ADA. For example, two separate awards dismissed a grievance on behalf of a janitor and a utility technician who were no longer able to perform their work, without requiring that the employer consider a transfer as an accommodation,[50] which would typically be required under the ADA.[51] In a third award, the arbitrator applied the CBA to require that the employer reinstate the employee into a position previously held, but refused to award

46. *Id.*

47. *See, e.g.*, BWXT Pantex v. Metal Trades Council, 120 Lab. Arb. Rep. (BNA) at 392; Jefferson-Smurfit Corp. v. Graphic Commc'ns Int'l Union Local 16-C, 103 Lab. Arb. Rep. (BNA) 1041, 1048 (1994) (Canestraight, Arb.) (no duty to accommodate without express or imputed incorporation of ADA into CBA).

48. UFCW Local 135 v. Lucky Stores, 1999 Lab. Arb. Supp. (BNA) 107868 (1999) (Grabuskie, Arb.).

49. Ohio v. OCSEA, Local 11, 118 Lab. Arb. Rep. (BNA) 1361, 1365 (2003) (Murphy, Arb.).

50. Parkersburg Bedding v. Mid-Atlantic Reg'l Joint Bd., 118 Lab. Arb. Rep. (BNA) 1788, 1792 (2003) (Zobrak, Arb.); U.S. Steel Corp. v. United Steelworkers Local 4134, 134 Lab. Arb. Rep. (BNA) 1759, 1766 (2015) (Das, Arb.).

51. 29 C.F.R. § 1630.2(o) (2012); *see also* Stacy M. Hickox, *Transfer as an Accommodation: Standards from Discrimination Cases and Theory*, 62 Ark. L. Rev. 195, 196–206 (2009).

back pay, even though the CBA required that an employee who is injured on the job be placed in other work if possible.[52]

A CBA's nondiscrimination clause can provide support for an arbitration award in favor of a grievant with a disability. For example, an arbitrator reinstated a firefighter with hearing loss, under the nondiscrimination clause of his CBA, which limited the broader management rights clause.[53] Conversely, a nondiscrimination clause was insufficient to sustain the grievance of a Red Cross employee who sought an excuse from performing certain job duties, where the CBA specifically stated that only disabilities that did not affect an employee's performance were protected.[54]

A health and safety clause has also provided support for the grievance of an employee seeking accommodation. For example, an award sustained the grievance of a teacher with chemical sensitivity under a CBA provision stating that "[e]mployees shall not be required to work under unsafe conditions or be required to perform tasks in facilities which endanger their health and/or safety."[55] Without relying on the ADA directly, the arbitrator looked to its definition of "reasonable" to interpret that CBA provision, and explained that he was balancing "the need to reasonably accommodate [the] grievant with the duties of the District to carry out its important mission."[56] One commentator referred to this award as an example of an arbitrator applying the law "even less restrictively than the courts" in favor of the employer.[57] To the contrary, this arbitrator was careful to apply only the contract language, but followed standard arbitration practice in looking to outside applications of common terms to interpret the CBA.[58]

When CBAs require just cause for discipline or discharge, employees with disabilities receive greater protection against discharge if their employer refuses to provide an accommodation that would en-

52. Techneglass, Inc. v. GMP Int'l Union, Local 306, 120 Lab. Arb. Rep. (BNA) 722, 728–29 (2004) (Dean, Arb.).

53. City of Selah v. Gen. Teamsters Local 524, 2002 Lab. Arb. Supp. (BNA) 119948 (2002) (Smith, Arb.).

54. Am. Red Cross v. Mich. Council of Nurses and Healthcare Prof'ls Local 79, 122 Lab. Arb. Rep. (BNA) 1441 (2006) (McDonald, Arb.).

55. Culver City Unified Sch. Dist. v. Cal. Fed'n of Teachers, 110 Lab. Arb. Rep. (BNA) 519, 520, 528 (1997) (Hoh, Arb.).

56. *Id.* at 528.

57. Levinson, *supra* note 10, at 834.

58. *See, e.g.*, Pittsburg & Midway Coal Mining Co. v. UMWA Local 1332 Dist. 22, 123 Lab. Arb. Rep. (BNA) 239, 243 (2006) (West, Arb.) (Arbitrators can and should "look to outside sources for guidance, rather than possibly interpreting a provision or situation in opposition to the law.").

able them to perform their job. An employee with a disability may frame a claim for accommodation as a just cause claim "to get the arbitrator to decide cases that would otherwise fall under" a non-discrimination statute.[59] One arbitrator explained that it is not uncommon for an arbitrator to require reasonable accommodation under a just cause requirement.[60] Thus, some would argue that an arbitrator should consider the concept of reasonable accommodation when determining whether the employer had just cause to discharge an employee who was not accommodated because the duty to accommodate is a "fundamental employer obligation" under the ADA.[61]

Some arbitrators will rely on a just cause provision to mandate reasonable accommodation as an alternative to discharge from a position that the employee cannot perform without the requested accommodation.[62] One arbitrator explained that incorporation of the reasonable accommodation into her just cause determination was appropriate based on the CBA's inclusion of both a general nondiscrimination clause and a conflict with law provision.[63] Such an interpretation of just cause can be beneficial for an employee with a disability; e.g., an arbitrator relied on the just cause provision of a CBA to sustain the grievance of an employee with a disability who was discharged and absent for more than six months after being injured on job.[64] The arbitrator engaged in typical just cause analysis, finding that the employer's policy of discharging all employees who are absent for over six months had not been applied consistently, and that the CBA allowed for a leave of absence for "good cause," defined to include accidental injury.[65]

59. Daniel B. Moar, *Arbitrating Hate: Why Binding Arbitration of Discrimination Claims is Appropriate for Union Members*, 10 DUQ. BUS. L.J. 47, 62 (2008).

60. Thermo King Corp. v. United Steelworkers Local 2175, 102 Lab. Arb. Rep. (BNA) 612, 613 (1993) (Dworkin, Arb.); *see also* Meijer, Inc. v. UFCW Local 951, 103 Lab. Arb. Rep. (BNA) 834, 840 (1994) (Daniel, Arb.) ("[R]ights established by law . . . must be taken into consideration in determining whether just cause exists . . . .").

61. Levinson, *supra* note 10, at 834.

62. *See* Sherwin-Williams Co. v. Int'l Bhd. of Painters & Allied Trades, Local 1961, 113 Lab. Arb. Rep. (BNA) 1184, 1191 (2000) (Statham, Arb.) (transfer as alternative to discharge); Dynergy Midwest Generation v. Int'l Bhd. of Elec. Workers, Local 51, 131 Lab. Arb. Rep. (BNA) 1529, 1534–35 (2013) (Dichter, Arb.) (continuation of long-term disability as alternative to discharge).

63. GTE N., Inc. v. IBEW Local 986, 113 Lab. Arb. Rep. (BNA) 665, 672 (1999) (Brodsky, Arb.).

64. Magnolia Mktg. Co. v. Teamsters Tobacco Workers Union, Local 270, 107 Lab. Arb. Rep. (BNA) 102, 109 (1996) (Chumley, Arb.).

65. *Id.*

Under a just cause standard, an employee might benefit from having an impairment even without direct reliance on her rights under the ADA. For example, a driver's grievance was sustained under the CBA's just cause standard where the employer failed to warn him that he would be discharged if he did not take his medication, and the employer had tolerated his condition for a long time.[66] This award relied on basic principles of just cause—the failure to warn employees as well as employer's past acceptance of behavior as minimizing factors.[67] Similarly, a grocery store was deemed unable to accommodate an employee who had failed to seek treatment for his condition that prevented him from performing his job involving contact with customers.[68] Even so, the arbitrator reinstated the employee to a position without customer contact.[69] These two awards illustrate the ability of an arbitrator to use a CBA's just cause provision to push an employer to provide accommodations beyond what the ADA might require, even though the employer had no duty to accommodate under the ADA.

Consistent with this approach, the just cause standard can justify the denial of a grievance by an employee with a disability. For example, an employer demonstrated just cause to discharge a driver with a mental illness, rather than accommodate him, where the arbitrator concluded that the chances for rehabilitation were "remote" so as to enable the employee to perform.[70]

Not all arbitrators will turn to the ADA to interpret a just cause standard. For example, an arbitrator denied the grievance of an employee who was discharged because she could no longer perform her previous position due to her impairment, refusing to incorporate a duty to accommodate through transfer into the employer's obligation to discharge only for just cause.[71]

These awards demonstrate that even if the CBA limits the authority of the arbitrator to an interpretation of the CBA, an arbitrator may

66. Laidlaw Transit, Inc. v. Machinists Auto. Trades Dist. Lodge 190, 104 Lab. Arb. Rep. (BNA) 302, 306 (1995) (Concepion, Arb.).

67. *Id.*

68. Meijer, Inc. v. UFCW Local 951, 103 Lab. Arb. Rep. (BNA) 834 (1994) (Daniel, Arb.).

69. *Id.* at 841.

70. Interstate Brands Corp. v. BCTGM, Local 149, 113 Lab. Arb. Rep. (BNA) 161 (1999) (Howell, Arb.).

71. Jefferson-Smurfit Corp. v. Graphic Commc'ns Int'l Union Local 16-C, 103 Lab. Arb. Rep. (BNA) 1041, 1048–49 (1994) (Canestraight, Arb.).

turn to outside sources—including ADA case law and general principles applied by arbitrators—to resolve disputes.

2. Reliance on the ADA

In contrast to the above-referenced awards, which were based on contract language alone, other arbitrators are expressly empowered or assume the authority to apply the ADA to grievances involving requests for accommodation. Historically, arbitrators cited relevant labor statutes about half the time,[72] but their consideration of the statutory issues was found to be often "cursory and conclusory, almost an afterthought to the contractual issue."[73] As a result, Patricia Greenfield concluded that "few arbitrators consider statutory rights fully and in detail."[74]

In the employment law context, arbitrators arguably exercise greater care in applying nondiscrimination laws. Before arbitration awards became the exclusive venue for trying discrimination claims, the EEOC reversed approximately 16% of the arbitration awards it reviewed, and reviewing courts reversed less than 7% of awards concerning discrimination.[75] This suggests that at least some arbitrators historically applied nondiscrimination statutes appropriately.

Arbitrators will engage in an analysis of whether the grievant is a person with a disability where he or she is empowered to apply nondiscrimination statutes. For example, one arbitrator directly reversed a federal agency's determination that the grievant was not a person with a disability, and therefore was not entitled to reassignment as an accommodation.[76] This determination does not always benefit the grievant; e.g., a determination that a school aide with a lifting limitation was not a person with a disability under the ADA and therefore the school was not required to accommodate her under the ADA.[77] The arbitrator considered whether the school had established a past practice of providing the accommodation she sought, but did not consider

72. Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 195–96 (2006); Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 INDUS. & LAB. REL. REV. 683, 694 (1992).

73. Greenfield, *supra* note 72, at 694.

74. *Id.*

75. Michele Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, 39 ARB. J. 49, 54–55 (1984).

76. Fed. Aviation Admin. v. Prof'l Airways Sys. Specialists, Dist. No. 1-MEBA/NMU, 2001 Lab. Arb Supp. (BNA) 108849 (2001) (Sergent, Arb.).

77. Twinsburg Bd. of Educ. v. Twinsburg Support Staff, 119 Lab. Arb. Rep. (BNA) 54, 58–59 (2003) (Chattman, Arb.).

whether the school had just cause to discharge her rather than reassign her to another aide position that did not require lifting.[78]

Some arbitrators rely directly on ADA case law and EEOC regulations to determine whether an employer has fulfilled its duty to accommodate.[79] For example, delays in providing accommodations to a grievant were insufficient to sustain a grievance based on an arbitrator's interpretation of ADA case law and the EEOC regulations.[80] One arbitrator engaged in a rather lengthy analysis justifying the reinstatement of a grievant found to be otherwise qualified for his position in spite of misconduct associated with his disability.[81] This analysis is consistent with ADA case law regarding an employer's longstanding direct threat defense, which allows an employer to avoid accommodation and even discharge an employee because she poses a direct threat to herself or others, even with reasonable accommodation.[82] Because the direct threat defense typically results in a motion for summary judgment in the employer's favor in federal court,[83] this decision illustrates an arbitrator's more lenient approach toward a sympathetic grievant.[84]

Despite this incorporation of ADA standards by some arbitrators, only one arbitrator in our review stated directly that a request for accommodation could not be denied based on a conflict with the terms of a CBA.[85] Most arbitrators find themselves bound to enforce the CBA alone, such as the arbitrator who denied the grievance filed on behalf of an employee who sought a transfer as an accommodation, explaining that the union had not agreed to waive the CBA's job-bid-

78. *Id.* at 60.

79. *See* Pittsburg & Midway Coal Mining Co. v. UMWA Local 1332 Dist. 22, 123 Lab. Arb. Rep. (BNA) 239, 244 (2006) (West, Arb.) (Arbitrators can and should "look to outside sources for guidance, rather than possibly interpreting a provision or situation in opposition to the law.").

80. Dep't of Hous. & Urban Dev. v. Am. Fed'n of Gov't Emps., Local 3475, 116 Lab. Arb. Rep. (BNA) 1364, 1369 (2002) (McReynolds, Arb.).

81. USPTO v. POPA, 1999 Lab. Arb. Supp. (BNA) 107763 (1999) (Moore, Arb.).

82. *See, e.g.*, Palmer v. Circuit Court of Cook Cty., 117 F.3d 351, 352–53 (7th Cir. 1997) ("The [ADA] protects only 'qualified' employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one."); 29 C.F.R. 1630.2(r) (2012) ("Direct [t]hreat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.").

83. *Palmer*, 117 F.3d at 353; *see also* EEOC v. Amego, Inc., 110 F.3d 135, 145–46 (1st Cir. 1997) (explaining that employee failed to establish that she was not a direct threat).

84. *USPTO*, 1999 Lab. Arb. Supp. (BNA) at 107763.

85. BCTGM, Local 417 v. Sara Lee Bakery, 1997 Lab. Arb. Supp. (BNA) 101935 (1997) (Berquist, Arb.).

ding and seniority rules which would apply to that transfer.[86] While some arbitrators may apply the ADA or at least look to its case law to interpret contractual provisions, very few will require that an employer provide an accommodation that would otherwise be deemed reasonable if it conflicts with the rights of other employees under the CBA.

II. Determination of Availability/Reasonableness of Accommodation

Arbitrators' interpretation and application of several different CBA provisions illustrate their struggles in reconciling those contractual rights with the right to accommodation under the ADA. Some CBAs require reasonable accommodation. To interpret that requirement, arbitrators will look to its definition under the ADA.[87] Unlike in court, an arbitrator also has the option of remanding the dispute to the parties to determine what changes might provide a reasonable accommodation.[88]

Requests for accommodation are often affected by provisions on leave of absence, transfers into a new position, or assignment of light duty, and most commonly, provisions that clarify which duties are essential for a position. An exploration of awards touching on those issues sheds further light on the influence of the ADA and the terms of the CBA on requests for accommodation, and illustrates how closely awards mirror expected results in similar claims heard under the ADA in federal court.

A. Defining Essential Job Duties

The scope of the essential job duties of a position often determines whether an employee with an impairment is otherwise qualified for the position she holds or seeks. An employer is only required to retain an employee who can perform those essential duties, with or without reasonable accommodation.[89] An employee with a disability may face discharge even if she can perform her current job duties on a regular work schedule, if the employer retains the ability to mandate

86. City of Roswell v. United Steelworkers, 109 Lab. Arb. Rep. (BNA) 1153, 1159 (1998) (Wyman, Arb.).

87. *See, e.g.*, Multi-Clean, Inc. v. Int'l Ass'n of Machinists and Aerospace Workers, Dist. Lodge 77, Local Lodge 459, 102 Lab. Arb. Rep. 463, 467 (1993) (Miller, Arb.).

88. *Id.* at 469.

89. *See, e.g.*, Goodman v. Unity Twp., No. 2:03-cv-1650, 2006 U.S. Dist. LEXIS 18138 at *14 (W.D. Pa. Mar. 30, 2006) (quoting 42 U.S.C. § 12111(8)).

overtime or rotate employees into positions with different duties that the employee with a disability cannot perform.[90]

Under the ADA, an employee is only protected if she is otherwise qualified to perform the essential duties of her position.[91] As noted above, of the 104 arbitration awards concerning grievances by employees seeking accommodations, 53 (over 50%) were decided based completely or in part on the scope of the essential job duties of the grievant's position, or the position sought through a transfer.[92] Of those 53 awards, 13 (24%) were decided in favor of the grievant, with the basis for those awards outlined in the chart below.[93]

Table 3: Essential Job Duties Disputes

Awards Involving Disputes Over Essential Job Duties	Applying ADA Only	Applying CBA Only	Applying ADA & CBA	Total Awards
Awards for Grievant	3 (23%)	8 (57%)	2 (14%)	13 (25%)
Awards for Employer	9 (23%)	16 (40%)	15 (38%)	40 (75%)
Total Awards	12 (27%)	24 (44%)	17 (31%)	53

Source: data taken from arbitration cases in Appendix A; calculations by authors.

It is noteworthy that more decisions in favor of both the grievant and the employer relied on the CBA only, but the employer seemed to benefit more from consideration of the ADA as well. This distribution of reliance on the ADA, the CBA, or both demonstrates that when determining whether a grievant can be accommodated to perform the essential job duties of a position, reliance on the ADA, the CBA, or both does not clearly favor one party over the other.

1. Evidence of What's Essential

Generally, both the courts and arbitrators defer to an employer's determination of which duties are essential.[94] This deference to the

90. *See, e.g.*, Nalley v. Donahoe, No. 3:11-0610, 2014 U.S. Dist. LEXIS 87736, at *23–26 (M.D. Tenn. Jun. 27, 2014) (mail handler's claim who requested reassignment turned on the question of whether a possible new position required rotation through different tasks).

91. 42 U.S.C. 12111(8) (2012); 29 C.F.R. 1630.2(m) (2012).

92. *See infra* Table 3.

93. *Id.*

94. 42 U.S.C. 12111(8) ("[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential . . . ."); 29 C.F.R. 1630.2(n)(3) (deference to employer's judgment as to what duties are essential); *see, e.g.*, Kvorjak v. Maine, 259 F.3d 48,

employer's identification of essential job duties stems in part from a general recognition of management rights.[95] In addition, arbitrators sometimes rely at least in part on the burden of an accommodation on other employees, as with an award which recognized that a grievant's inability to lift could "wear on" his coworkers, and "may make it impossible to do some of the tasks involved."[96]

Despite this deference to employers, arbitrators have required that an employer accurately assess which duties are essential for a position.[97] If an employer fails to present proper evidence that a duty is essential—such as listing a specific duty in the position description—the arbitrator may refuse to find that duty essential.[98] In applying this principle to alternative jobs for a grievant, one arbitrator sustained the grievance of an employee who sought a transfer to a position which the employer alleged he could not perform citing a CBA provision that an incapacitated employee "shall be placed at any work he can do."[99] That employer looked for positions in which the grievant could perform the "full scope of the job," but failed to consider positions in which the grievant could perform "a portion" of the duties, even though he could not perform all of the duties listed in those job descriptions.[100] This decision reflects the reasoning used by arbitrators in ADA disputes—that essential job duties are those that the incumbent actually performs, not simply what is listed in a job description.[101]

56 (1st Cir. 2001) (reliance on employer's statement to determine what duties are essential); Minnegasco v. Gas Workers Union Local 340, 109 Lab. Arb. Rep. (BNA) 220, 224 (1997) (Jacobowski, Arb.) (employer determined that license was essential because of impact on productivity and efficiency).

95. Teamster, Local No. 377 v. Venture Indus., 2002 Lab. Arb. Supp. (BNA) 109777 (2002) (Goldberg, Arb.) ("Employer was entitled to consider all of the necessary job functions set forth in the job description and to judge the Grievant's ability to perform against the existing job standards for productivity and efficiency.").

96. Rootstown Local Sch. Dist. v. Ohio Ass'n of Pub. Sch. Emps., Chapter 569, 117 Lab. Arb. Rep. (BNA) 1217, 1223 (2002) (Fullmer, Arb.).

97. Genesee Cty. Cmty. Mental Health Servs. v. Mich. Council 25 AFSCME, Local 496, 2000 Lab. Arb. Supp. (BNA) 108512 (2000) (Daniel, Arb.) (the ability to drive was not listed in the position description for a mental health therapist).

98. *Id.*

99. Cleveland Elec. Illuminating Co. v. Util. Workers, Local 270, 100 Lab. Arb. Rep. (BNA) 1039, 1044–45 (1993) (Lipson, Arb.); *see also* Kenai Borough Emps. Ass'n v. Kenai Peninsula Borough, 1995 Lab. Arb. Supp. (BNA) 116269 (Landau, Arb.) (CBA required transfer of bargaining unit member into available position for which she was qualified).

100. *Cleveland Elec. Illuminating Co.*, 100 Lab. Arb. Rep. (BNA) at 1044.

101. *See, e.g.*, Deane v. Pocono Med. Ctr., 142 F.3d 138, 148 (3d Cir. 1998) (although "unassisted patient lifting" was included in the job description, it was not an essential duty for a nurse to perform her job).

Arbitration can help establish which duties are actually essential to a job, such as the use of ladders by a telephone technician.[102] The ability to use a ladder was not essential where the grievant had worked productively for years without using a ladder, under the CBA's just cause standard, which considered the employer's ADA obligations.[103] Conversely, a grievance was denied where the physically demanding position clearly required—as essential functions of the job—climbing and longer periods of standing and kneeling than the grievant could sustain.[104] Without referencing the ADA, the arbitrator determined that taking up to two breaks per hour was an unreasonable accommodation where the employer allowed only three breaks per day.[105]

2. Identification of General Essential Duties

Like the deference to an employer's determination of physical duties, arbitrators have also mirrored the reasoning of ADA decisions, which have consistently found that regular attendance is an essential part of most jobs.[106] For example, an employer had the right to transfer the grievant into a different position where his attendance issues had rendered him unfit to perform his previous duties as an electrician.[107]

As with attendance, certain hours of work may be deemed essential for a particular job. For example, two arbitrators determined that employers may establish that overtime is an essential part of a job, rendering an employee unqualified if she cannot work overtime hours.[108] One of these decisions was characterized as "not as well rea-

102. GTE N. v. IBEW Local 1106, 113 Lab. Arb. Rep. (BNA) 1047, 1052 (1999) (Daniel, Arb.) ("[T]estimony reflects the fact that other employees within the work group frequently helped each other on a daily basis and that it would not be unusual for someone working with the grievant to take the ladder climbing duties.").

103. *Id.*; *see also* Office of the State Emp'r, 2011 Lab. Arb. Supp. (BNA) 149630 (Townsend, Arb.) (employer allowed employee to avoid working at heights for twenty years and thus working at heights was not deemed "an essential function of the position.").

104. Case Corp. v. United Steelworkers, Local 1958-02, 113 Lab. Arb. Rep. (BNA) 1 (1999) (Thornell, Arb.).

105. *Id.* at 3–4 (multiple breaks each hour in a physically demanding role was not deemed a "practical solution" where employer only permitted a break in the morning, lunch, and evening).

106. Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994) (disqualified based on long period of leave); Greer v. Emerson Elec. Co., 185 F.3d 917, 921–22 (8th Cir. 1999) (disqualified based on irregular absences).

107. Dinagraphics, Inc. v. United Paperworkers Int'l Union Local 98, 102 Lab. Arb. Rep. (BNA) 947, 952–53 (1994) (Paolucci, Arb.).

108. Am. Crystal Sugar Co. v. BCTGM, 2001 Lab. Arb. Supp. (BNA) 109041 (2001) (Bognanno, Arb.); Bobcat Co. v. PACE Local 7-560, 119 Lab. Arb. Rep. (BNA) 817, 820 (2004) (Jacobowski, Arb.).

soned or well supported by citations to authority as would be ideal . . . not explicit about which cases he relied on or how the actual accommodations related to the finding that the ADA was not violated."[109] However, both of these awards are entirely consistent with ADA case law regarding the ability of an employer to determine that overtime is an essential part of a job.[110]

Like the overtime awards, an arbitrator denied the grievance of an employee who was discharged because he could not work more than four hours per day, where the employer established that his position and others like it required eight hours of work per day.[111] That arbitrator explained that the ADA does not require that "existing jobs be restructured so extensively that wage and benefit systems established under a collective bargaining agreement are thrown into disarray."[112] This reasoning reflects similar ADA court opinions indicating that an employer can determine what hours of work are required for a particular position,[113] unless the employee can complete the essential duties of the position under a different schedule.[114]

Past practice, however, can undermine the employer's authority to mandate certain work hours as essential to a job. For example, an award sustained a grievance challenging a mandatory overtime requirement that an employee could not meet because of her disability, where the employer had excused other employees from working overtime.[115]

Arbitration awards have mirrored judicial ADA analysis of the scope of reasonable accommodation with respect to employees performing duties that are deemed essential. Both the courts[116] and arbi-

109. Levinson, *supra* note 10, at 835.

110. *See, e.g.*, Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1305 (11th Cir. 2000) (overtime deemed essential based on nature of work, past practice).

111. Am. Sterilizer Co. v. UAW, Local 832, 104 Lab. Arb. Rep. (BNA) 921, 927 (1995) (Dissen, Arb.).

112. *Id.*

113. *See, e.g.*, Earl v. Mervyns, Inc., 207 F.3d 1361, 1366 (11th Cir. 2000) (set hours of work essential for retail store employee); Treanor v. MCI Telecomms. Corp., 200 F.3d 570, 575 (8th Cir. 2000) (employer not required to change full-time to part-time position).

114. *See, e.g.*, Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 34–35 (1st Cir. 2000).

115. City of Akron v. Civil Serv. Pers. Ass'n, 111 Lab. Arb. Rep. (BNA) 705, 711–12 (1998) (Franckiewicz, Arb.).

116. *See, e.g.*, Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1218 (8th Cir. 1999) (employer not required to reduce job duties or hire additional employee to perform essential duties); Frix v. Fla. Tile Indus., Inc., 970 F. Supp. 1027, 1031, 1035 (N.D. Ga. 1997) (reassignment of essential duties not reasonable).

trators[117] have refused to require an employer to excuse the performance of an essential duty or assign another employee to perform an essential duty, unless assistance from other employees is commonplace.[118] In contrast, an employer should not refuse to return an employee to a position for which she can perform the essential duties, even if she cannot perform incidental or marginal functions of the position.[119]

3. Ability to Perform Essential Duties

As seen when clarifying essential duties, arbitration can also help to resolve disputes about whether an employee with a disability is able to perform the essential duties of a position with or without accommodation. For example, an arbitrator may engage in an evaluation of the evidence related to an employee's ability to perform the duties of her position.[120] This can include weighing the credibility and relevance of testimony from various health care providers as well as the grievant.[121]

An arbitrator can hold an employer to a particular standard in determining fitness for duty. A grievance regarding fitness to return to work was denied where the employer had "employed all means necessary to fully and fairly assess [g]rievant's physical condition," under the lenient "arbitral authority" standard that management retains the right to assess employees' fitness for duty.[122] In contrast, one arbitrator rejected the employer's position that a grievant was not able to perform the duties of his position, where the employer had failed to invoke a CBA provision that allowed the employer to send the employee for a medical examination to determine his ability to return to work.[123] However, the arbitrator conditioned his return to work on a

117. *See, e.g.*, Franklin Elec. Co. v. IUE-CWA, Local 84-802, 118 Lab. Arb. Rep. (BNA) 513, 518 (2003) (Lalka, Arb.).

118. *See* Coreslab Structures, Inc. v. Int'l Bhd. of Teamsters, Local 41, 129 Lab. Arb. Rep. (BNA) 329, 332 (2011) (Pratte, Arb.) (where employees commonly helped with lifting and grievant could at times perform the necessary lifting unassisted, grievance was sustained).

119. Canton Twp. Bd. of Supervisors v. GMP Int'l Union, Local 272, 121 Lab. Arb. Rep. (BNA) 259, 264–65 (2005) (Dissen, Arb.).

120. 162471-AAA, 2010 Lab. Arb. Supp. (BNA) 162471 (2010) (Skonier, Arb.).

121. *Id.*

122. Maint. & Indus. Servs., Inc. v. United Steelworkers, Local 1055L, 116 Lab. Arb. Rep. (BNA) 293, 297 (2001) (Hart, Arb.).

123. Champion Int'l Corp. v. United Paperworkers Int'l Union, Local 1137, 106 Lab. Arb. Rep. (BNA) 1024, 1032 (1996) (Howell, Arb.); *see also* Milwaukee Transport Servs. v. Amalgamated Transit Union, Local 998, 2009 Lab. Arb. Rep. Supp. (BNA) 119548 (2009) (Vernon, Arb.) (arbitrator required employer to perform another functional capacity evaluation based on actual job duties); Noranda Alum., Inc. v. United Steelworkers, 119 Lab.

showing that he could perform the work with reasonable accommodation.[124] As with the definition of "reasonable," an arbitrator can also remand a grievance to encourage the parties to consider whether the grievant could perform duties with modifications.[125]

B. Transfers

When an impairment is expected to permanently prevent the employee from performing the essential duties of her previous position, the employee with a disability may seek a transfer as an accommodation. Under the ADA, reasonable accommodation can include transfer into a vacant position for which the employee is qualified.[126]

Of the 104 arbitration awards reviewed concerning grievances by employees seeking accommodations, 32 (30%) concerned requests to transfer into a different position as an accommodation.[127] Of those 32 awards, 10 (31%) were decided in favor of the grievant.[128] The basis for those awards is outlined in the chart below:

Table 4: Request for Transfer Disputes

Awards Involving Requests for Transfer as an Accommodation	Applying ADA Only	Applying CBA Only	Applying ADA & CBA	Total Awards
Awards for Grievant	3 (30%)	3 (30%)	4 (40%)	10 (31%)
Awards for Employer	6 (27%)	7 (32%)	9 (41%)	22 (69%)
Total Awards	9 (28%)	10 (31%)	13 (41%)	32

Source: data taken from arbitration cases in Appendix A; calculations by authors.

This distribution demonstrates that in grievances involving requests for transfer into a different position, reliance on the ADA, the CBA, or both does not appear to have a significant effect on the outcome.

A CBA can sometimes support the grievance of an employee with a disability who can no longer perform the duties of her previous posi-

Arb. Rep. (BNA) 217, 221 (2003) (Gordon, Arb.) (employer required to obtain independent medical examination).

124. *Noranda Alum., Inc.*, 119 Lab. Arb. Rep. (BNA) at 217–18.

125. USS v. United Steelworkers, Local 1219, 1994 Lab. Arb. Supp. (BNA) 107253 (1994) (Dybeck, Arb.).

126. Hickox, *supra* note 51, at 196–206.

127. *See infra* Table 4.

128. *Id.*

tion, but can perform some other work for the employer. Two arbitrators, for example, sustained grievances seeking transfers into other positions under the ADA, recognizing those employers' obligations to consider a transfer as an accommodation.[129]

In line with the ADA's recognition that transfer into a vacant position can be a reasonable accommodation, arbitrators have applied CBA language in favor of a grievant with a disability. For example, an arbitrator relied both on the CBA and the ADA to require that an employer assist an employee with finding a different position that he could perform.[130] This decision reflects the reasoning in ADA decisions that a transfer can be a reasonable accommodation.[131] However, other arbitrators have failed to consider a transfer as a reasonable accommodation if the grievant can no longer perform the duties of his or her previous position;[132] this may be a function of the union's failure to make this argument or the grievant's inability to identify other open positions he or she could perform.

Like that award, another arbitrator denied the grievance of an employee who sought a transfer as an accommodation, recognizing that an employer does not have an obligation to bump another employee or create a position as an accommodation.[133] The reasoning in these awards reflects the line of ADA decisions limiting the right to transfer as an accommodation to vacant positions that exist.[134]

Related to requests for transfer, in the awards reviewed, grievants often sought light duty assignment as an accommodation. Of the 104 arbitration awards reviewed, 33 (32%) involved a request for light duty.[135] Twenty-three of the 104 (22%) were decided upon the availability of light duty, with 16 of those 23 (70%) grievances denied in

129. S.F. Unified Sch. Dist. v. United Educators, 104 Lab. Arb. Rep. (BNA) 215, 220–21 (1995) (Bogue, Arb.); Kenai Borough Emps. Ass'n v. Kenai Peninsula Borough, 1995 Lab. Arb. Supp. 116269 (1995) (Landau, Arb.).

130. Johns Hopkins Bayview Med. Ctr., Inc. v. AFSCME, Council 67, Local 3374, 105 Lab. Arb. Rep. (BNA) 193, 198 (1995) (Bowers, Arb.).

131. Hickox, *supra* note 51, at 196–206.

132. Cincinnati State Tech. & Cmty. Coll. v. Int'l Union of Operating Eng'rs Local 20, 114 Lab. Arb. (BNA) 153 (2000) (Heekin, Arb.) (based on medical evidence establishing inability to perform duties).

133. Consentino's Brywood Price Chopper v. UFCW Local 576, 104 Lab. Arb. Rep. (BNA) 187, 190 (1995) (Thornell, Arb.); *see also* Mead Prods. v. United Paperworkers Int'l Union, Local 291, 114 Lab. Arb. Rep. (BNA) 1753, 1759–60 (2000) (Nathan, Arb.).

134. 29 C.F.R. § 1630.2(o) (2012); *see also* Hickox, *supra* note 51, at 205–06.

135. *See infra* Appendix A.

favor of the employer.[136] This chart demonstrates the distribution of authority relied upon in making those decisions:

Table 5: Request for Light Duty Disputes

Awards Involving Light Duty Accommodation Requests	Applying ADA Only	Applying CBA Only	Applying ADA & CBA	Total Awards
Awards for Grievant	0 (0%)	6 (86%)	1 (14%)	7 (30%)
Awards for Employer	2 (13%)	9 (56%)	5 (31%)	16 (70%)
Total Awards	2 (9%)	15 (65%)	6 (26%)	23

Source: data taken from arbitration cases in Appendix A; calculations by authors.

This distribution highlights that, in claims involving light duty assignment, employers benefit from an assertion that the provision of light duty is not required by either the CBA and/or the ADA, but that grievants may take advantage of a CBA provision for light duty.

As with the creation of a new position, arbitrators commonly find that an employer has no obligation to create a light duty position as an accommodation.[137] For example, one arbitrator denied the grievance of an employee with a disability who sought a light duty position, noting that the CBA provided the employer with the exclusive right to "determine the type of work to be performed."[138] In contrast, a CBA that provides the right to light duty can be enforceable on behalf of an employee with a disability, even if the ADA would not provide the same right.[139]

136. *See infra* Table 5.

137. *See, e.g.*, Ogden Maint. Co. v. Int'l Union of Operating Eng'rs, Local 670, 101 Lab. Arb. Rep. (BNA) 467, 470 (1993) (Harr, Arb.); *see also* Flamingo Hilton-Laughlin v. Int'l Union of Operating Eng'rs, Local 501, 108 Lab. Arb. Rep. (BNA) 545, 558 (1997) (Weckstein, Arb.) (no obligation to create light duty position, but recognizing obligation to award vacant light duty position as accommodation); BCTGM, Local 417 v. Sara Lee Bakery, 1997 Lab. Arb. Supp. (BNA) 101935 (1997) (Berquist, Abr.) (no obligation to create light duty position as accommodation even if provided to employees injured on the job).

138. Altoona Hosp. v. AFSCME, Dist. Council 83, 102 Lab. Arb. Rep. (BNA) 650, 652 (1993) (Jones, Arb.); *see also* Johnson Controls World Servs., Inc. v. Int'l Union of Operating Eng'rs, Local 953, 104 Lab. Arb. Rep. (BNA) 336, 342 (1995) (Goodstein, Arb.) (assignment of work is a management right).

139. City of Erie v. Gen. Teamsters Local 397, 115 Lab. Arb. Rep. (BNA) 1409, 1414, 1417 (2001) (D'Eletto, Arb.) (noting that grievant prevailed in federal district court, Third Circuit overturned on appeal in 2000).

Even without specific supportive contractual language, past practice can determine an employer's contractual obligation to create light duty work, regardless of its obligations under the ADA.[140] Yet the limitations of past practice apply.[141] Past practice can create an obligation to act consistently with that practice where a pattern of prior conduct was "consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action."[142] For example, an employer that had only provided short-term light duty for employees injured at work had no obligation to place the grievant with permanent restrictions in a light duty position.[143] In contrast, an arbitrator recognized the obligation of a moulding company to place the grievant in a position that he determined to exist based on its listing in the CBA and the employer's past placement of others in that position.[144]

A grievant benefitted from a CBA provision that gave him more rights than would be available under the ADA, where he sought a transfer to a position that was occupied by a part-time employee.[145]

140. Kan. City Power & Light v. Int'l Bhd. of Elec. Workers, Local 412, 123 Lab. Arb. Rep. (BNA) 135, 139 (2006) (Pratte, Arb.) (practice of providing restricted duty had existed for thirty years); Sherwin-Williams Co. v. Int'l Bhd. of Painters, Local 1961, 113 Lab. Arb. Rep. (BNA) 1184, 1191 (2000) (Statham, Arb.) (past practice of assigning employees to duties they could perform, even though ADA did not apply).

141. Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 605 (6th ed. 2003) ("[C]ustom and past practice of the parties constitute one of the most significant evidentiary considerations in labor-management arbitration."); *see, e.g.*, Lextran v. Amalgamated Transit Union, Div. No. 639, 135 Lab. Arb. Rep. (BNA) 1160, 1166 (2015) (Harris, Jr., Arb.) (employer's inconsistent enforcement in the past rendered employee's discharge for attendance lacking in just cause); Kemps L.L.C. v. Int'l Bhd. of Teamsters, Local 160, 135 Lab. Arb. Rep (BNA) 1, 8 (2015) (Daly, Arb.) (employer's past practice can help determine violation of CBA).

142. *Kan. City Power & Light*, 123 Lab. Arb. Rep. (BNA) at 138 (citing Nat'l Acad. of Arbitrators, The Common Law of the Workplace: The Views of Arbitrators 89 (Theodore J. St. Antoine ed., 2d ed. 2005)).

143. Fox River Paper Co. v. United Paperworkers Union Local 16, 104 Lab. Arb. Rep. (BNA) 871, 875 (1995) (Suntrup, Arb.); *see also* Pittsburg & Midway Coal Mining Co. v. United Mine Workers, Local 1332, Dist. 22, 123 Lab. Arb. Rep. (BNA) 239, 243 (2006) (West, Arb.) (provision of light duty to one previous employee did not establish a binding past practice); Bowater, Inc. v. PACE Local No. 5-790, 116 Lab. Arb. Rep. (BNA) 382, 388 (2001) (Harris, Jr., Arb.) (temporary light duty position for employee recovering from injuries did not require employer to permanently restructure or create a new position to accommodate a now permanent restriction).

144. Ohio Moulding Corp. v. UAW, Local 217, 1996 Lab. Arb. Supp. (BNA) 117047 (1996) (Klein, Arb.). *But see* Ogden Maint. Co. v. Int'l Union of Operating Eng'rs, Local 670, 101 Lab. Arb. Rep. (BNA) 467, 470 (1993) (Harr, Arb.) (employer had past practice of discharging employees rather than providing light duty).

145. L.A. Cmty. Coll. Dist. v. Am. Fed'n of Teachers Coll. Guild, Local 1521, 112 Lab. Arb. Rep. (BNA) 733, 739–40 (1999) (Kaufman, Arb.).

Even though the ADA would not require such a transfer as an accommodation, the grievance was sustained because the CBA allowed full-time employees to bump part-time employees.[146]

Transfers as accommodations often come into conflict with the seniority rights of other employees where a collective bargaining agreement applies. In *U.S. Airways, Inc. v. Barnett,* the Supreme Court found that an employer's seniority policy is relevant but not conclusive as to whether a transfer would be a reasonable accommodation, where another employee seeks that position based on their seniority.[147] Lower courts have applied the reasoning in *Barnett* to address conflicts between an accommodation and CBA provisions, often holding that employers need not provide an accommodation that contradicts provisions of a CBA or any other non-discriminatory policy.[148]

One arbitrator foreshadowed the Supreme Court's reasoning in *Barnett* when directing the moulding company (discussed above) to allow the grievant to apply for an open position, but reserved the employer's right to discharge for just cause if another more senior employee were to bid for that position.[149] Interestingly, this is the only award, of the 115 reviewed, that involved a grievant seeking a transfer where the arbitrator considered the seniority rights of other employees under the CBA.[150] In comparison, eight of the eleven awards resolving grievances made by coworkers alleged that their seniority rights were violated by a transfer of an employee with a disability into a position to which they were entitled; the remaining three grievances made by coworkers concerned shift assignments not based on seniority.[151]

These awards typically follow the Supreme Court's reasoning in *Barnett,*[152] even those that preceded that decision, in giving deference to the seniority rights of coworkers at the expense of the employee seeking a transfer as an accommodation. For example, one award sustained the grievance of a more senior employee who was not awarded a promotion because the position was given to an employee with a

146. *Id.* at 741 ("[T]he [CBA] itself 'provides for the mechanism' to enable Grievant to have a full load upon his transfer . . . .").

147. 535 U.S. 391, 397 (2002).

148. *See, e.g.*, Hedrick v. W. Reserve Care Sys., 355 F.3d 444, 457 (6th Cir. 2004).

149. *Ohio Moulding Corp.*, 1996 Lab. Arb. Supp. (BNA) at 117047.

150. *See infra* Appendix A.

151. *Id.*

152. *Barnett*, 535 U.S. at 407.

disability.[153] The arbitrator explained, in line with the *Barnett* decision that would follow eight years later, that an employer "may justify a failure to accommodate a disabled employee if such accommodation would violate an existing collective bargaining agreement."[154]

These awards also allow for a transfer as an accommodation that conflicts with seniority rights of other employees, if seniority has not consistently determined transfers in the past. For example, a transfer to light duty was allowed as an accommodation, despite the CBA's bidding process based on seniority, where other employees had been transferred outside of the bidding process in the past.[155] This approach is consistent with the *Barnett* Court's subsequent recognition that a transfer can be a reasonable accommodation despite the seniority of a coworker, if the employer did not consistently allow transfers based on seniority in the past.[156]

Grievants seeking a transfer as an accommodation will find support in a CBA if their seniority or other transfer procedures, or even past practice, support their request. However, unless the parties create some special consideration for employees seeking to transfer because of their disabilities, a grievance will likely be denied if it seeks a transfer that would interfere with the contractual rights of a coworker, or is otherwise not allowed under the CBA.

C. Leave of Absence

If an employee cannot find another position that she can perform, she may seek a leave of absence as an accommodation. Leave is often required as an accommodation where the employee can provide a fairly specific duration and the absence would not otherwise impose an undue hardship on the employer.[157] Of the 104 arbitration awards

153. Olin Corp. v. Lake Charles Metal Trades Council, 103 Lab. Arb. Rep. (BNA) 481, 483 (1994) (Helburn, Arb.).

154. *Id.*; *see also* Thomson Consumer Elecs., Inc. v. IUE-CWA, 103 Lab. Arb. Rep. (BNA) 977, 980 (1994) (Duff, Arb.) (Employer "lacked the power to void the utilization of seniority rights by exercise of any unilateral displacement discretion which it arrogated to itself."); Alcoa Bldg. Prods. v. Alum., Brick & Glass Workers Int'l Union Local 117, 104 Lab. Arb. Rep. (BNA) 364, 368 (1995) (Cerone, Arb.) (Employer is not required to bump another employee to accommodate through transfer and "employer should consult with the union to work out an acceptable accommodation.").

155. Nat'l Castings, Inc. v. UAW, Local 477, 1996 Lab. Arb. Supp. (BNA) 116381 (1996) (Hoffman, Arb.).

156. *Barnett*, 535 U.S. at 405.

157. *See, e.g.*, Rascon v. U.S.W. Commc'ns, Inc., 143 F.3d 1324, 1334 (10th Cir. 1998) (leave of definite duration was reasonable); Cleveland v. Fed. Express Corp., 83 F. App'x 74, 78 (6th Cir. 2003) (considering costs associated with leave as accommodation). *See*

reviewed concerning grievances by employees seeking accommodations, 14 (13%) employees sought leave as an accommodation.[158] However, only nine awards actually determined whether the grievant was entitled to leave as an accommodation.[159] Of those awards, the distribution of authorities relied upon by the arbitrators is shown in the chart below:

Table 6: Request for Leave Disputes

Awards Involving Requests for Leave as an Accommodation	Applying ADA Only	Applying CBA Only	Applying ADA & CBA	Total Awards
Awards for Grievant	0 (0%)	4 (80%)	1 (20%)	5 (56%)
Awards for Employer	0 (0%)	1 (25%)	3 (75%)	4 (44%)
Total Awards	0 (0%)	5 (56%)	4 (44%)	9

Source: data taken from arbitration cases in Appendix A; calculations by authors.

This distribution was surprising since the ADA does provide for leave as a reasonable accommodation, but more arbitrators found in favor of grievants seeking leave based only on the CBA.

An employer's leave policy is sometimes persuasive to courts determining whether a particular amount of leave is a reasonable accommodation.[160] Some courts may find that leave is unreasonable even if required by an employer's policy[161] or comports with past practice.[162] Other courts refuse to defer automatically to an employer's policy in determining whether leave is a reasonable accommodation.[163]

In contrast to these different approaches in the courts, an arbitrator often will rely on a CBA's leave provision in determining whether an employee's request for leave is a reasonable accommodation.[164] On the one hand, the CBA may support the grievant's request for

generally Stacy A. Hickox & Joseph M. Guzman, *Leave as an Accommodation: When is Enough, Enough?*, 62 CLEV. ST. L. REV. 437, 452–63, 473–76 (2014).

158. *See infra* Appendix A.

159. *See infra* Table 6.

160. *See, e.g.*, Crano v. Graphic Packaging Corp., 65 F. App'x 705 (10th Cir. 2003) (leave beyond one year allowed by employer's policy was unreasonable).

161. *See* Myers v. Hose, 50 F.3d 278, 283–84 (4th Cir. 1995).

162. Walton v. Mental Health Ass'n, 168 F.3d 661, 664–65 (3d Cir. 1999).

163. *See, e.g.*, Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999). *See generally* Hickox & Guzman, *supra* note 157, at 463–71.

164. Hous. Auth. of Louisville v. Serv. Emps. Int'l Union Local 557, 111 Lab. Arb. Rep. (BNA) 121, 124 (1998) (Heekin, Arb.).

leave. A claim for leave was upheld in one award, for example, even where the CBA gave the employer discretion to approve extensions of leave, since the employer "may not arbitrarily refuse to extend the leave" based only on its "determination that it had been more than accommodating toward an employee who had not reported to work for over one (1) year and who was unlikely to report in the foreseeable future."[165] This contractual interpretation, without any reference to the ADA, gave the grievant a better result than she would have secured under the ADA, which has never been interpreted to require indefinite periods of leave as an accommodation.[166]

In interpreting a more specific leave provision allowing leave for "good cause," an award upheld the grievance of an employee with a disability who needed more than six months of leave.[167] The award was based on the employer's past practice of not consistently discharging other employees who used more than six months of leave, and the employer's failure to ask the employee for a specific return to work date.[168] The arbitrator hinted at an ADA-like undue burden analysis by explaining that the employer could have hired someone to replace the grievant while he was on leave, since the grievant was not being paid.[169]

Conversely, a CBA leave provision limiting leaves of absence to one year undermined the grievance of an employee who needed more than one year of leave.[170] The arbitrator proclaimed the employer's authority to promulgate "reasonable employee conduct rules" and referred to "arbitral law."[171] Yet the analysis, which found leave of an unlimited duration would be unreasonable, closely followed ADA

165. Timberline Packaging, Inc. v. PACE Local 2-0441, 2000 Lab. Arb. Supp. (BNA) 108346 (2000) (Dissen, Arb.).

166. Hickox & Guzman, *supra* note 157, at 457–63.

167. Magnolia Mktg. Co. v. Teamsters Tobacco Workers Union, Local 270, 107 Lab. Arb. Rep. (BNA) 102, 109 (1996) (Chumley, Arb.).

168. *Id.*; *see also* Tecumseh Corrugated Box Co. v. PACE Local 5-1228, 113 Lab. Arb. Rep. (BNA) 94, 96 (1999) (Duff, Arb.) (CBA provision requiring reinstatement within thirty-six months on leave supported leave of lesser amount as accommodation).

169. *Magnolia Mktg. Co.*, 107 Lab. Arb. Rep. (BNA) at 109.

170. Hous. Auth. of Louisville v. Serv. Emps. Int'l Union Local 557, 111 Lab. Arb. Rep. (BNA) 121, 124 (1998) (Heekin, Arb.); *see also* Ga. Pac. Structural Panels Div. v. PACE Local 530, 1999 Lab. Arb. Supp. (BNA) 104307 (Duda, Jr., Arb.) (CBA provision regarding the loss of seniority after employee performs no work for twelve months, which undermined employee's grievance seeking reinstatement following a leave in excess of twelve months).

171. *Hous. Auth. of Louisville*, 111 Lab. Arb. Rep. (BNA) at 124.

case law deeming indefinite amounts of leave to be unreasonable as accommodations.[172]

Although the reasoning in these awards is consistent with analysis of accommodations under the ADA, these arbitrators relied almost exclusively on the contract language to either support or deny the grievance, which sought a period of leave on behalf of an employee with a disability.[173] In contrast to the mixed deference to employer policies in the federal courts, employees seeking leave as an accommodation in arbitration will benefit if the leave falls within the amount of leave provided in the CBA, but employees will likely be denied leave as an accommodation if the time exceeds the contractual benefit.[174]

III. Arbitration as a Problem Solver

Virtually all CBAs contain arbitration provisions.[175] Legal scholars have noted that in resolving discrimination claims, "internal dispute resolution and problem-solving systems can be robust, if they are designed to provide for accountability and effectiveness."[176] As a problem solver, an arbitrator can be in a good position to assess the reasonableness and potential burden of various accommodations, and to determine their effect on the rights and interests of coworkers. A review of arbitration decisions, addressing requests for accommodation for employees covered by CBAs, sheds light on the question of whether arbitration provides an effective method to resolve conflicts between requests for accommodation and contractual rights in a CBA.

General prohibitions against discrimination have been included in CBAs,[177] even before the passage of the ADA.[178] The ADA itself encourages the use of arbitration "where appropriate and to the ex-

172. Rascon v. U.S.W. Commc'ns, 143 F.3d 1324, 1334 (10th Cir. 1998).

173. *See supra* note 157–59 and accompanying text.

174. *See supra* note 164–69 (discussion and accompanying text).

175. Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513, 525 (2001) [hereinafter Hodges, *Bargaining*].

176. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479 (2001); *see also* Green, *supra* note 15, at 60.

177. N. PETER LAREAU, DRAFTING THE UNION CONTRACT: A HANDBOOK FOR THE MANAGEMENT NEGOTIATOR § 5A.10 (2015) ("It has been estimated that 94% of all collective bargaining agreements contain a non-discrimination clause."); *see also* Bureau of Nat'l Affairs, Inc., BASIC PATTERNS IN UNION CONTRACTS 127 (14th ed. 1995) [hereinafter BASIC PATTERNS] (87% of CBAs banned discrimination based on race, color, creed, sex, national origin or age, 65% extended prohibition to at least one of: political affiliation, marital status, mental or physical handicap, Vietnam veteran, and sexual preference).

178. Ann C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 U. MIAMI L. REV. 567, 618 (1994) [hereinafter Hodges, *Unionized Workplace*] ("Even before

tent authorized by law."[179] Specific incorporation of the ADA in CBAs has been less common, but even in 1995, 49 of 400 sample CBAs included a provision promising compliance with the ADA.[180]

An arbitrator may be in the best position to enforce the contractual rights and the right to accommodation for a person with a disability. At the same time, the arbitrator can still protect the contractual rights of coworkers, the result of negotiation of such conflicts by the employer and the union. Conversely, an arbitrator who fails to interpret the CBA or correctly apply the statutory protections of the ADA could severely undermine the ability of an employee to secure a reasonable accommodation. This review attempts to answer the question of whether arbitration is the best forum to resolve potential conflicts surrounding requests for accommodation for employees covered by a CBA.

A. The Value of Arbitration First

Since the Supreme Court's endorsement of employment arbitration as an alternative forum to resolve discrimination claims, employers saw even more value in ensuring that statutory claims would be adjudicated under arbitration clauses in CBAs.[181] Even before the *Pyett* decision, experts recognized the value of arbitration for employers, including avoidance of litigation costs and publicity of allegations of bias, as well as taking advantage of an arbitrator's flexibility in granting relief.[182] Arbitration is arguably less costly and resolves disputes more quickly than litigation.[183]

Employees with discrimination claims may also appreciate the ability of arbitration to address discrimination without the stress, time commitment, and cost associated with litigation.[184] Arbitration has

passage of the ADA[,] many unions negotiated contractual protections for disabled employees.").

179. *Id.* at 622–23 (citing 42 U.S.C. § 12212 (1990).

180. BASIC PATTERNS, *supra* note 177, at 128.

181. Cole, *supra* note 4, at 871.

182. Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 826 (1992).

183. Theodore J. St. Antoine, Gilmer *in the Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 499 (2001); Michael Z. Green, *Ruminations About the EEOC's Policy Regarding Arbitration*, 11 EMP. RTS. & EMP. POL'Y J. 154, 174 (2007) [hereinafter *Ruminations*]; *see also* David B. Lipsky et al., *The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1986–2008*, 65 DISP. RESOL. J. 12 (2010); *see also* Gough, *supra* note 18, at 93.

184. *Ruminations*, *supra* note 183, at 176; *see also* Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 USF L. REV. 169, 218, 248 (1991).

been described as more accessible, particularly for employees in a union obligated to represent them, compared to limited access to federal courts to resolve a claim of discrimination,[185] and the extremely limited resources of the EEOC.[186] Some have argued that "the current judicial system fails most victims of discrimination because of its excessive waiting periods, massive procedural hurdles and the lack of lawyers willing to pursue discrimination claims."[187] Ideally, the arbitrator can construe the CBA in a way that preserves employees' statutory rights, but "the collective agreement is not usurped by the judicial process," and the process encourages settlement.[188]

B. The Union's Role in the Arbitration of ADA Claims

Despite these apparent advantages to arbitration of statutory claims, such as those arising under the ADA, labor arbitration may fail to adequately protect employees' statutory rights for several reasons. Because a union determines whether a grievance proceeds to arbitration, the discrimination claim may never receive a hearing at all, despite the desires of the employee.[189] As a creature of a CBA, arbitration cannot ensure the appropriate balancing of conflicting sets of rights between the grievant and other union-represented employees.[190] Even if the union decides to take the grievance alleging discrimination to arbitration, the union's representative at arbitration may not adhere to the same professional standards as an attorney, and the arbitration need not be equivalent to a judicial proceeding to meet the union's duty of fair representation.[191]

185. Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping It Lawful*, 60 CASE W. RES. L. REV. 629, 636–37 (2010); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J. 44, 47 (Nov. 2003–Jan. 2004) (middle and lower-income employees have less access to the courts than higher-paid employees); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. 8, 10–11 (2003) (most employees below the $60,000 income level cannot get into court); *see also* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 419 (2007).

186. St. Antoine, *supra* note 185, at 637–38.

187. Moar, *supra* note 59, at 58.

188. Rabin, *supra* note 184, at 248.

189. Hyde, *supra* note 6, at 977–78; *see also* Hodges, *Bargaining*, *supra* note 175, at 534. *But see* Kravar v. Triangle Servs., Inc., No. 1:06–cv–07858–RJH, 2009 U.S. Dist. LEXIS 42944, at *1 (S.D.N.Y. May 19, 2009) (no waiver where union refuses to invoke arbitration).

190. Rabin, *supra* note 184, at 218.

191. Hodges, *Protecting Unionized Employees*, *supra* note 33, at 146–48; *see, e.g.*, Moore v. Duke Power Co., 971 F. Supp. 978, 979–80 (W.D.N.C. 1997) (union did not breach its duty to fairly represent the employee by failing to raise disability discrimination claim in arbitration, but employee still waived right to raise disability discrimination claim in court).

A union represents the potentially competing interests of employees with statutory claims and the general union membership. In deferring to arbitration in discrimination claims, the Supreme Court still noted concerns that a union would act upon the collective interest of the union, subordinating the interests of the individual employee claiming discrimination.[192] The individual claim of discrimination may compete with the more general union goals and objectives, especially during the negotiations of the CBA.[193] More specifically, the union's pursuit of a discrimination claim may conflict with its maintenance of a collaborative relationship with the employer.[194]

The union's representation of a member with a statutory claim using the union's limited resources could engender resentment among other union members.[195] In general, union members may oppose mandatory arbitration of discrimination claims because "civil rights claims tend to engender hostilities and animosity among union members."[196] Union members may view civil rights claims as a process of giving preference to various union members based on their membership in a protected class.[197] As noted by the Supreme Court, in limiting the effect of an arbitration award in a subsequent civil rights claim, "[t]he union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may represent the employee's grievance less vigorously, or make different strategic choices, than would the employee."[198]

The dilemma faced by a union, representing both the employee seeking an accommodation and her coworkers, is illustrated in the arbitration award against Mead Products.[199] Prior to the filing of a grievance on behalf of employees who were bumped by a less senior employee with a disability, the union had supported the employee with a disability in his request for an accommodation that involved bumping another more senior employee.[200] After the employer implemented the accommodation, the union filed a grievance on behalf of

192. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 270–71 (2009).

193. Floyd D. Weatherspoon, *Incorporating Mandatory Arbitration Employment Clauses into Collective Bargaining Agreements: Challenges and Benefits to the Employer and the Union*, 38 DEL. J. CORP. L. 1025, 1059 (2014).

194. *Id.* at 1069.

195. *Id.*

196. *Id.* at 1034.

197. *Id.*

198. McDonald v. City of W. Branch, 466 U.S. 284, 291 (1984).

199. Mead Prods. v. United Paperworkers Int'l Union, Local 291, 114 Lab. Arb. Rep. (BNA) 1753, 1760 (2000) (Nathan, Arb.).

200. *Id.* at 1755.

the bumped coworker, and the employer sustained the grievance, only to have the union object to the employer's position that anyone who could not physically perform a job for which they were technically qualified would be laid off, and the union then refused to negotiate with the employer to find a mutually satisfactory solution.[201] The arbitrator resolved the union's dilemma by enforcing the language of the CBA in favor of the more senior coworkers.[202]

In contrast to the concerns about a union's competing roles, some have observed that a union can resolve and reach a compromise among the "inherent tension or disharmony between employees' collective and individual interests and unions' records of majoritarian preferences." Individual interests or rights are not necessarily subordinated to majority preferences, and a union may be in a good position to synthesize the federal policies prohibiting discrimination with policy favoring grievance arbitration to resolve disputes.[203] As observed by one expert, "[m]aking hard choices is nothing new for unions, which must constantly choose between conflicting interests."[204]

Despite these potentially competing interests, some union members may understand that advocacy for individuals' rights will benefit all members.[205] One arbitration award illustrates the union's interest in enforcing the CBA even if a member's rights are not specifically at stake. A county employer demoted an employee with a disability as an accommodation because he could not perform his previous position, but retained his salary to "minimize the financial impact" of the accommodation.[206] Because this salary retention violated the CBA, the union grieved it, putting the union "in the awkward position of arguing that an advantage being enjoyed by one of its members should be taken away."[207] The grievance was sustained, to the detriment of the employee with a disability.[208]

The union must resolve the potentially competing interests of an employee with a disability who seeks an accommodation and other employees who could potentially be negatively affected by that accommodation. A union must face the potential for grievances by employ-

201. *Id.* at 1756–57.
202. *Id.* at 1758–60.
203. Plass, *supra* note 182, at 827–28.
204. Rabin, *supra* note 184, at 253.
205. Weatherspoon, *supra* note 193, at 1035.
206. AFSCME Council No. 65 v. Wright Cty., 1998 Lab. Arb. Supp. (BNA) 104471 (1998) (Neigh, Arb.).
207. *Id.*
208. *Id.*

ees affected by a request for accommodation. Of the cases reviewed involving grievances by an employee without a disability—ten out of eleven involved interpretation of the CBA by an arbitrator[209]—interpretation that could have been accomplished through negotiation.

C. Substantive Outcomes in Discrimination Awards

Experts hold a variety of opinions regarding the impact of arbitration on the substantive rights of employees claiming discrimination. Limitations on judicial review of arbitration awards make it important that the arbitrator interprets and applies the statutes correctly.[210] Some experts worry that claimants in arbitration will be less successful and win lower awards than they would in court.[211] Others have found that the win rates for employees' statutory claims are comparable in arbitration and litigation,[212] and argue that arbitrators are equally as experienced and qualified as judges to apply antidiscrimination statutes to employees' claims.[213]

Quantitative studies have revealed a variety of results regarding the substantive outcomes in arbitration awards. A 2013 study of labor arbitration awards in discrimination claims found that the union prevailed in 57 cases, or approximately 36%, and lost 103, or approximately 64%.[214] Comparatively, a 2014 survey of plaintiffs' attorneys found a "win rate" of 45% for claims taken to arbitration, compared to a win rate of 63% of claims tried in civil litigation,[215] and an earlier study found a win rate of 21-27% for employees under employer-created arbitration agreements.[216] This grievant success rate compares fa-

209. *See infra* Appendix A.

210. Shelley McGill & Ann Marie Tracey, *Building a New Bridge Over Troubled Waters: Lessons Learned from Canadian and U.S. Arbitration of Human Rights and Discrimination Employment Claims*, 20 CARDOZO J. INT'L & COMP. L. 1, 68 (2011).

211. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5–6, 8–9 (2011); *see* Eisenberg & Hill, *supra* note 185, at 45, 53.

212. Cole, *supra* note 4, at 862–63.

213. *Id.* at 865; *see also* David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment:* 14 Penn Plaza v. Pyett, 19 CORNELL J.L. & PUB. POL'Y 429, 451 (2010).

214. Levinson, *supra* note 10, at 837.

215. Gough, *supra* note 18, at 105.

216. Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, 23 N.Z. J. INDUS. RELS. 5, 16 (1998); Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA 303, 323 (Samuel Estreicher & David Sherwyn eds., 2004); Alexander J.S. Colvin & Kelly Pike,

vorably to overall win rates for discrimination claims in federal court, where employees find it difficult to survive employers' motions for summary judgment.[217]

The reasoning used by arbitrators also varies widely. The same 2013 labor arbitration report reviewed 111 awards concerning statutory ADA rights in which 71 of those cases cited legal authorities other than the statute.[218] Of those 111 awards, 52 cited relevant case law, 13 cited the EEOC guidelines or regulations, and 26 cited other arbitration decisions.[219] Additionally, 17 decisions cited a treatise or other secondary source, while 40 decisions cited only the relevant statute or no legal authority at all.[220]

This research expands on previous studies and is based on a review of 104 arbitration awards involving claims by employees with disabilities seeking accommodation, as well as 10 grievances filed by coworkers who believed that an accommodation interfered with their contractual rights.[221] These awards provide additional insight into the potential role for arbitration in resolving requests for accommodation. In particular, the awards demonstrate the different frameworks used by arbitrators, including contractual language, statutory protections, and a combination of both. Additionally, the reasoning behind these awards demonstrates that arbitrators generally comply with case law—developed under application of the ADA—in regard to accommodations.

Conclusion

Arbitration can help resolve disputes concerning the essential job duties of a position, which in turn can define what accommodations are reasonable for an employee with a disability. Essential duties can be clarified through arbitration through consideration of evidence of what duties are essential, and requiring that employers complete a thorough process to identify those essential duties. In addition, arbitration can resolve disputes concerning an employee's ability to perform those essential duties.

Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?, 29 OHIO ST. J. ON DISP. RESOL. 59, 74 (2014).

217. Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 48–49 (2005).

218. Levinson, *supra* note 10, at 830.

219. *Id.*

220. *Id.*

221. *See infra* Appendix A.

Beyond the definition of essential job duties, arbitrators can also play a role in determining whether a transfer or a period of leave is a reasonable accommodation. Arbitrators that have applied the ADA to accommodation requests have closely followed analogous court decisions that have determined whether transfer or leave is reasonable or impose an undue hardship under the ADA. However, if a CBA includes specific language limiting an employer's ability to transfer an employee—such as with a seniority provision or limits on leave—then the grievant will find it difficult to obtain the transfer or leave that she might otherwise be entitled under the ADA.

These awards illustrate the importance of negotiating a CBA that empowers an arbitrator to interpret the CBA in conformity with the obligations of the ADA. Without such authority, the parties will forego the benefits of arbitration, because the employee will likely be allowed to file a separate ADA claim in federal or state court. Moreover, the parties to a CBA could find themselves liable for CBA provisions that produce a disparate impact on employees with disabilities. In addition, empowering an arbitrator to interpret both the CBA and the ADA allows the arbitrator to resolve potential conflicts between those two sources of employees' rights, considering both the intention of the parties to the CBA and their obligations under the ADA.

The role of negotiation in resolving potential conflicts between contractual rights and the ADA is illustrated by several awards enforcing the CBA-protected seniority rights of employees seeking to retain their positions given to employees with disabilities. In these cases, arbitrators explained that the employer would need to negotiate for the right to unilaterally remove employees from positions without regard to their seniority.[222] This advice reflects the duty of the employer under the ADA to interact with the employee with a disability who is in need of an accommodation.[223] One award explains that "[t]he ADA requires the Company to notify the Union, as well as to meet and discuss any changes that would occur as a result of ADA."[224] That arbi-

222. Thomson Consumer Elecs., Inc. v. IUE-CWA, 103 Lab. Arb. Rep. (BNA) 977, 981 (1994) (Duff, Arb.); *see also* Clark Cty. Sheriff's Dep't v. FOP, 102 Lab. Arb. Rep. (BNA) 193, 197 (1994) (Kindig, Arb.) (employer should negotiate with union to find "agreed upon solution that is compatible with the Agreement and the law."); Alcoa Bldg. Prods. v. Alum., Brick & Glass Workers Int'l Union Local 117, 104 Lab. Arb. Rep. (BNA) 364, 368 (1995) (Cerone, Arb.) ("[E]mployer should consult with the union and try to work out an acceptable accommodation.").

223. 29 C.F.R. § 1630.2(o)(3) (2012).

224. Nat'l Castings, Inc. v. UAW, Local 477, 1996 Lab. Arb. Supp. (BNA) 116381 (1996) (Hoffman, Arb.).

trator went on to suggest that if the union opposes the employer's practice of transferring employees with disabilities as accommodations, "its remedy may be at the bargaining table to propose changes, and to clarify the interaction between job transfers for light duty and job transfers that are accommodating permanent disabilities."[225]

The parties to a CBA can avoid a potential disparate impact claim and provide clearer direction to an arbitrator by considering requests for accommodations when negotiating relevant contract provisions. For example, a CBA could define or at least include a requisite process for determining the scope of the essential job duties for various positions, and a second process to determine whether an employee can perform those duties. Similarly, the conflict between seniority and transfer requests as accommodations can be resolved by preemptively negotiating the balance between the interests of the person seeking the transfer as an accommodation and other more senior employees. The parties can also consider exceptions to a general leave policy that would apply to requests for leave as an accommodation.

This type of negotiation will help to avoid disputes when an individual request for accommodation is made. Litigation will be less likely, and the person with a disability is more likely to be accommodated and remain as a productive member of the labor force. Such negotiations will help to fulfill the main goal of the ADA, while still giving the parties to a CBA the flexibility to arrange accommodations that fit a particular workplace.

In addition to resolving potential conflicts between a CBA and ADA rights, this review of arbitration awards demonstrates the potential for arbitrators to resolve claims for accommodation under the ADA in a fair manner, to protect the interests of both the employer and the employee seeking the accommodation. An arbitrator may not realize this potential if the parties do not authorize full application of the ADA. But with such authority, numerous arbitrators have demonstrated the ability to apply the ADA in a manner consistent with judicial interpretations of the duty to accommodate.

This review demonstrates that not all arbitrators have explored the potential to require alternative accommodations, such as leave of absence for an employee who cannot currently perform her job duties. If these alternatives are presented to the arbitrator and the arbitrator has the authority to interpret and apply the ADA, arbitrators are capable of reaching a fair outcome for both the employer and the

225. *Id.*

employee with a disability. Such outcomes should expand the opportunities for people with disabilities to participate in the labor market and realize their full potential.

Appendix A

List of awards reviewed and analyzed by authors.

No.	Name of Arbitration Case
1.	U.S. Army v. Am. Fed'n of Gov't Emps., 136 Lab. Arb. Rep. (BNA) 190 (2016) (Frockt, Arb.).
2.	Cornerstone Chem. Co. v. United Steelworkers Local 13-447, 135 Lab. Arb. Rep. (BNA) 1028 (2015) (Williams, Arb.).
3.	Dep't of Homeland Sec. v. NBPC Local 1929, 135 Lab. Arb. Rep. (BNA) 57 (2015) (Alpern, Arb.).
4.	Olson Steel v. Shopmen Iron Workers Local 790, 134 Lab. Arb. Rep. (BNA) 1782 (2015) (Staudohar, Arb.).
5.	Dep't of Justice v. Council of Prison Locals, Local 1616, 134 Lab. Arb. Rep. (BNA) 1509 (2015) (Daly, Arb.).
6.	AT&T Sw. Bell Tel. Co. v. Commc'n Workers, Dist. 6, 135 Lab. Arb. Rep. (BNA) 275 (2015) (Nicholas, Arb.).
7.	Titan Tire Corp. v. United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Local 745, 135 Lab. Arb. Rep. (BNA) 235 (2015) (Szuter, Arb.).
8.	U.S. Steel Corp. v. United Steelworkers Local 4134, 134 Lab. Arb. Rep. (BNA) 1759 (2015) (Das, Arb.).
9.	CH2M-WG Idaho, L.L.C. v. United Steelworkers Local 652, 134 Lab. Arb. Rep. (BNA) 876 (2014) (DiFalco, Arb.).
10.	Teamsters, 2014 Lab. Arb. Supp. (BNA) 165915 (2014) (Tillem, Arb.).
11.	I.A.F.F., 2013 Lab. Arb. Supp. (BNA) 148147 (2013) (Daly, Arb.).
12.	Nashville Symphony Ass'n v. Nashville Musicians Ass'n, Local 257, 132 Lab. Arb. Rep. (BNA) 174 (2013) (Ruben, Arb.).
13.	Int'l Bhd. of Elec. Workers, 2012 Lab. Arb. Supp. (BNA) 148860 (2012) (Grossman, Arb.).
14.	Coreslab Structures, Inc. v. Int'l Bhd. of Teamsters, Local 41, 129 Lab. Arb. Rep. (BNA) 329 (2011) (Pratte, Arb.).
15.	Office of the State Emp'r v. State Emps. Ass'n, 2011 Lab. Arb. Supp. (BNA) 149630 (Townsend, Arb.).
16.	St. Emps. Ass'n, 2011 Lab. Arb. Supp. (BNA) 149340 (2011) (Collins, Arb.).
17.	Warren, Ohio Sheriff's Office v. Warren Cty. Deputy Sherrif's Benevolent Ass'n, 128 Lab. Arb. Rep. (BNA) 787 (2010) (Bell, Arb.).
18.	Teamsters, 2010 Lab. Arb. Supp. (BNA). 162471 (2010) (Skonier, Arb.).
19.	Kroger Ltd. P'ship I v. UFCW Local 227, 2010 Lab. Arb. Supp. (BNA) 119162 (2010) (Nicholas, Arb.).
20.	John Muir Health Sys. v. Serv. Emps. Int'l Union, 126 Lab. Arb. Rep. (BNA) 257 (2009) (Staudohar, Arb.).
21.	Milwaukee Transport Servs. v. Amalgamated Transit Union, Local 998, 2009 Lab. Arb. Supp. (BNA) 119548 (2009) (Vernon, Arb.).
22.	City of Minneapolis, Pub. Works Dep't v. IBEW Local 292, 125 Lab. Arb. Rep. (BNA) 558 (2008) (Befort, Arb.).
23.	City of Oak Forest v. Teamsters, Local 726, 125 Lab. Arb. Rep. (BNA) 683 (2008) (Wolff, Arb.).
24.	Safeway Corp. v. Teamsters Local 455, 2008 Lab. Arb. Supp. (BNA) 119039 (2008) (Wages, Arb.).

25. Kans. City Power & Light v. Int'l Bhd. of Elec. Workers Local 412, 123 Lab. Arb. Rep. (BNA) 135 (2006) (Pratte, Arb.).
26. Pittsburg & Midway Coal Mining Co. v. United Mine Workers, Local 1332, Dist. 22, 123 Lab. Arb. Rep. (BNA) 239 (2006) (West, Arb.).
27. Com. Cleaning Sys., Inc. v. Serv. Emps. Int'l Union, Local 105, 122 Lab. Arb. Rep. (BNA) 1383 (2006) (McCurdy, Arb.).
28. Am. Red Cross v. Mich. Council of Nurses and Healthcare Prof'ls Local 79, 122 Lab. Arb. Rep. (BNA) 1441 (2006) (McDonald, Arb.).
29. AT&T Corp. v. Commc'n Workers, 2005 Lab. Arb. Supp. (BNA) 115056 (2005) (Goldstein, Arb.).
30. Del Monte Foods v. UFCW Local 325, 121 Lab. Arb. Rep. (BNA) 1100 (2005) (Miles, Arb.).
31. Cytec Indus., Inc. v. PACE Local 4-447, 2005 Lab. Arb. Supp. (BNA) 111342 (2005) (Crow, Arb.).
32. Canton Twp. Bd. of Supervisors v. GMP Int'l Union, Local 272, 121 Lab. Arb. Rep. (BNA) 259 (2005) (Dissen, Arb.).
33. UAW, Local Union 2488 v. Premier Mfg. Support Servs., 2005 Lab. Arb. Supp. (BNA) 111197 (2005) (Hetrick, Arb.).
34. AFSCME v. City of Jackson, 2005 Lab. Arb. Supp. (BNA) 111184 (2005) (Goldberg, Arb.).
35. BWXT Pantex v. Metal Trades Council, 120 Lab. Arb. Rep. (BNA) 385 (2004) (Jennings, Arb.).
36. S. Peninsula Hosp. v. Gen. Teamsters, Local 959, 120 Lab. Arb. Rep. (BNA) 673 (2004) (Landau, Arb.).
37. Techneglass, Inc. v. GMP Int'l Union, Local 306, 120 Lab. Arb. Rep. (BNA) 722 (2004) (Dean, Arb.).
38. SuperValu, Inc. v. Teamsters, Local 120, 119 Lab. Arb. Rep. (BNA) 1377 (2004) (Daly, Arb.).
39. Roll Coater, Inc. v. United Steelworkers, Local 1191-14, 2004 Lab. Arb. Supp. (BNA) 110759 (2004) (Fullmer, Arb.).
40. Ohio v. Ohio Civ. Serv. Emps. Ass'n/AFSCME, Local 11, 118 Lab. Arb. Rep. 1361 (2003) (Murphy, Arb.).
41. Twinsburg Bd. of Educ. v. Twinsburg Support Staff, 119 Lab. Arb. Rep. (BNA) 54 (2003) (Chattman, Arb.).
42. Noranda Alum., Inc. v. United Steelworkers, 119 Lab. Arb. Rep. (BNA) 217 (2003) (Gordon, Arb.).
43. Parkersburg Bedding v. Mid-Atlantic Reg'l Joint Bd., 118 Lab. Arb. Rep. (BNA) 1788 (2003) (Zobrak, Arb.).
44. United Refining Co. v. Operating Eng'rs Local 95, 2003 Lab. Arb. Supp. (BNA) 110488 (2003) (Miller, Arb.).
45. Franklin Elec. Co. v. IUE-CWA, Local 84-802, 118 Lab. Arb. Rep. (BNA) 513 (2003) (Lalka, Arb.).
46. City of Selah v. Gen. Teamsters Local 524, 2002 Lab. Arb. Supp. (BNA) 119948 (2002) (Smith, Arb.).
47. Rootstown Local Sch. Dist. v. Ohio Ass'n of Pub. Sch. Emps., Chapter 569, 117 Lab. Arb. Rep. (BNA) 1217 (2002) (Fullmer, Arb.).
48. Teamster Local No. 377 v. Venture Indus., 2002 Lab. Arb. Supp. (BNA) 109777 (2002) (Goldberg, Arb.).

49. Keebler Co. v. Bakery & Confectionery Workers, Local 184-L, 2002 Lab. Arb. Supp. (BNA) 109319 (2002) (Marino, Arb.).
50. Dep't of Hous. & Urban Dev. v. Am. Fed'n of Gov't Emps., Local 3475, 116 Lab. Arb. Rep. (BNA) 1364 (2002) (McReynolds, Arb.).
51. Bowater, Inc. v. PACE Local 5-790, 116 Lab. Arb. Rep. (BNA) 382 (2001) (Harris, Arb.).
52. Am. Crystal Sugar Co. v. BCTGM, 2001 Lab. Arb. Supp. (BNA) 109041 (2001) (Bognanno, Arb.).
53. Empire Coke Co. v. United Steelworkers, Local 12768, 2001 Lab. Arb. Supp. (BNA) 109273 (2001) (Giblin, Arb.).
54. Maint. & Indus. Servs., Inc. v. United Steelworkers, Local 1055L, 116 Lab. Arb. Rep. (BNA) 293, 297 (2001) (Hart, Arb.).
55. City of Erie v. Gen. Teamsters Local 397, 115 Lab. Arb. Rep. (BNA) 1409, 1414, 1417 (2001) (D'Eletto, Arb.).
56. Genesee Cty. Cmty. Mental Health Servs. v. Mich. Council 25 AFSCME, Local 496, 2000 Lab. Arb. Supp. (BNA) 108512 (2000) (Daniel, Arb.).
57. Mead Prods. v. United Paperworkers Int'l Union, Local 291, 114 Lab. Arb. Rep. (BNA) 1753 (2000) (Nathan, Arb.).
58. King Soopers, Inc. v. Commercial Workers, Local 7, 115 Lab. Arb. Rep. (BNA) 207 (2000) (Watkins, Arb.).
59. Timberline Packaging, Inc. v. PACE Local 2-0441, 2000 Lab. Arb. Supp. (BNA) 108346 (2000) (Dissen, Arb.).
60. Sherwin-Williams Co. v. Int'l Bhd. of Painters, Local 1961, 113 Lab. Arb. Rep. (BNA) 1184 (2000) (Statham, Arb.).
61. S.F. Unified Sch. Dist. v. United Educators, 114 Lab. Arb. Rep. (BNA) 140 (2000) (Riker, Arb.).
62. GTE-N., Inc. v. IBEW, Local 1106, 113 Lab. Arb. Rep. (BNA) 1047 (1999) (Daniel, Arb.).
63. GTE N., Inc. v. IBEW Local 986, 113 Lab. Arb. Rep. (BNA) 665 (1999) (Brodsky, Arb.).
64. Parmadale v. Serv. Emps. Int'l Union, Dist. 1199, 1999 Lab. Arb. Supp. (BNA) 108234 (1999) (Ruben, Arb.).
65. USPTO v. POPA, 1999 Lab. Arb. Supp. (BNA) 107763 (1999) (Moore, Arb.).
66. UFCW Local 135 v. Lucky Stores, 1999 Lab. Arb. Supp. (BNA) 107868 (1999) (Grabuskie, Arb.).
67. Interstate Brands Corp. v. BCTGM, Local 149, 113 Lab. Arb. Rep. (BNA) 161 (1999) (Howell, Arb.).
68. Case Corp. v. United Steelworkers, Local 1958-02, 113 Lab. Arb. Rep. (BNA) 1 (1999) (Thornell, Arb.).
69. Maint. & Indus. Servs., Inc. v. United Steelworkers, Local 1055L, 1999 Lab. Arb. Supp. (BNA) 104495 (1999) (Hart, Arb.).
70. Allegheny-Ludlum Steel W. Leechburg Plant v. United Steelworkers, Local Union 1138, 1999 Lab. Arb. Supp. (BNA) 108050 (1999) (Vernon, Arb.).
71. Tecumseh Corrugated Box Co. v. PACE Local 5-1228, 113 Lab. Arb. Rep. (BNA) 94 (1999) (Duff, Arb.).
72. Ga. Pac. Structural Panels Div. v. PACE Local 530, 1999 Lab. Arb. Supp. (BNA) 104307 (Duda, Jr., Arb.).
73. L.A. Cmty. Coll. Dist. v. Am. Fed'n of Teachers Coll. Guild, Local 1521, 112 Lab. Arb. Rep. (BNA) 733 (1999) (Kaufman, Arb.).

74. AFSCME Council No. 65 v. Wright Cty., 1998 Lab. Arb. Supp. (BNA) 104471 (1998) (Neigh, Arb.).
75. City of Akron v. Civil Serv. Pers. Ass'n, 111 Lab. Arb. Rep. (BNA) 705 (1998) (Franckiewicz, Arb.).
76. Mason & Hanger Corp. v. Metal Trades Council, 111 Lab. Arb. Rep. (BNA) 60 (1998) (Caraway, Arb.).
77. Hous. Auth. of Louisville v. Serv. Emps. Int'l Union Local 557, 111 Lab. Arb. Rep. (BNA) 121 (1998) (Heekin, Arb.).
78. City of Tampa v. Amalgamated Transit Union Local 1464, 111 Lab. Arb. Rep. (BNA) 65 (1998) (Hoffman, Arb.).
79. Cont., Metals & Welding, Inc. v. IUE-CWA Local 1001, 110 Lab. Arb. Rep. (BNA) 673 (1998) (Klein, Arb.).
80. City of Roswell v. United Steelworkers, 109 Lab. Arb. Rep. (BNA) 1153 (1998) (Wyman, Arb.).
81. Cty. of Sacramento v. Sacramento Cty. Emps.' Org., 109 Lab. Arb. Rep. (BNA) 440 (1997) (Gentile, Arb.).
82. Aeronautical Machinists Local Lodge No. 709 v. Lockheed Martin Aeronautical Sys., 1997 Lab. Arb. Supp. (BNA) 103167 (1997) (Brunner, Arb.).
83. BCTGM, Local 417 v. Sara Lee Bakery, 1997 Lab. Arb. Supp. (BNA) 101935 (1997) (Berquist, Abr.).
84. Flamingo Hilton-Laughlin v. Int'l Union of Operating Eng'rs, Local 501, 108 Lab. Arb. Rep. (BNA) 545 (1997) (Weckstein, Arb.).
85. Mid-Am. Energy Co. v. IBEW, Local Union No. 109, 1997 Lab. Arb. Supp. (BNA) 118090 (1997) (Berquist, Arb.).
86. Cal. Sch. Emps. Ass'n, Chapter #239 v. Amador Cty. Unified Sch. Dist., 1997 Lab. Arb. Supp. (BNA) 111721 (1997) (Larocco, Arb.).
87. Rheem Mfg. Co. v. Local 7893, United Steelworkers, 108 Lab. Arb. Rep. (BNA) 193 (1997) (Woolf, Arb.).
88. Riester & Thesmacher Co. v. Sheet Metal Workers Int'l Ass'n, Local 486, 107 Lab. Arb. Rep. (BNA) 572 (1996) (Weisheit, Arb.).
89. Magnolia Mktg. Co. v. Teamsters Tobacco Workers Union, Local 270, 107 Lab. Arb. Rep. (BNA) 102 (1996) (Chumley, Arb.).
90. Ohio Moulding Corp. v. UAW, Local 217, 1996 Lab. Arb. Supp. (BNA) 117047 (1996) (Klein, Arb.).
91. Champion Int'l Corp. v. United Paperworkers Int'l Union, Local 1137, 106 Lab. Arb. Rep. (BNA) 1024 (1996) (Howell, Arb.).
92. Nat'l Castings, Inc. v. UAW, Local 477, 1996 Lab. Arb. Supp. (BNA) 116381 (1996) (Hoffman, Arb.).
93. AFSCME Council 14, Local 2508 v. City of St. Paul, 1996 Lab. Arb. Supp. (BNA) 117294 (1996) (Berquist, Arb.).
94. Kenai Borough Emps. Ass'n v. Kenai Peninsula Borough, 1995 Lab. Arb. Supp. (BNA) 116269 (Landau, Arb.).
95. Johns Hopkins Bayview Med. Ctr., Inc. v. AFSCME, Council 67, Local 3374, 105 Lab. Arb. Rep. (BNA) 193 (1995) (Bowers, Arb.).
96. Am. Sterilizer Co. v. UAW, Local 832, 104 Lab. Arb. Rep. (BNA) 921 (1995) (Dissen, Arb.).
97. Fox River Paper Co. v. United Paperworkers Union Local 16, 104 Lab. Arb. Rep. (BNA) 871 (1995) (Suntrup, Arb.).

98. Alcoa Bldg. Prods. v. Alum., Brick & Glass Workers Int'l Union Local 117, 104 Lab. Arb. Rep. (BNA) 364 (1995) (Cerone, Arb.).
99. Consentino's Brywood Price Chopper v. UFCW Local 576, 104 Lab. Arb. Rep. (BNA) 187 (1995) (Thornell, Arb.).
100. S.F. Unified Sch. Dist. v. United Educators, 104 Lab. Arb. Rep. (BNA) 215 (1995) (Bogue, Arb.).
101. Jefferson-Smurfit Corp. v. Graphic Commc'ns Int'l Union Local 16-C, 103 Lab. Arb. Rep. (BNA) 1041 (1994) (Canestraight, Arb.).
102. Thomson Consumer Elecs., Inc. v. IUE, 103 Lab. Arb. Rep. (BNA) 977 (1994) (Duff, Arb.).
103. Meijer, Inc. v. UFCW Local 951, 103 Lab. Arb. Rep. (BNA) 834 (1994) (Daniel, Arb.).
104. USS, Edgar Thomson Plant v. United Steelworkers, Local Union 1219, 1994 Lab. Arb. Supp. (BNA) 107253 (1994) (Dybeck, Arb.).
105. Hendricson Turner Co. v. Teamsters Local 92, 1994 Lab. Arb. Supp. (BNA) 107150 (1994) (Richard, Arb.).
106. Olin Corp. v. Lake Charles Metal Trades Council, 103 Lab. Arb. Rep. (BNA) 481 (1994) (Helburn, Arb.).
107. Dinagraphics, Inc. v. United Paperworkers Int'l Union Local 98, 102 Lab. Arb. Rep. (BNA) 947 (1994) (Paolucci, Arb.).
108. Clark Cty. Sheriff's Dep't v. FOP, 102 Lab. Arb. Rep. (BNA) 193 (1994) (Kindig, Arb.).
109. Altoona Hosp. v. AFSCME, Dist. Council 83, 102 Lab. Arb. Rep. (BNA) 650 (1993) (Jones, Arb.).
110. Stone Container Corp. v. United Paperworkers Int'l Union, Local 1974, 101 Lab. Arb. Rep. (BNA) 943 (1993) (Feldman, Arb.).
111. City of Dearborn Heights v. Dearborn Heights P.S.A., 101 Lab. Arb. Rep. (BNA) 809 (1993) (Kanner, Arb.).
112. Thermo King Corp. v. United Steelworkers Local 2175, 102 Lab. Arb. Rep. (BNA) 612 (1993) (Dworkin, Arb.).
113. Multi-Clean, Inc. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. Lodge 77, Local Lodge 459, 102 Lab. Arb. Rep. 463 (1993) (Miller, Arb.).
114. Ogden Maint. Co. v. Int'l Union of Operating Eng'rs, Local 670, 101 Lab. Arb. Rep. (BNA) 467 (1993) (Harr, Arb.).
115. Cleveland Elec. Illuminating Co. v. Util. Workers, Local 270, 100 Lab. Arb. Rep. (BNA) 1039 (1993) (Lipson, Arb.).