

### Are Drug Addicts Disabled? Court Says Yes...And No

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In a recent decision that applies to California employers, the Ninth Circuit Court of Appeals ruled that the Americans With Disabilities Act ("ADA") prohibits employers from discriminating against drug addicts who have been rehabilitated. However, the decision also reiterated that the ADA does not cover addicts who are presently using drugs or alcohol.

On June 11, 2002, the Ninth Circuit handed down its decision in *Hernandez v. Hughes Missile Systems*. Hernandez had been employed by Hughes for 25 years when he failed a drug test at work in 1991. As a result of his failed drug test, he was given the option of resigning or being terminated. Hernandez chose to resign and his separation paperwork noted that he "quit in lieu of discharge."

In 1994, Hernandez reapplied for work at Hughes. On his application he checked the box "yes" in response to a question about whether he had previously worked for the Company. He also attached two letters of reference to his application. One of the letters was from his pastor who wrote that Hernandez was a "faithful and active member" of his church. The other letter was from a rehabilitation counselor who wrote that Hernandez attended alcoholics anonymous meetings regularly, maintained his sobriety, and was committed to his recovery.

The human resources representative who received the application reviewed Hernandez' file from his earlier employment. She learned that Hernandez had "quit in lieu of discharge." Because Hughes had an unwritten policy of not re-hiring former employees whose employment ended due to termination or resignation in lieu of termination, the human resources representative determined Hernandez was not eligible for rehire. Hernandez, in turn, sued Hughes, contending his application had been rejected because of his "disability."

Rejecting a lower court's decision to dismiss the case, the Ninth Circuit held that the Company's policy of not re-hiring former employees whose employment ended because they tested positive for illegal drugs, discriminated against those who, like Hernandez apparently had, successfully overcome their addiction. The Court's analysis focused upon the fact that the ADA treats those who suffer, or who have suffered, with drug or alcohol addiction and who have successfully rehabilitated themselves to be "disabled." Thus, the Court ruled if Hughes had rejected Hernandez' application solely because of his former drug use (the basis for his earlier discharge) and he was no longer using drugs, it violated the ADA.

One question that arises from this decision is, if Hughes' refusal to consider Hernandez' application because of his drug use constitutes disability discrimination, why would the Company not also be liable for forcing Hernandez to quit back in 1991. One answer is that in order for a drug addict to come under the coverage of the ADA he or she must be *rehabilitated*. This successfully "rehabilitated" requirement, by definition, *excludes all addicts who are currently using drugs*. In the Ninth Circuit's words, "the ADA does not protect an employee or applicant who is currently engaging in illegal drug use." Consequently, addicts with active drug habits (like

Hernandez at the time of his termination) are not "disabled," whereas addicts who are rehabilitated are transformed into individuals with "disabilities" for ADA purposes. (While California's Fair Employment and Housing Act ("FEHA") defines "disability" much more broadly than does the ADA, the "drug addict" analysis set forth above is one area of disability discrimination law that appears to apply equally under both California and federal law.)

One lesson to be drawn from the *Hernandez* decision is that employers should not lump employees who suffer with drug or alcohol problems in with general "misconduct" cases. Employers are also cautioned to remember that their obligations to employees with drug or alcohol problems do not end with the ADA. The federal Family Rights Act ("FMLA") and its state counterpart, the California Family Rights Act ("CFRA"), require employers to provide up to 12-weeks of leave each year to qualified employees who are not currently using drugs or alcohol but require treatment for a drug or alcohol problem that qualifies as a "serious health condition." In addition, California Labor Code § 1025 mandates that all employers (with 25 or more employees) reasonably accommodate any employee "who wishes to voluntarily enter and participate in an alcohol or drug treatment program, provided [the] accommodation does not impose an undue hardship on the employer." Hence, Labor Code § 1025 protects even those addicts who are currently using drugs.

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## Practice Areas

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