FACIALLY NEUTRAL NO-REHIRE RULES AND THE AMERICANS WITH DISABILITIES ACT[†]

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I. INTRODUCTION

Imagine a man who works as a technician for a large federal defense contractor, arriving at work with alcohol on his breath. He consents to a drug test that reveals cocaine in his system, and then quits in the face of almost certain termination. Several years later, after getting his act together through Alcoholics Anonymous, the former employee reapplies to the same employer. The employer refuses to rehire him because of its universal, albeit unwritten, company policy not to rehire employees who quit rather than be fired for violation of misconduct rules. The employee sues, maintaining that he is clean and sober and that the employer's refusal to reconsider him once he was qualified again is a violation of the Americans with Disabilities Act ("ADA").[1] Is the employee correct?

It is common for businesses to promulgate rules regarding discipline and discharge for alcohol and illegal drug use while on duty.[2] It is also not uncommon for employers to test employees for alcohol or drugs where the employee appears to be impaired while at work.[3] Employers often require applicants for employment to submit to such tests prior to finalizing offers of employment.[4] Certainly employers have legitimate business concerns about safety and sobriety in the workplace. Intoxicated employees may harm themselves or others while under the influ-

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1. *See* 42 U.S.C. § 12101 (2000).

2. *See* DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW, TEXT & CASES 643 (12th ed. 2004).

3. *See id.* at 634-36, 643-44.

4. *Id*. at 636.

ence of alcohol or drugs. Substance abuse of either drugs or alcohol may be categorized as "dangerous behavior" that employers should be able to regulate with workplace rules.[5] When substance abuse impairs an employee at work, it negatively impacts the quality of products produced and services performed, and consequently, detracts from the profitability of the business.

A flip side to the safety and economic concerns of employers is embodied in the language and legislative history of the ADA.[6] An important goal of the ADA is the reintegration into the workforce of those who have a disability or a record of disability.[7] Included among those protected by the ADA are rehabilitated drug or alcohol addicts, if they are otherwise qualified for an open position.[8] Discrimination against recovered addicts is a reality. Advocates for recovered addicts note that if job applicants admit their history of addiction, they will be rejected for employment seventy-five percent of the time.[9] Where an employee's disability, former disability, or record of disability correlates to previous workplace misconduct, what protection, if any, should be afforded by the ADA?

This paper discusses the issues involved in a recent decision of the United States Supreme Court where an employer refused to rehire a former drug and alcohol abuser.[10] The Court decided the case narrowly, leaving a key question unanswered: does the ADA protect recovered workers from broad facially neutral "no-rehire" policies?[11] As the peti-

5. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 20-21, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (No. 02-749) (quoting Despears v. Milwaukee County, 63 F.3d 635, 637 (7th Cir. 1995)).

6. *See* Brief for Amicus Curiae National Employment Lawyers Association, et al. at 15, *Hernandez* (No. 02-749) (discussing ADA protections and legislative history).

7. *See* Brief of the Betty Ford Center, et al. as Amici Curiae in Support of the Respondent at 16 n.10, *Hernandez* (No. 02-749) (stating that "workforce participation has a significant, reinforcing effect for recovery" and "work provides structure . . . [that] interferes with addiction." (citations omitted)).

8. *See id*. at 14-15.

9. *Id*. at 14 (quoting Alexandra Marks, *Jobs Elude Former Drug Addicts*, CHRISTIAN SCI. MONITOR, June 4, 2002).

10. *Raytheon Co. v. Hernandez*, 540 U.S. at 44. Petitioner Raytheon Company acquired Hughes Missile System during the course of litigation. *Id*. at 47, n.1.

11. *Id*. at 44, 47. Plaintiff Hernandez's victory at the United States Court of Appeals for the Ninth Circuit was reversed because of his procedural failure to assert the more appropriate theory of disparate impact at the pleadings stage of his district court case. *See Question Remains: Must employers rehire employees dismissed for cause?*, 27 DISABILITY COMPLIANCE BULL. No. 2, Dec. 24, 2003, LEXIS, News Library, Legal News file; Robert S. Greenberger, *High Court Issues Narrow Ruling on ADA's Scope*, WALL ST. J., Dec. 3, 2003, at A3, A5; *National Council on Disability Says Partial Victory in Supreme Court's* Hernandez vs. Raytheon *Decision*, U.S. NEWSWIRE, Dec. 3, 2003, at http://releases.usnewswire.com/GetRelease.asp?id=24032;

tioner, Raytheon Company's, lawyer noted, "[t]housands of employers have precisely this rule."[12] This paper analyzes the Court's decision, outlines what the ADA requires in this area, and recommends guidelines for employment policies within the ambit of the ADA.

II. FACTS AND JUDICIAL HISTORY IN *RAYTHEON CO. V. HERNANDEZ*[13]

A. The Facts and the Equal Employment Opportunity Commission

On July 11, 1991, plaintiff, Joel Hernandez, came to work with the smell of alcohol on his breath.[14] Defendant, Hughes Missile Systems Company ("Hughes"), requested that Hernandez take a blood test, which revealed the presence of cocaine in his system.[15] Hernandez, who had worked for twenty-five years at Hughes as a janitor and later as a Calibration Service Technician, submitted his resignation in the face of certain termination.[16] Previously, in 1986, the company had allowed Hernandez to seek rehabilitation for alcoholism; after a thirty day intensive program, he returned to work.[17] During his treatment, it was "determined that [he] was 'alcohol-dependent,' 'cannabis-dependent,' and a 'cocaine abuser.'"[18] In 1992, Hernandez promised himself he would forswear drugs and alcohol, and was baptized as a "faithful and active member" of his childhood church.[19] In addition, he regularly attended Alcoholics Anonymous meetings between 1992 and 1995.[20] On January 24, 1994, Hernandez reapplied to the company for the position of Calibration Ser-

Gina Holland, *Supreme Court Rules on ADA Employment Case*, ASSOCIATED PRESS, BUSINESS NEWS, Dec. 2, 2003, at http://www.aapd-dc.org/News/legislature/scadaemp.html. As will be discussed, the Supreme Court decision expressly left the question certified unanswered. *Hernandez*, 540 U.S. at 46.

12. Gina Holland, *Top Court Considers Workplace Rights: Recovering Addict Fails to Get Job Back; Justices May Clarify Disability Act*, THE DETROIT NEWS, Oct. 9, 2003, at http://detnews.com/2003/business/0310/09/a13-293150.htm.

13. Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002), *vacated and remanded sub nom*. Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

14. *Hernandez*, 540 U.S. at 46-47; *see* Jack Kilpatrick, *Worker's Misconduct Fosters a Long Court Fight*, DESERET MORNING NEWS, Sept. 29, 2003,
at http://deseretnews.com/dn/view/0,1249,515034886,00.html .

15. *See Hernandez*, 298 F.3d at 1032.

16. *Id*.

17. *See* James J. Kilpatrick, *Ruling on Ex-Drunks and Current Law*, TULSA WORLD, Sept. 29, 2003, at A9, *available at* LEXIS, News Library.

18. Brief for Respondent at 12, *Hernandez* (No. 02-749).

19. *Id*. at 13.

20. *Id*. at 2.

vice Technician or Product Test Specialist, but his application was summarily rejected, purportedly because of the company's no-rehire policy.[21]

In June of 1994, Hernandez filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC").[22] The company explained its decision in its July 15, 1994 letter to the EEOC: "[Hernandez's] application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation. . . . [t]he company maintains it's [sic] right to deny re-employment to employees terminated for violation of Company rules and regulations."[23] In November of 1997, the EEOC issued a Letter of Determination finding reasonable cause that the company had violated Hernandez's rights under the ADA.[24]

B. The United States District Court for the District of Arizona

Hernandez filed suit in the United States District Court for the District of Arizona. Hughes maintained that Hernandez's application had been rejected because of an unwritten company rule prohibiting the rehire of former employees who were terminated for any violation of misconduct rules.[25] However, Hughes's written policies provide that if a job applicant for employment tests positive for drugs or alcohol, the applicant is only rendered ineligible for employment for the following twelve months.[26] In February of 1999, Hughes "offered [Hernandez] the position of Product Test Specialist if he passed the necessary examination."[27] This examination was identical to the one he would have had to pass in 1994 if he had been eligible for rehire.[28] Hernandez completed only four out of the eight sections and failed to pass any of them.[29] The district court granted Hughes's motion for summary judgment on January 30, 2001 without an explanation of its reasons.[30]

21. *Hernandez*, 298 F.3d at 1032.

22. *Id*.

23. *Id*. at 1033. George M. Medina, Sr., Manager of Diversity Development for Hughes, wrote the letter for the company. *Id*.

24. *See id*.

25. *Id*. at 1032, 1035.

26. *Id*. at 1036 n.16.

27. *Id*. at 1035.

28. *Id*. at 1035 n.13.

29. *Id*. at 1035.

30. *See* Brief of the Betty Ford Center, et al. as Amici Curiae in Support of the Respondent at 16 n.10, *Hernandez* (No. 02-749) at 20, *Hernandez* (No. 02-749).

C. The Court of Appeals for the Ninth Circuit

On June 11, 2002, the Ninth Circuit reversed the opinion of the district court, stating that there were genuine issues of material fact as to whether Hernandez was qualified for the position in 1994.[31] At the time of Hernandez's resignation in 1991, the parties agreed that he was qualified, in the sense that he was able to do the job.[32] In 1999, however, after Hernandez filed his claim, Hughes offered him a position, but Hernandez was unable to pass the necessary examination.[33] Whether Hernandez would have been qualified in 1994 when he first reapplied and was denied employment remained an open question for the court.[34] Further, the Ninth Circuit opinion noted that Hughes did not argue in its brief on appeal that Hernandez was unqualified for failing to show that he was rehabilitated.[35] Rather, Hernandez's letter from Alcoholics Anonymous and his own affidavit regarding his sobriety raised a genuine issue of fact as to his rehabilitation.[36]

In the Court of Appeals' view, Hernandez could establish a prima facie case of discrimination upon remand by presenting "sufficient evidence that he was not rehired by Hughes because of his record of drug addiction or because he was perceived as being a drug addict, as well as demonstrating that he is qualified for the position he seeks."[37] Because the court found that Hernandez made out such a prima facie case of discrimination, the burden shifted to Hughes to proffer "a legitimate nondiscriminatory reason for its actions."[38]

Further, the Ninth Circuit held that "even if it were correct that Bockmiller [a Hughes employee who evaluated Hernandez's employment application] was not aware of Hernandez's record of drug addiction at the time she rejected his application, Hughes's decision not to re-

31. *Hernandez,* 298 F.3d at 1035. The opinion was amended on denial of rehearing *en banc* on August 12, 2002. *Id*. at 1031-32.

32. *See id*. at 1035.

33. *See id*.

34. *Id*.

35. *Id*. at 1035 n.15.

36. *Id*. The court also reviewed the evidence from Raytheon's human resource person, Ms. Bockmiller, who rejected Hernandez's application. The court noted that it "permits an inference that she was aware of Hernandez's positive drug test [and thus did] not eliminate the question of fact that arises as a result of Hughes's explicit statements to the EEOC that the application was rejected because of Hernandez's prior drug addiction." *Id*. at 1034.

37. *Id*. at 1033. The court noted that Hernandez could receive damages if he were qualified for the position in 1994, even if he were no longer qualified when he was tested in 1999. *Id*. at 1035 n.14.

38. *Id*. at 1035.

employ him because of his prior 'termination' would violate the ADA."[39] The court also stated that "Hughes's unwritten policy [was] not a 'legitimate, nondiscriminatory reason' for its rejection of Hernandez's application."[40] They expressed concern that such a policy violated the ADA *as applied* to individuals like Hernandez,[41] and found fault with a "blanket policy against rehire" that would result in a staff member making an employment decision without knowing about a disability.[42] Nevertheless, even though the court held that "a policy that serves to bar re-employment of a drug addict despite his successful rehabilitation violates the ADA,"[43] they still affirmed the district court's ruling that "Hernandez failed to timely raise a disparate impact claim."[44]

D. The United States Supreme Court

1. The Question

On February 24, 2003, the United States Supreme Court granted certiorari in *Raytheon Co. v. Hernandez*.[45] The question certified to the Court was "whether the [Americans with Disabilities Act] confers preferential rehire rights on employees lawfully terminated for violating workplace conduct rules."[46] Oral arguments were heard on October 8, 2003[47] and the Court issued its decision on December 2, 2003.[48] During the oral arguments, one Justice expressed more concern over the Ninth Circuit's rule that "where you have such a [no-rehire] policy, it will not be applicable to someone who's a rehabilitated drug addict," than with the factual disputes underlying the grant of summary judgment.[49] Another member of the Court boldly stated, "I don't care about all these factual controversies."[50] The questions and statements to counsel during the arguments brought into focus what at least some members of the

39. *Id*. at 1036.
40. *Id*.
41. *Id*. (emphasis added).
42. *Id*.
43. *Id*. at 1036-37.
44. *Id*. at 1037 n.20.
45. 537 U.S. 1187 (2003).
46. Raytheon Co. v. Hernandez, 540 U.S. 44, 46 (2003).
47. Oral Argument at 20, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (No. 02-749).
48. *Hernandez*, 540 U.S. at 44.
49. Oral Argument at 31-32, *Hernandez* (No. 02-749).
50. *Id*. at 48.

Court considered to be the important issue underlying the case: whether the ADA is violated by a company's refusal to consider for re-employment a formerly-discharged employee who later reapplies, when the prior discharge was due to misconduct, and the misconduct was related to illegal drug use.[51]

2. The Decision

Justice Clarence Thomas authored the opinion of the Court, with all joining except for Justice Souter, who took no part in the decision, and Justice Breyer, who recused himself prior to consideration of the case.[52] The Court vacated the judgment of the Ninth Circuit and remanded the case because the court of appeals "improperly applied a disparate impact analysis in a disparate treatment case."[53] The Court explicitly did not reach the question certified.[54] Rather, the opinion reviewed the facts in the case, and noted that the EEOC's letter found that there was reasonable cause to believe that Hernandez was denied rehire because of his disability.[55] In addition, the Court pointed out that throughout discovery, Respondent Hernandez relied upon the theory that the company rejected him because of his record of drug addiction.[56] In fact, Respondent only raised the alternative theory of disparate impact in response to Petitioner's motion for summary judgment, and therefore the district court did not consider the theory because it was not raised in a timely manner.[57] The court of appeals agreed with the district court on this point.[58]

The Supreme Court criticized the court of appeals because it applied the traditional burden-shifting paradigm for disparate treatment cases, but found that the employer policy had a disparate impact, thereby

51. *See id*. at 6, 10, 31-32. One member of the Court asked "whether the Ninth Circuit's treatment of the no-rehire policy was correct under ADA law." *Id*. at 6. Another member of the Court questioned the attorney for the petitioner as to how a qualified applicant who has a "history of drug or alcohol use and was fired for that years ago," but who is rehabilitated and thinks that the rule barring discrimination against those with handicaps "requires [the employer] to make a special accommodation for him" could be turned down. *Id*. at 10. Another Justice noted that "the reason we have this case is that it is a very important proposition of law . . . that where you have such a [no-hire] policy, it will be applicable to someone who's a rehabilitated drug addict." *Id*. at 31-32.

52. *Hernandez*, 540 U.S. at 45.

53. *Id*. at 46.

54. *Id*.

55. *See id*. at 46-48.

56. *Id*. at 49.

57. *Id*.

58. *See id*.

combining the two frameworks.[59] The Court explained that in disparate treatment cases, the protected trait is a motivating factor in the decision-making process of the employer, whereas in disparate impact cases, a facially neutral employment practice impacts a protected group without justification by "business necessity."[60] While both of these claims are valid under the ADA, "courts must be careful to distinguish between these two theories."[61] Since the only theory available to Hernandez was disparate treatment, Raytheon's neutral no-rehire policy provided a legitimate, nondiscriminatory reason for its decision not to rehire him.[62] Therefore, the only way for Hernandez to succeed under a disparate treatment theory would be to convince a jury that Raytheon made its employment decision based upon Hernandez's disability status despite its claims to the contrary.[63]

The Court disagreed with the Ninth Circuit's conclusion that because the misconduct was related to his disability, Raytheon's refusal to rehire respondent violated the ADA.[64] It noted that the Ninth Circuit exhibited flawed reasoning when stating that Raytheon's policy violates the ADA because employees such as Ms. Bockmiller may make employment decisions while unaware of a disability.[65] If an employer had no knowledge of the respondent's disability status, the disability could not motivate the employment decision, and thus no disparate treatment claim would be available.[66]

3. Analysis

The Supreme Court could not allow the decision of the Ninth Circuit to stand because it was decided on the wrong theory, namely disparate impact rather than the available disparate treatment analysis. Because counsel for Hernandez failed to raise a disparate impact claim initially, Hernandez was left with only a disparate treatment claim,

59. *See id*. at 51-52.

60. *Id*. at 52-53.

61. *Id*.

62. *See id*. at 53-55. The Court characterized the no-rehire policy as a "quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules." *Id*.

63. *See id*.

64. *Id*. at 55 n.6 (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) (rejecting a similar claim in an Age Discrimination in Employment Act case)).

65. *Id*. at 520 n.7 (citing Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030, 1036 (9th Cir. 2002)).

66. *Id*.

which he could not substantiate. And yet, the court of appeals applied a disparate impact analysis in order to find for the Plaintiff. For this reason, the Supreme Court vacated the decision of the Court of Appeals for the Ninth Circuit, ruling that its analysis of the impact of the employer's policies was incorrect for a disparate treatment claim, and that it should have considered the discriminatory intent of the employer.[67]

In addition, the Ninth Circuit made bold assertions that were not supported by the well-settled law of employment discrimination.[68] The Supreme Court remanded the case for reconsideration under the appropriate analysis. The lower courts must abide by the Supreme Court's explicit finding that "a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA."[69] Therefore, under well-established precedent, the only issue left to determine is whether Respondent can produce sufficient evidence to show that the reason offered by Petitioner was pre-textual.[70] The Supreme Court deferred to the Ninth Circuit's determination that there were genuine issues of material fact remaining as to whether Hernandez was qualified for the position and whether Raytheon's refusal to rehire him was because of his past record of drug addiction.[71] In addition, the Court did not disturb the Ninth Circuit's conclusion that Hernandez had set forth sufficient evidence of genuine issues of material fact so as to establish a prima facie case of discrimination (thereby precluding summary judgment), because Raytheon did not challenge this finding.[72] Thus, upon remand to the trial court, Hernandez's first hurdle will be to establish that he was qualified for the position for which he applied in 1994.

Thereafter, Raytheon will likely assert its unwritten no-rehire rule as a legitimate, nondiscriminatory reason for its refusal to rehire Hernandez. The existence of such a policy or whether it served as grounds to deny Hernandez's application may be questioned, but the Supreme Court made clear that if such a policy exists, it is "a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules."[73] Therefore, if Raytheon can show that its decision not to rehire Hernandez was

67. *See id*. at 55.

68. *See id*. at 53-54 (asserting as a matter of law that "the neutral no-rehire policy was not a legitimate, non-discriminatory reason sufficient to defeat a prima facie case of discrimination.").

69. *Id*. at 51-52.

70. *Id*. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).

71. *Id*. at 50.

72. *Id*.

73. *Id*. at 54-55.

in fact based on "a neutral, generally applicable no-rehire policy" then its decision "can, in no way, be said to have been motivated by respondent's disability."[74] The Court noted that upon remand, if the facts are established that Raytheon's employee, Bockmiller, was indeed unaware of Hernandez's record of disability, then she could not have refused to rehire him *because of* his past record of drug addiction, and thus no disparate treatment claim would lie.[75]

4. Decision of the Ninth Circuit upon Remand

On March 23, 2004, the United States Court of Appeals for the Ninth Circuit issued its decision upon remand from the United States Supreme Court.[76] The only question upon remand was "whether there was 'sufficient evidence from which a jury could conclude that [Raytheon] did make its employment decision based on [Joel Hernandez's] status as disabled' despite its proffered explanation."[77] The Ninth Circuit once again reversed the district court's grant of summary judgment for Raytheon, thus answering the question in the affirmative.[78] The court noted the existence of a genuine issue of material fact, referring to the conflicting testimony of Ms. Bockmiller, who rejected Hernandez's application in 1994, and the reasons recited for rejecting Hernandez in the letter sent by George Medina, Raytheon's Manager of Diversity Development.[79] The court also indicated that jurors could find Raytheon's changing rationales for its rejection of Hernandez as evidence of pretext.[80]

Further, the court questioned the very existence of a uniform no-rehire policy for those fired because of misconduct, wondering why such a policy was not in writing in light of the "extensive set of written personnel policies covering various subjects, including substance abuse,"[81] and noted that there was no mention of the policy by Raytheon until after EEOC conciliation efforts concluded and the litigation ensued.[82] The

74. *Id*. The Court's statement regarding the employer's motivation relates directly to the disparate treatment standard, and does not indicate that a facially neutral no-rehire policy that is generally applied could never have a disparate impact upon protected individuals.

75. *Id*. at 55 n.7.

76. Hernandez v. Raytheon Co., 362 F.2d 564 (9th Cir. 2004).

77. *Id.* at 565 (quoting Hernandez, 540 U.S. at 53).

78. *Id.*

79. *Id.* at 568-69.

80. *Id.* 569.

81. *Id.* at 567.

82. *Id.* at 569.

Ninth Circuit also withdrew one footnote from its earlier opinion in the case because it "overstated the record" with respect to the existence of Raytheon's purported no-rehire policy.[83] The court of appeals reversed and remanded the case to the trial court since "Hernandez ha[d] presented sufficient evidence from which a reasonable jury could determine that Raytheon refused to re-hire him because of his past record of addiction and not because of a company rule barring re-hire of previously terminated employees."[84] In light of the Supreme Court's decision in the *Raytheon* case, the trial court's analysis will be limited to the narrow question of whether disparate treatment occurred.[85]

III. THE REMAINING QUESTION: WILL A NO-REHIRE RULE SURVIVE A DISPARATE IMPACT CHALLENGE?

Because the United States Supreme Court decided the case on the basis of Hernandez's claim as presented, the important issue regarding the ultimate legality of a neutral-on-its-face "no-rehire" policy was not addressed by the Court. Such a policy may be a legitimate, nondiscriminatory reason on its face, yet the impact of the policy on those protected by the ADA is a separate issue. The news sources touted the *Raytheon* case as one of the most closely watched business cases of the Supreme Court Term, a case with implications for "more than five million workers with substance abuse problems."[86]

The Supreme Court explicitly did not reach the question for certiorari, the wording of which was somewhat startling in that it queried "whether the ADA confers preferential rehire rights."[87] Before the Raytheon opinion was issued, it seemed unlikely that the current Court would endorse a preferential rehire right for former drug abusers, particularly since such a right would interfere with an employer's rights to discipline and discharge employees in order to enforce a drug free work-

83. *Id*. at 570 n.5 (referring to Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030, 1036 n.17 (9th Cir. 2002)).

84. *Id*. at 570.

85. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 55 (2003) (concluding that on remand the Ninth Circuit may only consider disparate treatment, not disparate impact).

86. Gina Holland, *Top Court Considers Workplace Rights: Recovering Addict Fails to Get Job Back; Justices May Clarify Disability Act*, THE DETROIT NEWS, Oct. 9, 2003, at http://detnews.com/2003/business/0310/09/a13-293150.htm.

87. *Hernandez*, 540 U.S. at 46; *see generally* Andrew J. Ruzicho & Louis A. Jacobs, *Distinguishing Motivation From Impact*, 27 EMP. PRAC. UPDATE 1 (2004) (discussing how the ADA does not confer "preferential rehire rights").

place.[88] As the Petitioner argued in its Brief, under the ADA, the disabled are entitled to an equal opportunity, not "a second chance that others would not get."[89] Yet during oral arguments, one of the Justices remarked that an employer's duty of reasonable accommodation is "always a discrimination in favor of the applicant."[90]

Even without resolution of the larger question by the Supreme Court in *Raytheon*, employers should prepare themselves for a future, properly-pled disparate impact case. Employers' policies, such as no-rehire rules, should be carefully reviewed and revised where necessary to comply with the preexisting framework of equal employment opportunity law. Many companies have no-rehire policies. Raytheon maintained that such policies are so usual that they need not be in writing, and implied that this was why its policy was not written.[91] Employers are on notice of the limits to the "nondiscriminatory reason" defense provided by a facially neutral rule, namely that if the rule disproportionately affects and thus discriminates against protected individuals, the employer must show that it is justified by business necessity.[92] It is of interest that the U.S. Solicitor General's Brief in Support of Petitioner Raytheon conceded that a policy prohibiting the rehiring of employees discharged for misconduct could perhaps give rise to ADA liability under certain circumstances, because instead of analysis under disparate treatment, "such a policy would be properly analyzed as a disparate impact claim."[93]

88. This seems particularly true in light of the fact that Justices Breyer and Souter did not take part in the *Raytheon* decision. *See Hernandez*, 540 U.S. at 45. The notion of equal opportunity is one thing, but the label of 'preference' smacks of reverse discrimination.

89. Brief for the United States as Amicus Curiae Supporting Petitioner at 13, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (No. 02-749).

90. Oral Argument at 13, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (No. 02-749).

91. Brief for Petitioner at 3, *Hernandez* (No. 02-749). It should also be noted that federal contractors such as Raytheon are required to take steps to prevent workplace drug use under the Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-707. *See* Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioners at 12-13, *Hernandez* (No. 02-749).

92. *See* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 78 (2002) (finding that the ADA "creates an affirmative defense for action under a qualification standard 'shown to be job-related for the position in question and . . . consistent with business necessity.'") (quoting 42 U.S.C. § 12113(a) (2000)).

93. Brief for the United States as Amicus Curiae Supporting Petitioner at 16-17, *Hernandez* (No 02-749).

Pertinent Case Law

Raytheon is not the first case to address an employer's refusal to rehire an employee discharged for misconduct, where the conduct was caused by an ADA-protected disability. In *Harris v. Polk*,[94] a county attorney's office declined to rehire a legal stenographer based on an office policy against employing individuals with criminal records. The employee had been fired four years earlier after pleading guilty to a shoplifting charge.[95] The Court of Appeals for the Eighth Circuit rejected the employee's argument that, since her shoplifting and resulting criminal record were caused by a mental illness from which she had now recovered, the ADA prohibited using this criminal record as a basis for rejecting her bid for re-employment.[96] The Eighth Circuit ruled that "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees."[97]

The rationale of *Harris* is buttressed by a Seventh Circuit case in which a maintenance worker was demoted from a position that required a driver's license to one that did not.[98] The demotion followed the revocation of the employee's driver's license after he was convicted a fourth time of driving under the influence of alcohol.[99] While conceding that alcoholism was a contributing cause of the employee's drunk driving, the court distinguished between the disability of alcoholism and the decision to drive under the influence:

> [A]lcoholics *are* capable of avoiding driving while drunk. . . . To impose liability [on the employer] under the Americans with Disabilities Act . . . in such circumstances would indirectly but unmistakably undermine the laws that regulate dangerous behavior. It would give alcoholics . . . a privilege to avoid some of the normal sanctions for criminal activity . . . . The refusal to excuse, or even alleviate the punishment of, the disabled person who commits a crime [caused by his disability] . . . is not "discrimination". . . [W]e do not think it is a reasonably required accommodation to overlook infractions of the law.[100]

94. 103 F.3d 696 (8th Cir. 1996).
95. *Id*. at 696.
96. *Id*. at 697.
97. *Id*.
98. Despears v. Milwaukee County, 63 F.3d 635, 635 (7th Cir. 1995).
99. *Id*.
100. *Id*. at 636-37 (internal citations omitted).

Similarly, it could be argued that allowing employees discharged for disability-related misconduct to apply for rehire where non-disabled employees could not, would allow them to avoid some of the normal sanctions associated with workplace rules that regulate and prohibit dangerous behavior, thereby undermining such rules. Hernandez, like the maintenance worker in *Despears*, chose to come to work under the influence of drugs and alcohol. His disability may have contributed to his propensity to consume alcohol and drugs, but it did not compel him to report to work in an intoxicated state, thereby violating a company rule and possibly creating danger in an industry where safety is a large concern.

The Solicitor General made some compelling arguments in its Brief Supporting the Petitioner in the *Raytheon* case.[101] It is clear that the ADA's provisions spell out an employer's right to prohibit the illegal use of drugs and alcohol at work and to "hold an employee who engages in the illegal use of drugs or who is an alcoholic *to the same qualification standards* for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee."[102] This right includes the ability to test for illegal drug or workplace alcohol use, and make employment decisions based on the test result.[103] Relying upon the Supreme Court's decision in *Hazen Paper Co. v. Biggins*,[104] one can argue that there is no legal problem, at least under a disparate treatment claim, with making an employment decision based upon misconduct that is correlated with a disability, if an analytical distinction can be made between the two.[105] However, in *Hazen Paper*, just as in the *Raytheon* case, the plaintiff only claimed disparate treatment,[106] and therefore, the Court also focused on whether

101. Brief for the United States as Amicus Curiae Supporting Petitioner at 11, 13, 18, *Hernandez* (No 02-749) (citing the ADA language that permits employers to hold alcoholics and drug addicts to the same standards as other employees. *Id*. at 13; arguing that the refusal to excuse punishment of the disabled person who engages in misconduct is not discrimination, but rather is a refusal to discriminate in their favor. *Id*.; asserting that the lower court's holding will disrupt legitimate workplace rules designed to promote safety and productivity. *Id*. at 18; contending that applying a facially neutral policy that prohibits rehiring of former employees who were discharged for misconduct does not constitute "misconduct" prohibited by the ADA. *Id*. at 11.).

102. *Id.* at 3-4 (citing 42 U.S.C. § 12114(c)(1)-(2) & (4) (2000)) (emphasis added).

103. *Id*. at 4 (citing 42 U.S.C. § 12114(d)(2)).

104. 507 U.S. 604 (1993).

105. *Id*. at 609-610. The Court in *Hazen Paper* distinguished, in a disparate treatment claim, the illegality of an employer's decision that was motivated by age versus the legality of the same decision motivated by something other than the protected trait under the ADEA. *Id*.

106. *Id.* at 610.

the protected trait actually motivated the employer's decision. The *Hazen Paper* Court noted that the employee could not succeed on a disparate treatment claim "unless the employee's protected trait actually played a role in that process [of decision-making] and had a determinative influence on the outcome."[107] Once again, the question that remains is how a facially neutral rule, such as a no-rehire rule, will fare when met with a disparate impact challenge.

The Disparate Impact Framework

Hernandez's only available ground for relief was a claim for disparate treatment because he had failed to timely plead disparate impact. However, there is no question that a disparate impact claim is "cognizable under the ADA."[108] This claim is made available by the language of the statute itself, which provides:

> . . . the term "discriminate" includes [both] . . . utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability [and] . . . using qualification standards, employment tests or other selection criteria that screen out, or tend to screen out, an individual with a disability . . . unless the standard, test or other selection criteria . . . is shown to be job-related . . . and is consistent with business necessity.[109]

In general, a plaintiff who seeks to establish a prima facie case of disparate impact "must show: (1) the occurrence of certain outwardly neutral practices, and (2) *a significantly adverse or disproportionate impact on persons of a particular type* produced by the defendant's facially neutral acts or practices."[110] A neutral no-rehire policy of the type described in *Raytheon* would clearly meet the first required showing. To establish significantly adverse or disproportionate impact in an employment discrimination context, "plaintiffs are ordinarily required to include statistical evidence to show disparity in outcome between groups."[111] Certainly a plaintiff challenging a facially neutral no-rehire rule on the basis of its disparate impact would need to establish statistical evidence

107. *Id.*

108. Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003).

109. 42 U.S.C. §12112(b) (2000).

110. Tsombanidis v. West Haven Fire Dep't, 352 F.3d 565, 574-75 (2d Cir. 2003) (citing Reg'l Econ. Cmty. Action Program v. City of Middletown, 294 F.3d 35, 52-53 (2d Cir. 2002), *cert. denied*, 537 U.S. 813 (2002)).

111. *Id.*

of the policy's disproportionate impact upon the protected group. An employer could then defend its actions by demonstrating that the policy did not cause a disparate impact, or that the rule was job related and consistent with business necessity.[112]

IV. CONCLUSION AND RECOMMENDATIONS

In order to protect themselves from ADA claims, companies should maintain written policies that apply fairly and evenhandedly to those who are members of protected groups. The advantages of a written policy include that a company avoids questions as to whether such a policy exists, and reduces factual inquiries to matters such as whether the clearly acknowledged policy was applied uniformly and consistently, and in a nondiscriminatory manner.[113] Also, when a written policy is distributed to existing employees, it puts them on notice of disciplinary consequences, such that if misconduct is serious and leads to termination, rehire will not be an option. Employees who have knowledge of rules are more likely to obey them and to be legally bound by them.

The Court of Appeals for the Ninth Circuit noted that Raytheon's unwritten no-rehire policy placed former employees such as Hernandez in a worse position than a new applicant who tested positive for drugs or alcohol at the time of hiring. This was so because a new applicant to Raytheon would be barred from employment for twelve months, while former employees were permanently barred. Should former employees be treated less favorably than new applicants? An argument can be made that employment policies should place a person like Hernandez in the same position as a new hire for purposes of employment consideration. After all, former employees are already trained, and by virtue of their experience, are of more value than a new applicant. Thus, it could be argued that a person should be able to apply for a position for which he is qualified, despite prior problems that have since dissipated, and should not be barred from applying for a job for any longer than a new applicant who is similarly situated.

Arguments against treating former employees the same as prospective employees can also be made. One argument relates to the fact that current employees have notice of company rules and the consequences for violation, whereas prospective employees generally do not. Secondly, and perhaps more importantly, what clout does an employer's

112. *See* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 78 (2002).

113. *See* discussion *supra* Part II.D.3.

disciplinary code have if employees can circumvent it by quitting and reapplying after termination? No-rehire rules encourage employee compliance with workplace conduct rules. Companies need to maintain drug and alcohol free environments and to some extent, the threat of termination is the ultimate consequence that may keep current employees sober and drug free. A blanket no-rehire rule also saves an employer from dealing with many former employee applicants individually, a process that can be time consuming and expensive.

Nonetheless, perhaps the best hiring/rehiring policy for an employer to promulgate would include an individualized inquiry rather than a blanket no-rehire rule. Otherwise, there is some probability that an employer will encounter difficulties with its no-rehire rule pursuant to a disparate impact theory under the ADA.[114] If an employer refuses to depart from its facially neutral no-rehire rule, inevitably there will be a disabled individual who will challenge the policy that automatically bars her opportunity to seek a position for which she is otherwise qualified, and to receive reasonable accommodation where such is not an undue hardship to the employer.[115] After the *Raytheon* decision, such a facially neutral rule will generally withstand a disparate treatment challenge. Even under a disparate treatment analysis, however, an employer may encounter the same legal pitfalls, whether using a no-rehire rule or not. This is so because once an employer has *knowledge* of an applicant's disability or record of disability, or is perceived as having a disability, there is often a question raised by an applicant as to whether the decision not to hire or rehire was *motivated* by the disability, using a disparate treatment theory.[116] If the decision is deemed not to have been based upon illegal motivation, but rather is illustrated by the employer to involve a legitimate business reason, then there is no duty to reasonably accommodate the disabled person, unless he or she can establish that the business reason defense was a pretext.[117] Facially neutral no-rehire rules

114. *See id.*

115. This is not to say that a former employee would be successful with such a challenge, even under disparate impact analysis, particularly if the former employee has received progressive discipline, and, despite opportunities for rehabilitation and employee assistance programs, has repeatedly violated work rules that resulted in her termination for misconduct. At some point, an individual's recidivism will defeat re-entry, particularly to the same workplace. Neither arbitration proceedings under the guidance of a collective bargaining agreement, nor most federal circuits following the mandates of the ADA, would reinstate an individual who is not truly rehabilitated. Even if there is evidence of an applicant's successful rehabilitation, an employer's work rules prohibiting rehire after repeated serious misconduct may ultimately qualify as job related and a business necessity.

116. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 53-55 (2003).

117. *See id.*

will withstand this disparate treatment analysis unless a plaintiff establishes improper motivation with respect to the business decision.

Under a disparate impact analysis, facially neutral no-rehire rules are more problematic, and thus, are more likely to result in litigation if employers continue to insist upon them. While the Supreme Court in *Raytheon* characterized a neutral no-rehire rule as a legitimate business reason, this is not the same thing as saying that such a rule is a business necessity. If a facially neutral no-rehire rule is shown to have a disparate impact on protected individuals, the employer must show that the rule is job related and consistent with business necessity in order to defend its use.[118] However, the Supreme Court did not provide guidance on this issue, so there is some question as to whether employers may need to reconsider recovered individuals, essentially bending the rules to accommodate the disabled, or those who have a record of disability, since the ADA prohibits discrimination against recovered drug and alcohol addicts.[119]

In the long run, the use of an individualized inquiry into an applicant's qualifications and abilities may be a better approach than a facially neutral rule that routinely bars qualified individuals who have disabilities that are protected by the ADA. If an employer maintains facially neutral employment policies, they should be designed to withstand a traditional disparate impact challenge, not merely the disparate treatment analysis regarding motivation or intent that applied to Hernandez. While Raytheon may win upon remand to the trial court, this is largely because disparate impact analysis is unavailable to Hernandez. Raytheon sought to avoid problems in one clean swipe, by having a blanket rule against rehire. Whether Raytheon and other employers could successfully defend a similar case against a disparate impact challenge is the important question now, and one that should evoke some reassessment and revision of current employment policies. Employers who wish to retain facially neutral no-rehire rules should determine the impact of such facially neutral policies on protected groups, and also evaluate whether such policies are, in earnest, a business necessity.

118. *See* Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 78 (2002).

119. *See Hernandez*, 540 U.S. at 46.