



**Employer's "Do Not Rehire" Policy Upheld:
Employee Terminated For Drug Policy Violation Need Not Be Rehired**

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The United States Supreme Court took a small step toward providing guidance to employers faced with questions about the employment of recovering substance abusers in the case of Raytheon Co. v. Hernandez, decided on December 2, 2003. In Raytheon, the employee, Joel Hernandez, appeared to be under the influence of drugs while at work. As a result, and pursuant to company policy, Hernandez took a drug test and tested positive for cocaine. Hernandez also admitted that he had stayed up drinking beer and using cocaine the night before the test. Hernandez's conduct of working under the influence of drugs violated the company's workplace conduct rules. Thus, in July 1991, he was forced to resign – noted as "quit in lieu of discharge" on his separation summary. Two and a half years later, he reapplied to work with Raytheon. On his application, Hernandez stated that he had been previously employed by the company. He also submitted two letters of reference: one from his pastor, stating that he was an "active and faithful member" of his church, and one from Alcoholics Anonymous, stating that he regularly attended meetings and was in recovery. An employee in the company's labor relations department reviewed the application and upon noting Hernandez's prior employment with the company, pulled his personnel file and reviewed his separation summary which stated "quit in lieu of discharge." Based on that information and the company's policy prohibiting the rehire of employees terminated for workplace misconduct, and without any knowledge that Hernandez was a former drug addict, the labor relations employee rejected Hernandez's application.

Hernandez filed a charge with the Equal Employment Opportunity Commission ("EEOC") claiming that the rejection of his application constituted discrimination in violation of the Americans With Disabilities Act ("ADA"). The EEOC issued a "right-to-sue" letter and Hernandez filed a lawsuit in federal district court claiming that the company discriminated against him based on a theory of disparate *treatment* -- that the company rejected his application *because of* his record of drug addiction and/or because he was regarded as being a drug addict. The company filed a motion for summary judgment arguing that it rejected the application solely based on Hernandez's prior discharge for workplace misconduct and not because he was a drug addict, recovering or otherwise. In response to the company's motion, Hernandez argued, for the first time, that the company's facially neutral policy of prohibiting re-employment of former employees

terminated for misconduct results in a disparate *impact* against recovering drug addicts and thereby discriminates against recovering drug addicts in violation of the ADA. The district court granted the motion for summary judgment on Hernandez's claim of disparate *treatment*, finding that there was no evidence that the company refused to rehire Hernandez because he was a recovering drug addict or regarded as a drug addict. The district court disregarded Hernandez's disparate *impact* argument on the ground that Hernandez had not properly raised the issue of disparate *impact* in his lawsuit. Hernandez appealed the district court's ruling.

The Ninth Circuit agreed that Hernandez could not proceed on his disparate *impact* theory because he failed to raise it in a timely fashion. However, the Ninth Circuit reversed the district court's grant of summary judgment on Hernandez's claim of disparate *treatment*. The Ninth Circuit held that Raytheon had failed to establish a legitimate, non-discriminatory reason for its decision to reject Hernandez's application, the company policy of not rehiring employees discharged for workplace misconduct, was although neutral on its face, was nonetheless unlawful "as it applied to former drug addicts whose only work-related offense was testing positive because of their addiction." The Ninth Circuit concluded its reasoning noting that Raytheon had not demonstrated a business necessity for its rehire policy.

The United States Supreme Court vacated and remanded the Ninth Circuit's decision and held that the Ninth Circuit improperly applied disparate *impact* analysis to a disparate *treatment* claim. In its opinion, the Supreme Court clearly explained the well-established difference between a claim for disparate *treatment* and a claim for disparate *impact*:

Liability in a disparate treatment case 'depends on whether the protected trait . . . [i.e. disability] actually motivated the employer's decision.' [citation] By contrast, disparate impact claims 'involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.' [citation]

The Supreme Court noted that the company's facially neutral no-rehire policy is, by its very nature, "a quintessential legitimate, non-discriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules." Thus, the only question left for the Ninth Circuit to consider was whether Hernandez had sufficient evidence from which a jury could conclude that Raytheon's decision was based on Hernandez's status as a recovering addict rather than its re-hire policy. The Supreme Court also noted that if the company had indeed applied this policy, it can "in no way, be said to have been motivated by" Hernandez's disability, thereby defeating Hernandez's claim against the company. The Supreme Court concluded that by applying disparate *impact* analysis to Hernandez's case, the Ninth Circuit failed to ask the appropriate question. Therefore, the Supreme Court vacated the decision of the Ninth Circuit and remanded the case to the Ninth Circuit to review the facts in a manner consistent with a claim for disparate *treatment*.

The Supreme Court's decision benefits all employers, particularly California employers, because it reaffirms the legal boundaries for the courts in reviewing claims of employment discrimination. Unfortunately, the Supreme Court did not decide whether Hernandez's status as a recovering drug addict affords him additional protection under the ADA. Perhaps the Supreme Court will have the opportunity to decide the issue if further review of the case by the Ninth Circuit results in another appeal. Until then, employers must take care in making employment decisions regarding employees and applicants who are recovering drug addicts.

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