

**THE AMERICANS WITH DISABILITIES ACT:
EMPLOYEE RIGHT TO PRIVACY v.
UNION RIGHT TO KNOW**

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ABSTRACT

This article explores the potential conflict posed by the Americans with Disabilities Act's (ADA) concern for individual privacy rights, and the National Labor Relations Act's (NLRA) provisions for informed exclusive representation in all aspects of collective bargaining. The ADA is designed to encourage full participation of the disabled in the workplace by promising disabled employees reasonable accommodation to their needs with the assurance that their privacy rights will be protected. The NLRA, in contrast, protects the collective interests of employees in the workplace through the informed and exclusive representation of an elected bargaining agent. The apparent conflict between the goals and procedures mandated by these laws is discussed in light of judicial decisions that have weighed the individual's right to privacy against the union's right to know.

Exclusive representation has been a linchpin of the collective bargaining process outlined by the National Labor Relations Act (NLRA) [1] and its state progeny in the public sector. The goals, procedures, and provisions of the Americans with Disabilities Act (ADA) [2], however, appear at odds with collective bargaining through exclusive representation, and set the stage for conflict between the disabled employee's right to privacy and reasonable accommodation and the union's right, as exclusive bargaining agent, to know and to participate in the process of reasonable accommodation.

By law and bargaining precedent, representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit

appropriate for such purposes are the exclusive representatives of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment [1, Sec. 9 § 159(a)]. Exclusive representation precludes any third party or individual bargaining conducted without the participation of the elected bargaining representative. Potential conflict between the doctrine of bargaining agent exclusivity and an individual's right to bargain was specifically addressed in the NLRA's provision that "an individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, and if the bargaining representative has been given the opportunity to be present" [1, Sec. 9 § 159(a)].

The Americans with Disabilities Act, however, is concerned with reasonably accommodating the disabled individual in the workplace while preserving that individual's privacy rights and interests, and such confidential individualized reasonable accommodation inevitably involves policies and procedures covered by the collective bargaining agreement. The Equal Employment Opportunity Commission's (EEOC) guidelines and regulations [3] implementing the ADA acknowledge this probability and the potential for conflict between the goals of collective bargaining and the goals of the ADA, but make it clear that the collective bargaining agreement cannot be used to evade an employer's responsibilities under the ADA. This article explores the specific ADA policies and procedures that challenge traditional collective bargaining rights, and the judicial and legislative history of employee privacy rights with respect to a union's right to know and participate in all matters affecting the terms and conditions of employment.

EXCLUSIVE REPRESENTATION AND THE COURTS

Case law interpreting the NLRA has upheld the doctrine of exclusive representation as a means of maintaining labor peace and stability. In defending exclusivity, the courts have said that an employer confronted with bargaining demands from each of several minority groups would not necessarily, or even probably, be able to agree to remedial steps satisfactory to all at once, and competing claims on the employer's ability to accommodate each group's demands could only set one against the other, even if it is not the employer's intention to divide and overcome them [4].

The courts have also based their support for representational exclusivity on the union's legitimate interest in presenting a united front, and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests [4]. In short, individual

contracts, no matter what the circumstances that justify their execution, or what their terms, may not be availed of to defeat or delay the procedures prescribed by the NLRA looking to collective bargaining, or to limit or condition the terms of the collective agreement [5]. Collective bargaining agreements represent compromise between the rights of the individual and the rights of the group, and the complete satisfaction of all who are represented is hardly to be expected [6]. Whenever private contracts conflict with NLRA functions, they must yield or the act would be reduced to futility [5].

The Supreme Court, however, while protective of the doctrine of exclusivity, stopped short of saying that under no circumstances can an individual enforce an agreement *more advantageous* than a collective agreement, and found the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive and surmount collective ones [5]. An employee is not prevented from making any contract, provided it is not inconsistent with a collective bargaining contract or does not amount to or result from an unfair labor practice. In reality, though, collective bargaining looks with suspicion on such individual advantages, and sees them as disruptive to labor peace [5]. In practice, individual advantage in collective bargaining is sacrificed to collective concerns.

Under the NLRA, employers are limited in any direct dealing they may conduct with individual employees since they are not permitted to make unilateral changes in conditions of employment [1, § 8(a)(5)]. Unilateral changes (made in the course of direct dealing with individuals) are viewed as a circumvention of the duty to negotiate, which frustrates the objectives of the NLRA as much as does a flat refusal [7].

Even when the focal point of challenge to exclusive representation has been national policy against racial discrimination in employment, the Supreme Court has upheld the concept of exclusive representation. The NLRA was found not to protect independent picketing by a minority group when the collective bargaining agreement established grievance and arbitration machinery for processing any claimed contract violation, including a violation of the antidiscrimination clause [4]. The Supreme Court cited congressional, judicial, and agency policies developed to protect such minority interests, and noted that Congress implicitly imposed on a bargaining unit a duty fairly and in good faith to represent the interests of minorities within the unit [8]. The National Labor Relations Board, designated to implement the NLRA, has repeatedly taken the position that a union's refusal to process grievances against racial discrimination, in violation of that duty, is an unfair labor practice [9]. Indeed the board had ordered a union implicated by a collective-bargaining agreement in discrimination with an employer to propose specific contractual provisions to prohibit racial discrimination [10]. In view of these existing procedures and precedents, the Court felt ample safeguards were in place to protect minority interests within the context of exclusive representation.

THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act [2], like Title VII [11], addresses national labor policy and the issue of discrimination in the workplace. However, while Title VII has as its focus equality of opportunity through uniform treatment, the ADA seeks equality of opportunity through differential treatment. The ADA is designed to eliminate, as much as possible, the barriers that previously excluded disabled persons from the mainstream of American life. It prohibits discrimination against any qualified disabled individual because of the disability of such an individual with respect to job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions, and privileges of employment, and mandates whatever workplace accommodations are needed to achieve full assimilation for the disabled [2, § 12112(a)]. It is the duty of all employers covered by the ADA to make a "reasonable accommodation" to the needs of disabled persons in the workplace [2, § 12112(b)(5)]. The ADA prohibitions against discrimination have their foundation in the Rehabilitation Act of 1973 [12] addressing the rights of the disabled in the public sector. The ADA, however, mandates that the *primary* duty of *all* employers, private and public sector alike, is to make a "reasonable accommodation" to the needs of disabled persons in the workplace [2, § 12112(b)(5)]. An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would pose an undue hardship on the business [3, at III.3.1]. It is the ADA's prescription for differential accommodation and its guidelines for achieving accommodation that challenge traditional exclusive representation and traditional collective bargaining practices.

REASONABLE ACCOMMODATION

Reasonable accommodation is defined as any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity [3, at III.3.1]. An equal employment opportunity means an opportunity to attain the same level of performance or to enjoy equal benefits and privileges of employment as are available to an average, similarly situated employee without a disability [3, at III.3.3]. Specifically, the ADA requires reasonable accommodation: 1) to ensure equal opportunity in the application process; 2) to enable a qualified individual with a disability to perform the essential function of a job; and 3) to enable an employee with a disability to enjoy equal benefits and privileges of employment [3, at III.3.3]. The ADA's list of accommodations includes such bargainable issues as:

- job restructuring by reallocation or redistribution of job functions;
- altering when or how an essential job function is performed;
- providing part-time or modified work schedules;
- reassignment to a vacant position; and
- permitting use of accrued paid or unpaid leave for necessary treatment [3, at III.5.3.5].

It is obvious that the ADA's recommended approaches to reasonable accommodation deal with issues addressed in most collective bargaining agreements. The EEOC's guidelines for reasonable accommodation, however, give employers the right and duty to sidestep collective bargaining agreements if necessary in order to reasonably accommodate the disabled individual in the workplace. Although the guidelines do say that the terms of a collective bargaining agreement may be relevant in determining whether an accommodation would impose an undue hardship, the congressional committee reports accompanying the ADA advise employers and unions that they could carry out their responsibilities under the act, and avoid conflicts between the bargaining agreement and the employer's duty to provide reasonable accommodation, by adding a provision to agreements negotiated after the ADA's effective date, simply permitting the employer to take all actions necessary to comply with the act [3, at VII.7.11(a)]. The law also makes it clear that exclusive bargaining agents are covered by the ADA and have the same obligation as the employer to comply with its regulations, that is, an employer may not do anything through a contractual relationship that it cannot do directly [3, at VII.7.11(a)]. Guidelines published specifically state that an employer may not claim undue hardship solely because providing an accommodation has a negative impact on the morale of other employees [3, at III.3.9.2]. Problems of employee morale and employee negative attitudes should be addressed by the employer through appropriate consultations with supervisors and, where relevant, with union representatives [3, at III.3.7]. In the final analysis, neither union nor employer can sacrifice the due process and equal protection rights of qualified disabled individuals in the name of workplace harmony.

The EEOC's regulations require, when necessary, an informal interactive process in which the employer and the individual with a disability work together to identify an effective accommodation [3, at III.3.7]. Employers are to consult with qualified disabled individuals, but no mention is made of union participation in this process. In fact, the law's specific provision protecting the privacy interests of the disabled individual precludes union participation in the process:

Information obtained regarding the medical condition or history of the applicant is to be collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that:

- (i) supervisors and managers may be informed regarding necessary restrictions on work or duties of the employees and necessary accommodations;
- (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency aid;
- (iii) government officials investigating compliance with this Act shall be provided relevant information on request [2, § 12112(d)(3)(B)].

The exclusive bargaining representative does not fall into one of these three groups, and is therefore not legally privy to information regarding the existence or nature of a disability requiring a reasonable accommodation even if it has an impact on the existing collective bargaining agreement.

EMPLOYEE PRIVACY RIGHTS VERSUS THE UNION'S RIGHT TO KNOW

In light of the ADA's concern for the disabled employee's privacy, the stage is set for conflict between the exclusivity of collective representation and individual statutory rights. It is easy to imagine a situation in which an employee seeking reasonable accommodation for a disability would choose not to reveal that disability to anyone other than the employer who is charged by the ADA with providing reasonable accommodation and bound by its prescription for confidentiality. The law is specifically designed to address the workplace needs of those who require special medical treatment, such as cancer patients, AIDS patients, or people with mental illness; people who need rest periods (including those with MS, cancer, diabetes, respiratory conditions, or mental illness); people whose disabilities are affected by eating or sleeping schedules; and people with mobility impairments [3, at III.3.10.3]. Employees in any one of these groups could be expected to invoke the act's privacy provision to limit disclosure.

Privacy rights have historically been protected by both law and judicial precedent. The Fourth and Fifth Amendments have been described as protections against all government invasions of the sanctity of an individual's home and the privacies of life [13]. A case on point is *Griswold v. Connecticut*, in which the Supreme Court established that the First Amendment has a penumbra where privacy is protected from government intrusion [14]. The Privacy Act of 1974 is yet another legislated safeguard requiring federal agencies to keep their records with due regard for the privacy of the subjects of the records, limiting disclosure without prior consent [15].

In true privacy actions the plaintiff does not claim falsity, but rather that *true* disclosures about the plaintiff's personal life are embarrassing invasions of privacy, not newsworthy and subject to liability [16]. It is against such disclosure of embarrassing truth that the laws cited and the ADA's privacy provision guard. Even the Freedom of Information Act (FOIA), which generally provides for

public disclosure of information contained in agency files, except personnel, medical, and similar files—the disclosure of which would constitute a clearly unwarranted invasion of personal privacy [17]. Under the FOIA, if the exempt materials are inextricably intertwined with nonexempt materials, the entire document is exempt from mandatory disclosure [17]. To determine whether files are protected from disclosure under the FOIA's Exemption 6, the agency and the court reviewing an agency decision must balance the individual's right to privacy against the public's right to information [18].

With this concern for privacy in mind, arbitrators and courts alike have balanced privacy interests against the exclusive bargaining unit's right to disclosure in several significant cases that define the judiciary's posture in this area. *In re Veterans Affairs Medical Center, San Antonio, Texas and American Federation of Government Employees, Professional Local 4032*, is a case in which a hospital pharmacist challenged his fourteen-day suspension for copying a patient's records and giving them to a union steward [19]. The union steward wanted to use the records in connection with the pharmacist's grievance protesting discipline for an alleged error made while dispensing a drug. The pharmacist had released the records to the steward without authorization from either his supervisor or the patient, and without deleting the patient's name and other confidential information. The records in question were collected for medical purposes, although the pharmacist used copies of these medical records to support his union grievance.

The union in this case argued there are two exceptions to the Privacy Act that authorize a union representative to have access to medical documents without consent or permission where they are needed to pursue official union business. These are the "need to know" and "routine use" exceptions. However, the case arbitrator found no authority in any of the Privacy Act's twelve exceptions for a union representative to have access to these documents without the patient's consent and permission.

Andrews v. Veterans Administration of the United States of America is a case more directly on point dealing with the release of actual employee records to the union without employee permission [20]. In this case the exclusive bargaining representative requested copies of job performance evaluations, acknowledging the need to sanitize the records to guard against identification. The bargaining representative stated she needed the evaluations in connection with a grievance the union would possibly file and to facilitate preparation for upcoming labor-management negotiations.

Several of the employees affected, on learning of the request for evaluations, asked both orally and in writing that the records not be released. The employer in this case released the records despite the employees' requests not to do so, believing the Federal Service Labor-Management Relations Act [21] required such disclosure, after proper sanitizing to preserve the anonymity of the subjects of the records.

The evaluations contained numerical ratings for factors such as integrity, emotional stability, dependability, and interpersonal relations, with an overall numerical score as well as a rating of the individual's capacity for advancement. Unfortunately, the records were improperly sanitized and released, and the employees affected alleged this disclosure was an intentional and willful violation of the Privacy Act. They claimed the release resulted in injury and damages including, but not limited to, mental distress and embarrassment, and they sought damages and attorney's fees.

The district court agreed the employees' privacy interests had been violated and this violation was substantial when balanced against the union's interest in obtaining these records. The employer appealed the district court's decision, arguing it was faced with the difficult task of reconciling the prodisclosure mandates of the Federal Service Labor-Management Relations Act and the Freedom of Information Act with the antidisclosure mandate of the Privacy Act. The employer argued that while it may have been negligent, it did not act in an intentional or willful manner. The appellate court, in reversing the district court, concluded that no willful or intentional violation of the Privacy Act had occurred, and therefore no punishment could be imposed. Citing *Parks v. United States Internal Revenue Service* [22], the court noted that for a violation of the Privacy Act to be "willful or intentional" something more than negligence is required. While premeditated malice is not required to establish a willful or intentional violation of the Privacy Act, the term "willful or intentional" clearly does require conduct amounting to more than gross negligence. In this case, the court found the Veterans' Administration's (VA) conduct fell far short of a "willful or intentional" violation of the Privacy Act. The court viewed the inadequacy of the sanitization efforts as indicative of negligence, at most, on the part of the VA, not the higher level of culpability necessary to establish liability under the Privacy Act. Having found no willful or intentional violation of the act, the court of appeals did not review the district court's balancing of the public and privacy interests at issue.

The Supreme Court, however, did address these issues in *Detroit Edison Co. v. National Labor Relations Board* [23]. In this case a union requested release of psychological aptitude test questions, actual employee answer sheets, and the scores linked with the names of employees who received them in connection with arbitration of a grievance filed on behalf of employees in the bargaining unit who had been rejected for certain job openings because of their failure to receive "acceptable" test scores. The company had administered the tests to applicants with the express promise that each applicant's test score would remain confidential. The company argued that even if the scores were relevant to the union's grievance, the union's need for the information was not sufficiently weighty to require breach of the promise of confidentiality to the examinees, breach of its industrial psychologists' code of professional ethics, and the potential embarrassment and harassment of at least some of the examinees. The company refused to release this information, maintaining that complete confidentiality of these

materials was necessary to insure the future integrity of the tests and to protect the examinees' privacy interests. The company did offer to turn over scores of any employee who signed a waiver releasing the company psychologist from his pledge of confidentiality, but the union declined to seek such releases.

The union charged that the company had violated its duty to bargain collectively under § 8(a)(5) of the National Labor Relations Act by refusing to provide relevant information needed by the union for the proper performance of its duties as the employee's bargaining representative. The National Labor Relations Board concluded that all the requested items were relevant to the grievance and ordered the company to turn over all of the materials directly to the union, subject to certain restrictions on the union's use of the information. The board, and the court of appeals, in its decision enforcing the board's order, both rejected the company's claim that employee privacy and the professional obligations of the company's industrial psychologists should outweigh the union's request for the employee-linked scores.

The Supreme Court, however, found that the board abused its remedial discretion in ordering the company to turn over this information. The Court held that a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under § 8(a)(5) turns upon "the circumstances of the particular case" [24]. The company's willingness to disclose test scores linked with the employee names only upon receipt of consents from the examinees satisfied the company's statutory obligations under § 8(a)(5) [25].

The National Labor Relations Board's position favoring the union appeared to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. In overruling the board, the Court found that such an absolute rule has never been established, and declined to adopt such a rule here. The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice, and the company presented evidence that disclosure of individual scores had in the past resulted in the harassment of some lower-scoring examinees who had, as a result, left the company [23, at 319]. The federal Privacy Act ban on disclosure of employee records without written consent has been construed to provide a valid defense to a union request for certain employee personnel data made pursuant to the terms of a public employee collective bargaining agreement [25].

In determining the balance between the privacy rights of the individual and the disclosure rights of the union in the collective bargaining process in the public sector, the ADA will join a field of conflicting pieces of legislation addressing privacy and disclosure rights and procedures.

The Privacy Act was enacted "to protect the privacy of individuals identified in information systems maintained by federal agencies by preventing the 'misuse' of that information" [26]. It states in pertinent part:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure would be required under section 552 of this title (Freedom of Information Act) [15].

The Freedom of Information Act generally provides for public disclosure of information contained in agency files, with specified exceptions including personnel, medical files, and similar files—the disclosure of which would constitute a clearly unwarranted invasion of personal privacy [17]. An agency must attempt to segregate sensitive from nonsensitive material, if a document contains both, and release the nonsensitive information [17, 18]. If the exempt materials are inextricably intertwined with the nonexempt materials, the entire document is exempt from mandatory disclosure under the Freedom of Information Act [17].

Nevertheless, under the National Labor Relations Act the duty to bargain collectively is imposed on an employer by § 8(a)(5), and under § 8(a)(1) refusal to provide relevant information needed by the union for the proper performance of its duties as the employee's bargaining representative may be construed as interfering with the employees' right to bargain collectively through representatives of their own choosing [1]. It is easy to see how these laws can conflict with each other and with the privacy provisions of the ADA.

SUMMARY DISCUSSION

In *Detroit Edison* the Supreme Court held that the company's willingness to disclose test scores linked with employee names only upon receipt of consents from the examinees satisfied its statutory obligations under § 8(a)(5) [23]. It is therefore likely that the Court will take a similar stand regarding the union's right to information about the reasonable accommodation of a disabled employee. That is, union participation in the process of deciding reasonable accommodation will be premised on employee consent for disclosure through such union participation. Under these circumstances, it is also likely that in many instances disabled employees will not give this consent, invoking instead their right to privacy under the ADA. When this happens, under the ADA, the employer will be obliged to deal unilaterally with the disabled employee on matters that may well have a significant impact on the existing collective bargaining agreement, and this is a serious departure from the principle of exclusive representation.

Congress may have envisioned the ADA as applying to only a few employees in any one work setting, and thus having a limited effect on the overall collective bargaining scheme. However, since the law applies to both new and existing employees, this may be an inaccurate assumption. It is statistically predictable that as a workforce matures requests for reasonable accommodation will multiply, as

will the need for employer unilateral action and direct dealing with disabled employees.

There is no easy answer to the dilemma presented by the ADA's concern for privacy rights in determining reasonable accommodation. To ignore the privacy provisions delineated in the law would in many instances defeat the ADA's very purpose. Often those most in need of its protections would be discouraged from using it for fear of such public disclosure. On the other hand, to abide by the ADA's dual prescription for privacy and reasonable accommodation would be to relegate the exclusive bargaining agent to the role of an uninformed and impotent observer. Thus, in the final analysis, the impact of the ADA on collective bargaining in the public sector may go well beyond that anticipated. The ADA may set precedents that make the concepts of exclusive representation and public sector collective bargaining obsolete.

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ENDNOTES

1. 29 U.S.C. §§ 151-169.
2. 42 U.S.C. § 12101 *et seq.*
3. U.S. Equal Employment Opportunity Commission, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, 1992*.
4. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).
5. *J. I. Case co. v. NLRB*, 321 U.S. 332 (1944).
6. *Ford Motor Co. v. Huffmann*, 345 U.S. 330, 338 (1953).
7. *NLRB v. Katz*, 369 U.S. 736 (1962).
8. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); cf. *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944).
9. *Hughes Tool Co.*, 147 NLRB 1573 (1964); see *Miranda Fuel Co.*, 140 NLRB 181 (1962), enforcement denied, 362 F.2d 172 (C.A. 2 1963).
10. See *Local Union No. 12, United Rubber Workers of America v. NLRB*, 368 F.2d 12 (C.A. 5 1966), enforcement granted.
11. 42 U.S.C. § 2000e *et seq.*
12. 29 U.S.C. §§ 701-796.
13. *Boyd v. United States*, 116 U.S. 616 (1886).
14. *Griswold v. Connecticut*, 391 U.S. 479 (1965).

15. 5 U.S.C. § 552a.
16. E. Warren and L. D. Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193 (1890).
17. 5 U.S.C., at 552 (b)(6).
18. *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976).
19. 97 Lab. Arb. (BNA) 1038.
20. 838 F.2d 418 (10th Cir. 1988).
21. 5 U.S.C. § 7101-7135.
22. 618 F.2d 677 (10th Cir. 1980).
23. 440 U.S. 301 (1979).
24. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956).
25. *American Federation of Gov't Employees v. Defense General Supply Center*, 423 F. Suppl. 481 (ED Va. 1976), *aff'd per curiam*, 573 F.2d 184 (C.A. 4 1978).
26. Pub. L. No. 93-579, 88 Stat 1896, reprinted in 1974 U.S. Code Cong. & Ad. News 2177-78 (congressional findings and statement of purpose).

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