NOTES

STEPPING OUT OF THE COURTROOM AND INTO THE PERSONNEL DEPARTMENT: AN ANALYSIS OF REASONABLE ACCOMMODATION AND DISPARATE IMPACT IN *RAYTHEON V. HERNANDEZ*

I. INTRODUCTION

Alcoholism and drug abuse are an endemic condition in American society; they have infiltrated every aspect of people's lives. This is never more problematic than in cases where a person's addiction spills over and begins to disable their capacity to maintain employment. Being terminated from employment due to drug addiction not only displaces the individual from the workforce but also creates a stigma that could possibly burden that person's ability to procure future employment. This stigma can remain attached whether or not the person has attempted to rehabilitate himself and has taken every step an individual can in order to overcome the addiction. It is because of this fact that the Americans with Disabilities Act ("ADA")[1] recognizes former drug abusers as a protected disabled class,[2] and states that a person who has successfully completed a rehabilitation program and is no longer using drugs is a "qualified individual with a disability."[3] Entities covered under the Act who discriminate against applicants and employees who have a prior history of drug addiction will be found in violation of the ADA.[4]

1. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2001).

2. 42 U.S.C. § 12114(b) (2002).

3. *Id.* A qualified person with a disability is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."42 U.S.C. § 12111(8) (2002).

4. 42 U.S.C. §12114(b).

The ADA however does not protect applicants or employees who are "currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."[5] In fact, the statute explicitly states that an employer can hold an employee who is currently engaging in illegal drug use to the same qualifications for performance and behavior that they hold other employees even if the unsatisfactory performance is related to the drug addiction or alcoholism.[6]

In a recent Ninth Circuit decision, *Hernandez v. Hughes Missile System Co.*,[7] the court set a dangerous precedent in holding that Hughes Missile (an employer) violated the ADA by refusing to rehire Hernandez, (an employee) who resigned in lieu of termination.[8] The refusal was due to a company wide policy stating that employees who had resigned in lieu of termination could not be considered for re-employment. The court held that although they are not facially discriminatory, blanket non-rehiring policies violate the ADA as applied to certain disabled individuals.[9]

The Ninth Circuit's decision in *Hernandez*, created a"[g]et out of jail free card"[10] by creating an invitation to every employee who is terminated, for whatever reason, to make a claim that the termination was a result of the disability.[11] This will create a revolving door whenever an employment relationship is terminated for cause, forcing the employer to rehire the disabled person in fear of violating federal law. The court's decision extends gross rehiring preferences on disabled individuals that have profound consequences for employers. If left standing the Ninth Circuit's decision would have no longer allowed companies to protect themselves with commonplace, common-sense and non-discriminatory non-rehire rules; these rules which have never been held to violate the text nor the policies of the ADA have been found by the Ninth Circuit to be discriminatory as applied and, thus, invalid. Seeing the potential conflict between Circuits on this issue, the Supreme Court granted certiorari to review the logic behind Ninth Circuit's decision.

5. 42 U.S.C. § 12114(a).

6. 42 U.S.C. § 12114(c)(4).

7. 292 F.3d 1038 (9th Cir. 2002).

8. *Id.* at 1044-5.

9. *Id.* at 1040, 1044.

10. Edward G. Guedes, *The Proverbial "Get Out of Jail Free" Card — The Ninth Circuit's Treatment of Addiction Under Hernandez v. Hughes Missile Systems Co.*, 76 FLA. B.J. 64 (2002).

11. *Id.* at 67-68 (stating that the Ninth Circuit's decision prevents employers from enforcing misconduct simply because the employee claims, for example, he is an addict, kleptomaniac, or compulsive gambler).

The Supreme Court sought to review whether facially valid blanket non-rehiring policies violated the ADA as applied to disabled individuals who are now fully able to perform the tasks related to the employment position.[12] However, due to the Ninth Circuit's misapplication of a disparate impact analysis in a disparate treatment claim, the Supreme Court was limited in its ability to analyze the issue fully.[13] Despite this fact, the Court was able to state that blanket non-rehire policies are legitimate non-discriminatory defenses against claims of disparate treatment under ADA.[14] However, the Court's decision does not bar the opportunity of a plaintiff to challenge an otherwise valid and facially neutral policy under a disparate impact theory.[15] If the plaintiff can provide sufficient evidence that the policy disproportionately affects disabled individuals it will not be able to survive judicial scrutiny.[16]

The Supreme Court's decision departs from traditional ADA analysis in as drastic a way as the Ninth Circuit's decision: while expeditiously settling the case at hand, the Court has left open a proverbial can of worms. The Court's decision, either mistakenly or by design (for which no rationale was given), creates the possibility for courts to strike down otherwise facially-neutral policies under a disparate impact theory.

Thus, the Court's decision fashions a loophole in traditional ADA reasonable accommodation theory by forcing employers to rehire disabled individuals who were terminated, for valid non-discriminatory reasons, through the disparate impact rubric. This decision in effect forces employers to extend gross rehiring preferences to qualified individuals with disabilities, an action which is clearly abhorrent to the stated purpose of the ADA.

As a guide to this analysis this note will discuss a number of perceived flaws with the Supreme Court's recent decision. To do so this note will begin with a comprehensive analysis of the ADA in regard to the language of the statute and the most recent Supreme Court and Court of Appeals cases in the area. All of this will be done in an attempt to explain how the ADA would traditionally be applied to the facts of a case such as the *Hernandez*.

Next this note will discuss *Hernandez v. Raytheon*, the Ninth circuit case that held, amongst other things, that blanket non-rehiring policies

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

13. *Id.* at 516.

14. *Id.* at 520.

15. Johnathan R. Mook, *Supreme Court Tells Ninth Circuit to Reconsider Refusal to Rehire Case*, 4 BENDER'S LABOR & EMPLOY. BULL. 31, 34, Jan. 1, 2004.

16. *Id.*

are repugnant to the ADA. We will discuss the facts of the case, the procedural history, and the issues presented when the Supreme Court granted certiorari.

The final section of our background will be a detailed overview of the Supreme Court decision, with a discussion of the issues the Court decided upon, the holdings and rationale of the court, and the topics ignored.

In the end we will attempt to establish that not only was the Ninth Circuit's decision a problematic and incorrect interpretation of the ADA, but also that the Supreme Court's attempt at rectifying these problems could have adverse consequences. The ultimate conclusion that flows from this analysis is that the Supreme Court's decision has significantly blurred the line between disparate impact cases and the necessity to grant reasonable accommodation.

II. BACKGROUND OF THE AMERICANS WITH DISABILITIES ACT

Disabled individuals in the United States are a discrete and insular minority. This class of people has faced both restrictions and limitations, have been subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.[17] This treatment is based on characteristics "that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[18]

Recognizing the need to act, Congress began the process of codifying the ADA in 1988.[19] The stated purpose of the act was to provide a clear and comprehensive mandate for the elimination of discrimination and to provide the standards by which the act will be enforced.[20] What

17. 42 U.S.C. § 12101(a) (2001).

18. 42 U.S.C. § 12101(a)(7).

19. Lowell P. Weicker Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 391 (1991). On April 28, 1988, the ADA bill was introduced in the Senate. *Id.* "The next day Representative Coelho, with the co-sponsorship of some thirty-three House members, introduced the ADA bill in the House." *Id.* (citing 132 CONG. REC. 1308 (daily ed. Apr. 29, 1988)). Soon after a joint congressional hearing was held; the hearing produced important testimony, but because it was late in the 100th Congressional Session, the bills were not acted upon by either the House or Senate before Congress adjourned. *Id.* During the 101st Congress significant revisions were made to the bill prior to its re-introduction in the Senate. *Id.* These modifications made the bill more specific and somewhat more moderate. *Id.* "On May 9, 1989, the revised bill was introduced in both houses of Congress." *Id.*; *see also* 134 CONG. REC. S5107 (1988) (introducing the proposed ADA to Congress).

20. 42 U.S.C. § 12101(b).

came out of this process is a clearly structured statute setting forth a workable nomenclature for achieving the proffered purpose.[21] To realize its purpose of eliminating discrimination in the workplace, the ADA established a comprehensive system of protections and remedies for qualified individuals with a disability.[22] Whether providing the employee with the remedy of reemployment in a disparate treatment termination, or allowing them a reasonable accommodation which allows the employee to perform essential functions of the job,[23] the ADA attempts to place the disabled employee on a level playing field with other workers and applicants, but refuses to extend to the qualified individual preferential status.[24]

Although the act has been modified several times since its inception,[25] it has maintained its original aspirations and functionality within a more modern context.[26] In the next two sections we will explore the text of the statute, beginning with a broad overview and then moving to a more specific analysis of how the statute is applied to the disability of drug addiction. In the section that follows we will look at how the courts have interpreted the ADA, and how it is applied to the specific topic at hand.

III. ANALYSIS OF THE STATUTORY FRAMEWORK OF THE ADA

A. Disability

The ADA defines a "disability" as a physical or mental impairment that substantially limits one or more of the major life activities of such individual.[27] In order to be considered disabled under the ADA with respect to employment, the individual must show that his condition significantly restricts his ability to perform either a class of jobs or a broad

21. *See* Weicker, *supra* note 19, at 391-92.

22. 42 U.S.C. §§ 2000e-2e-3.

23. 42 U.S.C. § 12112(b) (5) (a).

24. *See* Weicker, *supra* note 19, at 392.

25. *See* Weicker, *supra* note 19, at 391-92 (stating the opinion that although it has been modified many times, some for better some for worse, the statute still provides comprehensive protection for those with disabilities).

26. *Id.* at 391. Weicker believes, despite the changes, the ADA will still achieve its goals of "estalish[ing] a broad-scoped prohibition of discrimination against people with disabilities and will describe specific methods by which such discrimination is to be eliminated." *Id.* at 392 (quoting 134 Cong. Rec. 5107 (daily ed. Jan. 26, 1988)).

27. 42 U.S.C. § 12102(2) (A).

range of jobs in various classes as opposed to an average person of comparable skills.[28] A person will not be considered substantially limited in the major life activity of working just because the person is precluded from one type of specialized job or a particular job of choice; if there is a job available, which could utilize the person's skills, then the person is not precluded from a broad range of jobs and thus not substantially limited.[29]

Once a substantial limitation on the major life activity of working is established, the ADA requires that it be shown that the person is a "qualified individual with a disability."[30] A qualified individual is a person with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that he holds or desires.[31] If it is found that the individual, *inter alia*: 1) cannot perform many or all of the required functions of the position;[32] 2) presents a substantial liability to the safety of the other employees;[33] 3) has refused to accept reasonable accommodation offered by the employer,[34] or 4) is currently engaging in the illegal use of drugs,[35] then the employee will not be considered a qualified individual with a disability under the ADA. [36]

Built within the requirement of being a qualified individual with a disability is the concept of reasonable accommodation. The ADA places

28. Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1285 (11th Cir. 1997). *See also* Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1568 (S.D. Ga. 1995) (stating a significant impairment is one that is seen as foreclosing not just a narrow range of job tasks, but the general type of employment that is involved); Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727 (5th Cir. 1995) (holding that the inability to "perform one aspect of a job" while still maintaining the ability to perform the work in general is not a substantial limitation in regard to working).

29. Sutton v. United Air Lines, Inc., 527 U.S. 471, 492 (1999).

30. 42 U.S.C. § 12111(8).

31. 42 U.S.C. § 12111(8).

32. *See* Mertes v. Westfield Ford, 220 F. Supp. 2d 904, 910 (N.D. Ill. 2002) (holding that a person with an elbow injury which prevented him from performing all of the essential functions of his job was not a qualified individual because it would have required additional employees to assist him in almost every job and this would have represented an undue hardship on the employer).

33. *See* Schutts v. Bentley Nev. Corp., 966 F. Supp. 1549, 1556 (D. Nev. 1997) (holding that an individual is not qualified under the ADA because the risk posed to other employees could not be eliminated with any reasonable accommodation); *see also* Waddell v. Valley Forge Dental Ass'n., 276 F.3d 1275, 1281 (11th Cir. 2001) (holding that a dental hygienist who contracted HIV was a significant risk to the health of patients due to the nature of the employment position and because such a risk could not be eliminated by any accommodation).

34. Willett v. Kansas, 120 F.3d 272 (10th Cir. 1997) (stating that a woman who refused to accept reasonable accommodations is not considered a "qualified individual with a disability" under the ADA).

35. 42 U.S.C. § 12114.

36. *Id.* § 12114(a).

a duty upon the employer to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee.[37] Refusing to give such accommodations may result in a violation of the ADA.

Reasonable accommodations may include changing facilities for accessibility, modifying work schedules, reassignments, modifying equipment, adjustment in examinations, etc.[38] An accommodation is not per se unreasonable simply because it would confer an advantage on the employee; the fact that the accommodation would permit the employee with a disability to violate a rule that others must obey does not make the accommodation unreasonable.[39]

The ADA, however, does not require an employer to eliminate or reallocate essential functions of the position. It does not obligate an employer to give requested or preferred accommodation; rather it requires the reasonable accommodation necessary to enable the employee to perform the essential job functions.[40] This accommodation need not be an effective one; it need only be one that is reasonably calculated to provide the employee with an opportunity to perform the required functions of the position.[41]

An employer will not be required to give a reasonable accommodation, however, if such an accommodation would create "undue hardship" upon the employer.[42] An undue hardship is defined as an action requir-

37. *Id.* §§ 12112(b) (5) (A) & (B).

38. *Id.* § 12111; *see also* Weiler v. Household Finance Corp., 101 F.3d 519 (11th Cir. 1996) (detailing circumstances which satisfy reasonable accommodations such as: time off for therapy, short-term disability benefits, granting extended leave, allowing the employee to post for a new position in the company in the same salary grade and inviting the employee to interview for alternative positions within her salary grade); Milton v. Scrivner, Inc., 53 F.3d 1118 (10th Cir. 1995) (stating that a grocery selector whose job function included a quota requiring the movement of a large quantity of goods in a short period of time could not be accommodated by an altered or reduced production standard because this would remove him from the status of a qualified individual with a disability); Bivins v. Bruno's Inc., 953 F. Supp. 1558 (M.D. Ga. 1997) (holding that allowing other employees to do heavy lifting for a grocery store clerk was not a reasonable accommodation because the position consisted almost entirely of lifting, carrying, pushing and pulling items which might be heavy).

39. US Airways Inc. v. Barnett, 535 U.S. 391 (2002).

40. *See* Dey v. Milwaukee Forge, 957 F. Supp. 1043, 1050 (E.D. Wis. 1996) (holding that the ADA requires the employer only to make accommodations in its ordinary work rules, facilities, terms and conditions to enable the employee to work); s*ee also* Hershey v. Praxair, Inc., 969 F. Supp. 429 (S.D. Tex. 1997) (stating that the employer need not change the essential functions of the job to reasonably accommodate); Scheer v. City of Cedar Rapids, 956 F. Supp. 1496 (N.D. Iowa 1997) (holding that a reasonable accommodation does not need to be one that is preferred or requested).

41. *US Airways*, 535 U.S. at 391.

42. 42 U.S.C. § 12112(b) (5) (A) (2000).

ing significant difficulty or one that generates a great expense to the employer.[43] The statute gives the following factors to be considered when deciding whether a reasonable accommodation crosses a certain threshold and imposes an undue hardship on a covered entity: 1) the nature and cost of the accommodation needed; 2) the overall financial resources of the facility or facilities involved (the number of the persons employed at the facility; the effect on the expenses and resources, or the impact otherwise of such an accommodation on the operation of the facility); 3) the overall financial resources of the covered entity; the number employees and number and type of all facilities and; 4) the type of operation or operations of the covered entity.[44] While financial resources are an important aspect of determining whether an accommodation is reasonable, it is merely one of many that need to be analyzed in order to find an undue hardship.[45]

B. Discrimination

Generally, discrimination under the ADA falls into one of two categories, disparate treatment or disparate impact.[46] With regard to disparate treatment, the ADA prohibits any covered employer from discriminating against a "qualified individual with a disability,"[47] because of that disability "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment."[48] Under a disparate treatment theory, discrimination is defined as limiting, segregating, or classifying a job applicant in a way that adversely affects the opportunities or status of such applicant or employee because of his disability.[49]

On the other hand, disparate impact cases arise when an employer uses "qualification standards, employment tests or other selection crite-

43. *Id.* § 12111(10) (A).

44. *Id.* § 12111(10) (B).

45. Vande Zande v. State of Wis. Dept. of Admin., 44 F.3d 538 (7th Cir. 1995); *see also* EEOC v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997) (holding that a proposed accommodation of rearranging the schedule of an employee at a residence home for severely disabled people was an undue hardship because the proposed accommodation required that the employee, who suffered from depression, only be matched with residents that did not require medication, but only one of the residents did not take medication and this disrupted the mandatory one staff member to two patient ratio).

46. 45C AM. JUR. 2D *Job Discrimination* §2435 (2003).

47. 42 U.S.C. § 12111(8) (2000); *see also* Disability Section, *supra* at 240.

48. 42 U.S.C. § 12112(a).

49. *Id.* § 12112(b).

ria that screen out or tend to screen out an individual with a disability,"[50] regardless of whether or not there is intent to discriminate on the part of the employer.[51] Most often this occurs when a facially neutral policy on the part of the employer has a disproportionate impact on qualified individuals with disabilities thus creating a discriminatory effect as applied.[52]

Discrimination under the ADA may also be found where an employer refuses to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee; this is of course unless the covered employer can demonstrate that accommodation would impose an undue hardship.[53]

C. Drug Addiction and Discrimination

Section 12114 of the ADA states that the term "qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use."[54] The ADA further defines illegal use of drugs as "the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act ("CSA")."[55] An employee who engages in the illegal use of drugs or who is an alcoholic is held "to the same qualification standards for employment or job performance and behavior that such entity holds other employees . . . ."[56] The terms used in the ADA do not include the use of a drug taken under the supervision of a licensed health care professional, or other drug uses authorized by the CSA or other federal law.[57]

If an employer fires an individual due to lack of ability to perform essential job functions, it is not a violation of the ADA simply because the person suffered from an addiction at the time of their firing. In order

50. *Id.* § 12112 (b) (6).

51. *See* 45C AM. JUR. 2D *Job Discrimination* §2435 (2003) (stating that disparate impact cases generally arise from "more subtle practices" than disparate treatment).

52. *Id.*

53. 42 U.S.C. § 12112(b) (5) (A); *see also* Disability Section, *supra* at 240.

54. 42 U.S.C. § 12114(a).

55. *Id.* § 12114. The CSA is codified as 21 U.S.C. § 801 et seq. (2002); *see* 21 U.S.C. 812 (2002). The word drug is defined as it is used throughout the CSA and the ADA and placed into five schedules of controlled substances, known as schedules I, II, III, IV, and V. Each schedule is clearly defined and has several characteristics that separate it from the next, i.e. medicinal uses, potential for abuse, acceptable safety standards for use, etc.

56. 42 U.S.C. § 12114(c)(4).

57. *Id.* § 12111(6)(A).

for there to be a violation of § 12114 the employee must be a qualified individual with a disability, which as we have seen under § 12114(a), a person currently engaging in illegal drug use is not.[58]

However, a person who has successfully completed a supervised drug rehabilitation program and is no longer actively using illegal drugs is, under the ADA, a qualified individual with a disability.[59] Under the ADA, it is considered illegal behavior for a covered entity to discriminate against a successfully rehabilitated drug addict due to his past history of drug use.[60] All of the protections that are afforded to persons with disabilities under the act are also given to those individuals who are substantially limited in any number of life activities due to their past history of drug addiction.

To further help an individual and employer understand the recovering drug addiction provisions of the ADA, the Equal Employment Opportunity Commission ("EEOC") compliance manuals were created. Section 8.5 of this manual provides the following example: "an addict who is currently in a rehabilitation program and not currently using illegal substances is protected by the ADA because he has a history of addiction or is regarded as being addicted."[61] Rehabilitation programs may include in-patient, out-patient, employee assistance programs, or recognized self-help programs.[62] In order for a person to be substantially limited as a result of drug use, he must be actually addicted to a drug; casual past use will not qualify to create a disability.[63] The manual further explains that the ADA does not limit an employer's ability to gain information regarding an employee's participation in a rehabilitation program or from performing drug tests otherwise authorized under federal law.[64] In fact, the ADA allows for employers to openly review this information, and provides that the only violation of the ADA is where the employer discriminates based on the past history of drug use.[65]

58. *Id.* § 12114.

59. *Id.* § 12114(b)(1). This is, of course, subject to whether or not they are able to show that their drug addiction substantially limits them in one or more major life activities.

60. *Id.*

61. EEOC Compl. Man. No. 1A § 8.5 (1992).

62. *Id.*

63. *Id.*

64. *Id.*

65. 42 U.S.C. §§ 12112, 12114.

IV. COMMON LAW APPROACHES TO THE ADA

In order to fully understand the ADA, it is necessary to examine the case law surrounding the statute. While there are many conflicts in the interpretation of the ADA throughout different courts, the majority of courts are in unison when it comes to the underlying premises of the statute. In the following section we will discuss case law relating to the foundation of the statute, as well as, highlighting some areas of conflict.

A. Disparate Treatment, Reasonable Accommodation, and Disparate Impact

In order to establish a prima facie case of discrimination under the ADA a plaintiff must demonstrate that: (1) he is a member of a protected class, meaning, he has a "disability"; (2) he is qualified to work with reasonable accommodations (as defined above); and (3) he has suffered an adverse employment decision as a result of discrimination.[66] Once a plaintiff establishes a prima facie case for discrimination, the court will pursue one of three options depending on the type of claim brought by the plaintiff.

Under a disparate treatment claim, the employer is given the opportunity to try and establish that there was a legitimate nondiscriminatory reason for the adverse employment action.[67] If the employer, in fact, is able to establish a legitimate nondiscriminatory reason for the employment action, the "burden then shifts back upon plaintiff to establish by a preponderance of the evidence that the articulated reason was merely a pretext for unlawful discrimination."[68] If the plaintiff is unable to do so then the court will dismiss the discrimination action.

In a reasonable accommodation claim, the court takes a similar approach; once the plaintiff has established a failure to reasonably accommodate on the part of the employer, the court will then give the employer the opportunity to show that the given accommodation was an undue hardship.[69]

Finally, under a disparate impact theory, once a prima facie case has been established by the employee the burden shifts back to the em-

66. Horth v. Gen. Dynamics Land Sys., Inc., 960 F. Supp. 873, 877 (M.D. Pa. 1997) (citing Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 951 (3d Cir. 1996)).

67. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

68. Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 511 (5th Cir. 2003).

69. Holbrook v. City of Alpharetta, 112 F.3d 1522, 1526 (11th Cir. 1997).

ployer to show a business necessity.[70] If the employer is able to do so, the employee will then be given the opportunity to establish that other tests or selection devices are available, and do not have the same undesirable disparate impact.[71]

Although the three theories are often considered together and contain some similar elements, they are separate and distinct. In order to fully understand the ramifications of the Supreme Court's decision, it is imperative to analyze these three claims separately. By looking at the common law principles in each of these areas it will be made clear that each of these types of claims are textually distinct, and have different antecedents and unique evidentiary requirements.

1. Disparate Treatment

Disparate treatment occurs when the employer "simply treats some people less favorable than others because of their race, color, religion or other protected characteristics."[72] A disparate treatment claim exists when "an individual alleges that an employer has treated that particular person less favorably than others because of the . . ." persons protected characteristic.[73]"Proof of intentional discrimination is required under a disparate treatment analysis."[74] To establish a prima facie case for disparate treatment a plaintiff carries the burden of proving intentional discrimination in one of two ways:"(1) she may present direct evidence of discriminatory intent or, because of the difficulty in directly proving discrimination, (2) she may use the indirect, burden-shifting procedure set forth in *McDonnell Douglas* . . ."[75]

70. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658 (1989); *see also* Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53 (2003) (stating more specifically that "[u]nder a disparate-impact theory of discrimination, 'a facially neutral employment practice may be deemed [illegally discriminatory] without evidence of the employer's subjective intent to discriminate that is required in a disparate treatment case.'"(citing Wards Cove Packing Co., 490 U.S. 642).

71. Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

72. *Raytheon Co*., 540 U.S. at 52 (citing Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

73. *Watson*, 487 U.S. at 985-86.

74. Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1031 (7th Cir. 1998).

75. *Id.* at 1031; *see also* Bennett v. Roberts, 295 F.3d 687, 694 (7th Cir. 2002) (holding that in order to prove an ADA violation, a plaintiff must proffer direct or indirect evidence of employer's discriminatory intent; because of the difficulty in finding direct evidence however, the court stated that most cases proceed under the method of indirectly proving discrimination which is set forth in *McDonnell Douglas*).

In *McDonnell Douglas Corp. v. Green*,[76] the Supreme Court espoused the method for indirectly proving a prima facie case for disparate treatment. The Court held that the plaintiff must first show (i) he belongs to a protected class; (ii) he applied and was qualified for a job the employer was trying to fill; (iii) though qualified, he was rejected; and (iv) thereafter the employer continued to seek applicants with complainant's qualifications.[77] After making such a showing, the defendant can discharge its burden of proof by showing that its stated reason for the rehiring refusal was based on a legitimate non-discriminatory reason.[78] The Court went on to hold that the "respondent must be afforded a fair opportunity of proving that petitioner's stated reason was just a pretext for a . . . discriminatory decision, such as by showing that . . . similarly situated people outside the protected class were retained or hired by [employer]."[79] The Court also held that other evidence may be relevant, depending on the circumstances, including the fact that the petitioner had discriminated against disabled individuals, when employed, or that the employer was following a discriminatory policy toward disabled employees.[80]

Courts have universally held, however, that there is no disparate treatment, in violation of the ADA, where an employer holds disabled employees to the same standard of conduct as all other employees.[81] This means that an employer is permitted to enforce its policies so long as its enforcement is non-discriminatory;[82] under disparate treatment claim, a qualified individual with a disability under the ADA cannot secure special protection from universally applied rules by claiming that the adverse employment decision was made because of discrimination based on his disability.[83]

76. 411 U.S. 792 (1973).

77. *Id.* at 802.

78. *Id.*

79. *Id.* at 804; *see also* Taylor v. Southwestern Bell Tel. Co., 251 F.3d 735, 740 (8th Cir. 2001) (stating that an inference of discrimination can be made if there is direct evidence that a person in the protected class was treated differently then a similarly situated person outside of that class).

80. *McDonnell Douglas Corp.*, 411 U.S. at 804-05.

81. Harris v. Polk County, Iowa, 103 F.3d 696, 697 (8th Cir. 1996).

82. *See* Despears v. Milwaukee County, 63 F.3d 635, 637 (7th Cir. 1995); *see also* Pernice v. City of Chicago, 237 F.3d 783, 785 (7th Cir. 2001) (finding that "[i]t is well-established that an employee can be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred under the influence of a disability").

83. *See Despears*, 63 F.3d at 637 (finding that defendant would demote any worker who lost their license, thus foreclosing on the ability to perform an essential function of the job, precluding plaintiff from claiming an ADA violation despite the disability of alcoholism).

The plaintiff in *Despears v. Milwaukee County*, worked as a maintenance worker for a public medical facility.[84] His work involved occasional driving, to deliver parts, because of this there was a regulation that required workers in his job classification to have a valid driver's license.[85] Despears' license was revoked after he was convicted a fourth time of driving under the influence of alcohol.[86] Upon learning of the revocation, his employer demoted Despears to custodial worker, a job classification that does not involve any driving and does not require that the worker have a driver's license, but that paid less.[87]

Despears attributed the loss of his license to his having been an alcoholic and claimed his employer violated the ADA by demoting him due to this disability.[88] The court held that the ADA cannot be expanded in this manner to give benefits to those who break the law, stating that"[t]he refusal to excuse, or even alleviate the punishment of, the disabled person who commits a crime under the influence as it were of his disability yet not compelled by it and so not excused by it in the eyes of the criminal law is not 'discrimination' against the disabled; it is a refusal to discriminate in their favor."[89]

The court reasoned that Despears was no longer a "qualified individual with a disability"[90] because he could no longer perform one of the essential functions of his position, that of driving.[91] If the court were to extend the disparate treatment rubric in this manner then, in essence, the

84. *Id.* at 635.

85. *Id.* This was clearly stated in the employee handbook, which gave a description of the job and the requirements to maintain employment. *Id.* The plaintiff never claimed that he was unaware of this requirement or that the requirement itself was discriminatory as applied to him; the plaintiff claimed that he was demoted due to losing his license, which was caused by his disability and as such he was discriminated against. *Id.* at 635-36.

86. *Id.* at 635

87. *Id.*

88. *Id.* at 635-36.

89. *Id.* at 637.

90. *Id.*; *see also* Mertes v. Westfield Ford, 220 F. Supp. 2d 904, 909-10 (N.D. Ill. 2002) (holding that a person with an elbow injury which prevented him from performing all of the essential functions of his job was not a qualified individual because it would have required additional employees assist him in almost every job and this would have represented an undue hardship to the employer); Disability section *see supra*, at 240 (stating that if it is found that the individual, *inter alia*: 1) cannot perform many or all of the required functions of the position, 2) presents a substantial liability to the safety of the other employees, 3) has refused to accept reasonable accommodation offered by the employer, or 4) is currently engaging in the illegal use of drugs, then they will not be considered a qualified individual with a disability under the ADA).

91. *Despears*, 63 F.3d at 635.

court would give an advantage to disabled people, instead of, as the statute offers as its purpose, placing them on even ground.[92]

The court further held that to impose liability under the ADA in circumstances where plaintiff drove drunk and lost his license would have "indirectly but unmistakably undermined the laws that regulated dangerous behavior. It would have given alcoholics and other diseased or disabled persons a privilege to avoid some of the normal sanctions for criminal activity."[93]

Courts have further held that the ADA does not require employer's to overlook infractions of the law.[94] In *Harris v. Polk County, Iowa*, an Eighth Circuit Court of Appeals case, a woman pled guilty to a shoplifting charge and was fired. As a result she began attending mental health sessions.[95] After completing her sessions she was cured of any mental health problems that she claimed caused her to shoplift.[96] The county refused to rehire her based solely on an office policy against employing individuals with criminal records. [97]

Harris brought suit under the ADA, claiming that because her termination was caused by a symptom of her mental illness and that it was a violation of the ADA to deny her rehiring based solely on her shoplifting.[98] The court found that the office wide non- rehiring policy, which was applied evenly to disabled and non-disabled employees, was a legitimate non-discriminatory explanation for the adverse decision not to rehire.[99] The court in *Harris* made it clear that it is not disparate treatment in violation of the ADA for an employer to hold prospective employees "to the same standard of law-abiding conduct as all other em-

92. *Id.* at 637.

93. *Id.*; *see also* Leary v. Dalton, 58 F.3d 748, 753 (1st Cir. 1995) (reasoning that plaintiff cannot claim his disability of alcoholism caused him to drive drunk and thus lose his license, and subsequently his job, where it is a basic assumption under criminal law that even an alcoholic can prevent him/herself from driving drunk and is thus not immune to the DWI laws).

94. Harris v. Polk County, Iowa, 103 F.3d 696, 697 (8th Cir. 1996); *see also Despears*, 63 F.3d at 637 **(**holding that it is not disparate treatment under the ADA for employer to demote an employee who lost his license due to drunk driving violation where a license was a requirement of employees former position).

95. *Harris*, 103 F.3d at 696.

96. *Id.*

97. *Id.* While it wasn't an expressly written policy, the unwritten policy against employing individuals with criminal records was universally enforced and known to all employees. *Id.*

98. *Id.* at 696-97.

99. *See Harris*, 103 F.3d at 697 (stating that plaintiff had failed to present evidence that tended to show that the legitimate non-discriminatory reason given by the defendant employer was a pretext; without such a showing, the court held, plaintiff cannot prove there is a disparate treatment caused by uniformly enforced office wide policies).

ployees,"[100] regardless of whether or not the infraction was caused by their disability.

In fact the Seventh Circuit in *Pernice v. City of Chicago*[101] held that the ADA did not prohibit an employer from terminating an employee for possession of cocaine and disorderly conduct, regardless of the claim that the disability caused the drug use.[102] The court relied on 42 U.S.C. § 12114,[103] holding that the ADA does not protect people who are currently using drugs as disabled individuals.[104] The court held that, under the statute, only those people who were drug abusers and have successfully completed a rehabilitation program are covered; the only possible disparate treatment would be caused by discrimination against the recovered drug addict for his past history of drug use.[105] The court specifically relied on section 12114(4), stating that an employer may

> 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 behavior is related to the drug use or alcoholism of such employee . . . .[106]

2. Reasonable Accommodation

As discussed previously, the ADA imposes the affirmative requirement of making a "reasonable accommodation" upon the employer when the employee is a qualified individual with a disability.[107] It is considered a violation under the ADA if an employer fails to give reasonable accommodation to a disabled employee, who with such reasonable accommodations could perform the required tasks of his job.[108] How-

100. *Id.* at 167; *see, e.g.*, *Despears*, 63 F.3d at 637.

101. 237 F.3d 783 (7th Cir. 2001).

102. *Id.* at 785-86.

103. The statute explicitly states that "the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a). The statute goes on to say that "nothing in this [section] shall be construed to exclude as a qualified individual with a disability an individual who — (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use . . ." *Id.* § 12114(b)(1).

104. *Pernice*, 237 F.3d at 785, n.1.

105. *Id.* at 785-87.

106. 42 U.S.C. § 12114(4).

107. *Id.* § 12112(b) (5) (A).

108. US Airways, Inc. v. Barnett, 535 U.S. 391, 396 (2002); *cf* 42 U.S.C. § 12112 (a) & (b)

ever, the ADA does not require employers to accommodate disabilities, but rather limitations.[109] This aspect is important because a disability may limit one employee's ability to perform, but not another's; therefore a reasonable accommodation is only applicable to those instances where a "limitation" is the result of a disability.[110] In addition to the ADA's general concept that a reasonable accommodation is something designed to assist the individual in performing the essential functions of the position, courts have interpreted it to mean assistance which would help a person with a disability obtain the "same" workplace opportunities that those without disabilities enjoy.[111]

As previously mentioned, some of the various accommodations mentioned by the ADA are: changing facilities for accessibility, modifying work schedules, reassignments, modifying equipment, etc.[112] In *Weiler v. Household Finance Corp.*,[113] the court held that accommodations could include time off for therapy, short-term disability benefits, and inviting the employee to interview for alternative positions within his salary grade;[114] similar expansions have been at issue in many jurisdictions.[115]

The process of providing a reasonable accommodation does not fall solely on the employer; it is a process that involves the mutual workings of both employee and employer.[116] The process begins with the employee making the disability known to the employer; an employee cannot hide a disability and then invoke ADA liability for failure to provide accommodation.[117] The employee must also request that reasonable accommodations be made by the employer.[118] The employee and employer must then enter into an interactive process to determine what reasonable

(2001).

109. Burch v. Coca-Cola Co., 119 F.3d 305, 314 (5th Cir. 1997).

110. *Id.* at 314-15.

111. *Id.* at 313.

112. 42 U.S.C. § 12111(9).

113. 101 F.3d 519 (7th Cir. 1996).

114. *Id.* at 526.

115. *See* Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) (holding that unpaid leave for an employee undergoing treatment can be a reasonable accommodation). *But see* Hudson v. MCI Telecommunications Corp., 87 F.3d 1167, 1169 (10th Cir. 1996) (holding that unpaid leave for an undetermined length of time is not a reasonable accommodation).

116. Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (1996).

117. *Id.* at 1134.

118. *See* Burch v. Coca-Cola, Co., 119 F.3d 305 (5th Cir. 1997) (holding that an employee could not maintain a claim that his termination violated the ADA on the grounds that the employer did not provide reasonable accommodation because at no point did he request reasonable accommodations, he merely requested to return to his original position with no changes).

accommodations can be made; the process might include identifying the exact limitations and the accommodations in light of those limitations.[119] Litigation determining whether or not reasonable accommodations have been made often results from these interactive processes breaking down; as a result courts should look for failures to make good faith efforts to provide the other party with adequate information regarding the limitation or the accommodations available.[120] Failure to provide information, or acts designed to halt or obstruct these processes can lead to a finding that reasonable accommodations were not made.[121] Liability for failure to provide reasonable accommodations only ensues where the employer is responsible for the break down in communication.[122]

There are generally three circumstances in which the employer can avoid the requirement of making a reasonable accommodation. An employer can circumvent this obligation if the required accommodations would 1) create "undue hardship"[123] or, 2) require the employer to reallocate essential functions of the position, thereby removing the individual from the qualified status[124] or, 3) when the employee violates a company policy prohibiting the employee from being under the influence of alcohol or drugs at the workplace.[125]

In *Holbrook v. City of Alpharetta*, the plaintiff was a police detective who, as a result of an accident and diabetes, lost a substantial portion of his vision in one eye and total loss of vision in the other.[126] Because of his impairment, the police department provided some accommodations, such as pairing him with another officer to drive him

119. *Beck*, 75 F.3d at 1135.

120. *Id.*

121. *See id.* at 1137 (holding that ADA liability could not be imposed upon the employer because during the process of determining what accommodations could be made, the employee failed to provide the employer with exactly what kind of accommodations she needed, and as a result the employer was left guessing about what actions should be taken).

122. *Id.*

123. Holbrook v. City of Alpharetta, 112 F.3d 1522, 1526 (11th Cir. 1997) (holding that the ADA imposes a duty upon the employer to provide reasonable accommodations unless doing so would create undue hardship to the employer).

124. Bivins v. Bruno's, Inc., 953 F. Supp. 1558 (M.D. Ga. 1997); s*ee also* Gomez v. Am. Bldg. Maint., 940 F. Supp. 255 (N.D. Cal. 1996) (holding that an employer did not need to create an entirely new position to accommodate the disabled employee or reallocate essential functions of the position which the employee held).

125. Flynn v. Raytheon, 94 F.3d 640 (1st Cir. 1996) (holding that reasonable accommodation does not extend to accommodating an alcoholic who shows up to work under the influence or while on the job, particularly when a there is a company policy which mirrors that of 42 U.S.C. § 12114(c)(2)).

126. *Holbrook*, 112 F.3d at 1525.

to crime scenes and reducing his case work.[127] When he was denied supervisory positions, he filed suit claiming discrimination under the ADA.[128] In response, the court held that the police department was not required to give reasonable accommodations because it would create undue hardship and require reallocation of essential job functions.[129]

Holbrook's lack of vision would disable him from fully investigating all types of crime scenes and, should there be multiple crime scenes to investigate, it would be an undue hardship because the police department might not be capable of shuffling personnel around to accommodate Holbrook's disability.[130]

Accommodations which require the employer to change the essential functions of the position are held to be unreasonable in most situations. The predominate type of such accommodations are ones which require the employer to shift the disabled employee's work load to another employee.[131]

In *Bivins v. Bruno's, Inc.*, the plaintiff was promoted to frozen food clerk, a position which required lifting heavy items, unpacking heavy items, and storing them in the appropriate aisles.[132] He was terminated after an accident in the store that injured his neck and prevented him from lifting heavy items and storing them in high locations.[133] The court held that accommodations would have been burdensome and would require reallocation of essential job functions because Bivins would need someone to assist him in every aspect of unloading the packages, lifting the packages and storing them.[134]

The ADA supports an employer's authority to prohibit employees from using drugs or alcohol in the workplace and from being under the influence of drugs or alcohol in the workplace.[135] This essentially bars an employee who engages in such conduct from claiming that an em-

127. *Id.*

128. *Id.*

129. *Id.* at 1527.

130. *Id.*

131. *See* Aquinas v. Federal Exp. Corp., 940 F. Supp. 73 (S.D.N.Y. 1996) (holding that an employee's request that she be allowed to work only when her illness permitted was not a reasonable accommodation because regular attendance, an essential function of her position, would be undermined); McCollough v. Atlanta Beverage Co., 929 F. Supp. 1489 (N.D. Ga. 1996) (holding that an employer was not required to accommodate an employee's back injury because the injury prevented the employee from lifting heavy loads, an essential part of his position as an assistant to the supervisory salesperson, and would leave the salesperson to do all the manual labor).

132. 953 F. Supp. 1558, 1558-59 (M.D. Ga. 1997).

133. *Id.* at 1559-60.

134. *Id.* at 1562.

135. *See* 42 U.S.C. § 12114 (c)(1) - (2)(2001).

ployer has not made reasonable accommodations in response to the employee's disability.[136] In *Flynn v. Raytheon*, the First Circuit acknowledged that an employer may hold an employee who is an alcoholic to the same standards of work quality as every other employee, and when that employee's work suffers repeatedly from being under the influence, the employer may fire him.[137] Flynn contended that he was entitled to a second chance under the ADA as a result of his disability; however, the court stated that the ADA does not require an employer to rehire a former employee who is discharged lawfully, under 42 U.S.C. § 12114, for failing to meet job requirements.[138]

The First Circuit's opinion in *Flynn* has been reiterated by the Ninth Circuit in *Caniano v. Johnson Controls, Inc.*[139] The court held that an employer does not need to rehire a legitimately terminated employee even if the employee can afterwards demonstrate that he could now perform the job functions satisfactorily.[140] The court stated that an employer's refusal to give a "second chance" to an employee who was fired for legitimate reasons does not violate the reasonable accommodation requirement.[141]

Reasonable accommodation is a two way street, requiring both the employee and the employer to interact and find the best possible solution in assisting the employee in overcoming the limitation and fulfilling the job requirements. However, should the process break down, the outcomes can be detrimental to both parties, resulting either in liability in the employer's case, or a loss of protection for the employee. As stated previously, this process all depends on whether the accommodations do not create any undue burden, require alterations to the essential functions of the position, or are not required due to the employee's violation of a company policy prohibiting drug and alcohol usage in the workplace.

136. *See* Flynn v. Raytheon Co., No. 96-1019, 1996 U.S. App. LEXIS 20837 (1st Cir. Aug. 19, 1996).

137. *Id.* at *2.

138. *Id.*

139. No. 98-35159, 1999 U.S. App. LEXIS 20648 (9th Cir. Aug. 26, 1999). The plaintiff suffered from dysthemia, a recognized disability, which caused him to be excessively absent from work. *Id.* at *2. The employer was not made aware of the disability and the plaintiff was fired for his absences; no claim was brought for discrimination as a result of the firing. *Id.* After the plaintiff successfully got his condition under control he reapplied for his former position, the employer refused to hire him, and suit was brought under the ADA. *Id.* The plaintiff claimed that it was a "reasonable accommodation" for him to be rehired now that he could perform the job. *Id.* at *3.

140. *Id.* at *4.

141. *Id.*

3. Disparate Impact

Disparate impact claims differ from disparate treatment claims in that they "involve employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity."[142] A disparate impact claim exists where the plaintiff can demonstrate that the specific practice by the employer screens out, or tends to screen out disabled people at a rate disproportionate to that of people outside of the protected class.[143] Unlike disparate treatment cases, there is no need for the plaintiff to show that the employer acted with discriminatory intent in disparate impact cases to have a successful discrimination claim.[144]

In order to establish a prima facie case of disparate impact a plaintiff must first identify the specific employer practice or practices that lead to the overall disparity,[145] and second, the plaintiff must demonstrate causation by presenting "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotion because of their membership in a protected group."[146]

Once the employee has established a disparate impact claim using the above two-step process, the burden then shifts to the employer to show a "business necessity." [147] The Supreme Court held in *Griggs v. Duke Power Co.*,[148] that in order to satisfy the business necessity requirement, the employee has "the burden of showing that any given requirement [has] a manifest relationship to the employment in ques-

142. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

143. Watson v. Ft. Worth Bank & Trust Co., 487 U.S. 977, 986-87 (1988).

144. Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 645-46 (1989); Vitug v. Multistate Tax Comm'n, 88 F.3d 506, 513 (7th Cir. 1996). In *Virtug*, the court stated that:

> Under a disparate impact theory of discrimination, a plaintiff may successfully attack a subjective and arbitrary hiring procedure only if it has a disproportionately negative effect on members of a protected class. Put simply, success under a disparate impact theory of discrimination requires a showing of disparate impact. Absent such a showing, it is not the place of this court to judge the effectiveness or accuracy of a company's interview procedures.

Id. at 514.

145. *Watson*, 490 U.S. at 994.

146. *Id.*; *see* Ramos v. Baxter Healthcare Corp. of P.R., Inc., 256 F.Supp.2d 127, 146 (D. PR. 2003) (holding that "[i]n establishing causal relationship plaintiff must show that the differences come as a result of the policy at issue and not other unrelated causes" in order to satisfy the causation requirement.).

147. *Wards Cove*, 490 U.S. at 649.

148. 401 U.S. 424 (1971).

tion."[149] If the defendant is able to establish that the practice is based on a legitimate business practice the employee will then be given a chance to "show that other tests or selection devices, without a similarly undesirable [discriminatory] effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship."[150]

In *Griggs*, the plaintiff challenged an employer's uniformly-applied policy requiring that incoming employees have a high school diploma, and that they also pass a general intelligence test.[151] The Supreme Court held that the high school completion requirement and the general intelligence test cannot be "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used . . ." and that"[b]oth were adopted . . . without meaningful study of their relationship to job-performance ability."[152] In fact, the Court found evidence that those employees without diplomas, who were hired before the test criteria was put in place, performed satisfactorily on all levels.[153]

By striking down this facially neutral testing policy, which disproportionately screened out African Americans, the Supreme Court created the disparate impact theory of discrimination.[154] Although *Griggs* was a Title VII case, the common law disparate impact theory has been extended to the ADA as well.[155]

In *Riechmann*, the District Court for the District of Kansas explained how the *Griggs* disparate impact rubric is extended to the ADA.

149. *Id.* at 432. The court made it clear, however, that "such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant . . . the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Watson*, 487 U.S. at 997.

150. *Watson*, 487 U.S. at 998 (citing Albemarle Paper Co. v. Moody 422 U.S. 424, 425 (1975)). *See also* E.E.O.C. v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 602 (1995) (holding that a plaintiff can also prove that a proffered non-discriminatory rationale is pretextual by showing that "some other practice, without a similarly undesirable side effect, was available and would have served the defendant's legitimate interest equally well. Such an exhibition constitutes competent evidence that the defendant was using the interdicted practice merely as a 'pretext' for discrimination.") (citations omitted).

151. Griggs v. Duke Power, 401 U.S. 424, 425-26 (1971).

152. *Id.* at 431. The Court held that "neither standard is shown to be significantly related to successful job performance, both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and the jobs in question formerly had been filled only by white[s]." *Id*. at 426.

153. *Id.* at 431-32.

154. *Id.* at 431. *See Ramos v. Baxter Healthcare Corp. of P.R.*, 256 F. Supp. 2d 127, 147 (D. P.R. 2003) (stating that "the disparate impact theory originated in *Griggs* . . .").

155. *See, e.g.*, Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 385 (2001); Mehus v. Emporia State Univ., 295 F. Supp. 2d 1258, 1271 (D. Kan. 2004); Tsombanidis v. W. Haven Fire Dept., 352 F.3d 565 (2d. Cir. 2003); Riechmann v. Cutler-Hammer, Inc., 183 F.Supp.2d 1292 (D. Kan. 2001).

The court stated that within the "ADA context, the disparate impact analysis is appropriate in claims involving improper qualification standards, tests or selection criteria, when 'uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities.'"[156]

Another district court in *E.E.O.C. v. United Parcel Services, Inc.*,[157] explained that, as applied to Title VII, the terms "business necessity" and "job relatedness" espoused in *Griggs*, should have the same connotation when applied under ADA claims.[158]

In summation, under the ADA, disparate impact cases arise where an otherwise facially neutral employment policy disproportionately affects a disabled person or a class of disabled people. The only way an employer can rebut a disparate impact claim is by showing that the given policy is a business necessity. If the employer does so, then the disabled employee/applicant will then be given a chance to show that there are other non-discriminatory alternatives, thus establishing pretext; policies that cause a disparate impact on disabled individuals cannot survive if the plaintiff can show pretext.

B. Terminations and Rehiring

A disabled employee is also protected from discriminatory terminations by the ADA.[159] However, an employer may fire an employee if that employee failed to perform the job adequately, regardless of whether the employee has a disability.[160] For instance, the ADA allows an employer

156. *Riechmann*, 183 F. Supp. 2d at 1296 (citing 42 U.S.C. § 12112(b)(6); 29 C.F.R. Pt. 1630.15, App. §§ 1630.15(b)-(c)).

157. 149 F. Supp. 2d 1115, 1162 (N.D. Cal. 2000).

158. *Id.* at 1162-63. The court relied on Molzof v. United States, 502 U.S. 301, 307 (1992) where the Supreme Court held that:

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such cases, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them."

Id. (quoting Morissette v. United States, 342 U.S. 246, 263 (1952)).

159. Lawrence v. Nat'l Westminster Bank New Jersey, 98 F.3d 61, 67-68 (3d Cir. 1996). The court stated that in order for an employee to establish a prima facie case of discriminatory termination from employment, the employee must show that he 1) was part of the a protected class, 2) was qualified, with or without reasonable accommodation, 3) was dismissed despite being qualified, and 4) was ultimately replaced by a person outside the protected class as to create an inference of discrimination. *Id.* at 68.

160. Dey v. Milwaukee Forge, 957 F. Supp. 1043, 1050 (E.D. Wis. 1996).

to require employees not to be under the influence of drugs or alcohol in the workplace, and if such conduct occurs and affects the employee's work then termination can be lawful.[161] This is similar to *Flynn v. Raytheon Co.*, in which the court held that the plaintiff's termination was lawful because his consistent absences from work due to drinking were a violation of the ADA supported company policy.[162]

In regard to an employer's hiring decisions, the ADA states that an employer does not violate the ADA if the applicant has a disability which prevents him from fulfilling the essential functions of the job, even if reasonable accommodations are given to that employee. In *Hoffman v. Fidelity Brokerage Services, Inc.*,[163] the court held that the employer did not violate the ADA when he opted not to hire a blind applicant who, even with reasonable accommodations, could not perform the functions of the job sufficiently.[164]

The ADA states further that a person who is currently an alcoholic or drug abuser is not a qualified person with a disability and therefore it is not impermissible discrimination to refuse to hire them.[165] In *Martin v. Barnesville Exempted Village School District Board of Education*,[166] the court held that the school board did not violate the ADA when it decided not to hire a janitor who had been previously caught drinking while on the job as a school bus driver.[167] The possibility that he might drink again and the nature of the job he applied for could pose serious risks to the school's students and increased liability for the school board.[168]

Thus far we have seen how the ADA is structured to achieve its twin purposes of providing a clear and comprehensive mandate for the elimination of discrimination and providing the standards by which this will be enforced.[169] To do so, the statute has established a framework which allows employers, employees, and the courts to analyze situations involving disabled employees or applicants. First, in defining a class of people as "qualified individuals," the ADA clearly identifies who is pro-

161. Antoine v. Dept. of Pub. Safety, 681 So. 2d 1282, 1286 (1st Cir. 1996).

162. No. 96-1019, 1996 U.S. App. LEXIS 20837 (1st Cir. Aug. 19, 1996).

163. 959 F. Supp. 452 (S.D. Ohio 1997).

164. *Id.* at 463. The applicant was considered legally blind and would be required to view a large monitor as part of a customer service position. *Id.* at 464. The employer suggested certain accommodations, but these accommodations would be quickly out ruled. *Id.* at 454-55. The employer ultimately made a business decision and reasoned that the applicant would not be able to perform the functions of the position. *Id.* at 456.

165. 42 U.S.C. § 12114 (2001).

166. 209 F.3d 931 (6th Cir. 2000).

167. *Id.* at 932.

168. *Id.* at 935.

169. 42 U.S.C. § 12101(b)(1)-(2) (2001).

tected under the statute and who is not. Next, the ADA enumerates what steps are necessary to place the covered employee or applicant with a disability in a similarly situated position as other employees or applicants. Finally, the ADA provides recourse for qualified individuals with a disability; these include, *inter alia*, providing the employee with an avenue for taking back his job or allowing them a reasonable accommodation that will assist them in performing the required job functions. The courts have universally employed these steps in their application of the ADA to various types of claims by employees and applicants.

V. *HERNANDEZ V. HUGHES MISSILE SYSTEMS CO.*

A. Background

Joel Hernandez ("Hernandez") was employed by Hughes Missile Systems ("Hughes"), in a variety of capacities, for nearly twenty-five years.[170] During his tenure with Hughes, Hernandez worked his way up from a low-level janitorial position to the highly specialized position of calibration service technician.[171] In July 1991 Hernandez tested positive for cocaine during a random employee drug test.[172] The management at Hughes acknowledged that they were aware of Hernandez's ongoing problems with alcohol addiction even prior to testing positive for cocaine.[173] Hughes presented Hernandez with the opportunity to resign in lieu of termination,[174] an option that was offered to similarly situated employees who had tested positive for drug use in the past.[175] Hernandez then began a two-year battle with his drug addiction[176] by seeking counseling and enrolling in Alcoholics Anonymous.[177] Further evincing the

170. Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030, 1032 (9th Cir. 2002).

171. *Id. See* Edward G. Guedes, *The Proverbial "Get Out of Jail Free" Card — The Ninth Circuit's Treatment of Addiction Under Hernandez v. Hughes Missile Systems Co.*, 76 FLA. B.J. 64 (2002).

172. *Hernandez*, 298 F.3d at 1032. The administration of the test and its results are not at issue in this case; Hernandez conceded that the test was given in compliance with all federal law on drug testing. *Id.* at 1033 n.7.

173. *Id.* at 1032.

174. *Id.*; *see also* Guedes, *supra* note 171, at 64 (emphasizing the fact that "Hernandez neither challenged the legality of his resignation, nor questioned the finding that he was using illegal drugs.").

175. *Id.* at 64. Companies, like Hughes, offer this type of option to long standing employees to prevent them from an adverse employment dismissal on their permanent records. *Id.*

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

177. *Id.*

legitimacy of his rehabilitation, Hernandez became a "faithful and active member" of his community church.[178] Once Hernandez felt that he was prepared to re-establish himself as a contributing member of working class society, he re-applied for his former position at Hughes.[179]

In his application, Hernandez indicated that he had previously worked for Hughes; Hughes' labor relations department reviewed his application and subsequently rejected it.[180] The reason given for the rejection was an unwritten policy "of not rehiring former employees whose employment ended due to termination or resignation in lieu of termination." [181] Hernandez believed that the reason he was not rehired was because of his past history of drug abuse and, as a result, he decided to bring an action against his former employer under the ADA.[182] In June of 1994, Hernandez contacted the EEOC, which, after reviewing his letter, issued him a right to sue letter.[183] Hernandez brought his claim in federal district court where Hughes was subsequently granted summary judgment.[184]

B. Contentions of the Parties

1. Hernandez

Hernandez asserted in his claim that in rejecting his application for rehire Hughes discriminated against him based on his record of disability.[185] Hernandez's claim was that he was not rehired as a result of his

178. *Id.* In his application for re-hiring, Hernandez submitted two reference letters; one from his substance abuse counselor and another from his church pastor in order to show his compliance with the ADA requirements of successful completion of "a supervised drug rehabilitation program" and "is no longer engaging in the illegal use of drugs." *Id.*; *see* 42 U.S.C. § 12114(b) (1).

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

180. *Id.*

181. *Id.*

182. *Id.* at 1032.

183. *Id.* at 1032-33. The EEOC report, issued on November 20, 1997, stated that "there was reasonable cause to believe that [Hernandez] was denied hire . . . because of his disability." *Id.* at 1033. In doing so the EEOC found that Hughes violated the ADA and so they issued a right to sue letter to Hernandez. *See* Brief for Appellant at 5, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512). Before issuing the right to sue, the EEOC attempted to bring about a resolution to the dispute, but was unable to do so. *Hernandez*, 298 F.3d at 1033, n.5.

184. *Id.* at 1032.

185. *Id.* at 1033. *See* Brief for Appellant at 7, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512).

past history of drug addiction, a recognized disability under Title I of the ADA.[186]

In response to Hernandez's claim, Hughes offered the legitimate explanation that Hernandez was not rehired due to an unwritten company wide policy of disqualifying applicants who had worked for Hughes and subsequently been terminated or resigned in lieu of such termination.[187] Hernandez believed this was a pretext for two major reasons.[188] Firstly, when "Hernandez was disqualified from consideration for re-employment, Hughes had no written policy, procedure, or practice that required such treatment."[189] Secondly, George Medina, Manager of Diversity Development for Hughes, stated to the EEOC that "Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation."[190] Hernandez believed that these two facts were enough to show that the "unwritten policy" was just a pretext for discrimination.[191]

Hughes argued that regardless of whether the unwritten policy was a pretext or not, they still did not violate the ADA.[192] Hughes contended that Hernandez offered no evidence tending to show that he "successfully completed a supervised drug rehabilitation program and is no longer engaging in illegal use of drugs . . ."[193] as required by the ADA.[194]

In response, Hernandez offered proof that in the two and a half years that had passed since his decision to voluntarily submit his resignation, he had engaged in successful formal and informal rehabilitation efforts.[195] In January 1994 Hernandez proffered evidence tending to show that he was not only drug and alcohol free at the time,

186. *Hernandez*, 298 F.3d at 1033; *see* 42 U.S.C. §§ 12112, 12114.

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

188. Brief for Appellant at 3, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512).

189. Brief for Appellant at 4, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512). Oddly enough, Hughes had a written policy that stated that a new applicant for hire who failed a drug test only had to wait a twelve month period before re-applying. *Hernandez*, 298 F.3d at 1036 n.16. Essentially, Hughes' unwritten policy made it impossible to get re-hired if you failed a drug test, while making it comparatively simple to get hired if you are a first time employee. *Id.*

190. *Hernandez*, 298 F.3d at 1033.

191. *See* Brief for Appellant at 7, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512).

192. *Hernandez*, 298 F.3d at 1033.

193. 42 U.S.C. § 12114(b)(1).

194. *See* Brief for Appellee at 15, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512).

195. Appellant's Opening Brief at 9-10, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030

show that he was not only drug and alcohol free at the time, but that he had been for a substantial period.[196] There is no evidence in the record submitted by either party to contradict this. [197]

In fact, the record has clearly shown that any request by Hughes for information about his rehabilitation or past use of drugs or alcohol was provided by Hernandez; Hernandez submitted to any drug and alcohol tests sought by Hughes.[198] However, Hernandez argued that Hughes gave no consideration to this evidence of his rehabilitation.[199] In fact, Hernandez believed that when he sought re-employment, Hughes treated him as a person who was still engaging in the use of alcohol and drugs.[200] Hernandez claimed that Hughes was not looking for any evidence of successful drug rehabilitation, yet the only response proffered by Hughes to the EEOC on the charge of discrimination was the lack of any such evidence.[201]

Hernandez claimed, contrary to Hughes' assertion, that he was a qualified for the position under the ADA.[202] In 1999, five years after the commencement of this suit, Hernandez was given the opportunity by Hughes to take the necessary examination to become a Product Test Specialist, which he subsequently failed.[203] However, Hernandez argued that because the discrimination occurred in 1994, his failure of the examination in 1999 was not dispositive of the issue of his qualification because if given the test in 1994, when he originally applied for rehiring, he would have passed.[204] Hernandez further supported his claim that he was qualified by submitting his Employee Separation Sheet, made prior to his termination, which evaluated his performance ratings in three major categories: Ability, good; Conduct, fair; and Productivity, fair.[205]

(9th Cir. 2002) (No. 01-15512).

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

197. *See* Appellant's Opening Brief at 10, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512).

198. Appellant's Opening Brief at 10, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512).

199. *Id.*

200. *Hernandez*, 298 F.3d at 1033. Appellant's Opening Brief at 10-11, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512).

201. Appellant's Opening Brief at 12, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512).

202. *Id.* at 10.

203. *Hernandez*, 298 F.3d at 1035.

204. *See id*.

205. *Id.* at 1035 n. 11.

Hernandez's final contention was that the personnel department at Hughes could not have avoided taking his past drug history into account when making its decision.[206] He made this contention despite the fact that at deposition, Joanne Bockmiller, the individual responsible for making the re-hiring decision, unequivocally stated that when she disqualified his application she "did not know of Hernandez's history of drug addiction or the reason for his leaving the company in 1991."[207] However, Bockmiller also stated that her decision was based on Hernandez's prior employment and that her review included Hernandez's whole file; the file contained the results of the 1991 positive drug test and resignation.[208] Also contained in the file was the letter from Hernandez's counselor, indicating his enrollment in Alcoholics Anonymous and participation in drug addiction counseling.[209] He contends that the only inference to be drawn from these facts is that Bockmiller did, contrary to her testimony, know of his past history and took this information into consideration when refusing to hire him.[210]

Hernandez believed that all the facts stated above strongly suggested that he was directly discriminated against because of his disability. [211] This potential discrimination created a material question of fact, precluding the court's summary judgment in favor of Hughes.[212]

2. Hughes

Hughes stated that they disqualified Hernandez's application due to their unwritten policy of not re-hiring a former employee whose employment ended due to termination or resigned in lieu of termination.[213] Hughes contended that all other assertions to the contrary by Hernandez are not substantiated by evidence; the fact that George Medina's testimony regarding Hughes' decision not to re-hire Hernandez, was not determinative because he did not take part in the decision making process.[214] The individual who was responsible for the decision not to rehire,

206. Appellant's Opening Brief at 16, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512).

207. *Hernandez*, 298 F.3d at 1034.

208. *Id.*

209. *See id.* at 1032.

210. Appellant's Opening Brief at 16, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (No. 01-15512).

211. *See id.* at 14.

212. *See id.* at 17.

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

214. *See* Responsive Brief at 18, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th

Joanne Bockmiller, testified without contradiction that she had no knowledge of Hernandez's prior drug addiction or reason for his resignation.[215]

Hughes further argued that Hernandez's failure of the1999 Product Test Specialist exam removes him from the protection of ADA.[216] Despite the contention by Hernandez that the discrimination took place in 1994 and he was not tested until 1999, Hughes believed the 1999 test was determinative for two main reasons: 1) The exam from 1999 was exactly the same as the one which Hernandez would have taken in 1994; and 2) he unequivocally failed.[217]

In sum, Hughes contended that as a result of Bockmiller's uncontraverted testimony, a lack of evidence tending to show that the decision was made with any knowledge of his disability, and plaintiff's failure to state an ADA claim, there was no material question of fact and therefore summary judgment was properly granted.[218]

C. The Decision of the Ninth Circuit

After reviewing all the pertinent facts, the Ninth Circuit held that the legitimate non-discriminatory policy of refusing to re-hire employees that resigned in lieu of termination violated the ADA as applied to employees with disabilities.[219]

The Ninth Circuit, through Judge Reinhardt, agreed with Hernandez that there was a material question of fact as to whether or not he was qualified for the position of employment.[220] The court held that a reasonable person could make the inference that Hernandez, despite failing the 1999 examination, was qualified under federal law because he demonstrated that he had the "requisite skill, experience, education and other job-related requirements of the employment position."[221] The court

Cir. 2002) (No. 01-15512) (stating that Joanne Bockmiller solely determined that plaintiff was not eligible for rehire).

215. *See id.*

216. *See id.* at 13.

217. *See id.* at 14. Hernandez was given two weeks to prepare for the test and was told exactly the topics on which he would be tested. *Id.* at 15. He was given an additional two weeks to allow him to prepare for the test; "with one month to prepare plaintiff failed the test miserably." *Id.* Hernandez's scores on the test suggest that he never really knew the information. *Id.* He "attempted only four of the eight test sections in the allotted time, thereby getting a score of'0'for one-half of the test. And, for the four sections he attempted, he scored 56%, 50%, 39% and 22%." *Id.*

218. *See id.* at 24-25

219. *Hernandez*, 298 F.3d at 1036.

220. *Id.* at 1035.

221. *Id.* at 1034-35 (citing 29 C.F.R. §1630.2(m)).

based this decision on Hernandez's previous work record and the possibility that he would have passed the examination in 1994 when the discrimination occurred.[222] However, simply because Hernandez is a qualified individual with a disability under the ADA does not alone entitle him to relief.[223]

The Ninth Circuit further decided that there was a material question of fact regarding whether or not Hughes took Hernandez's prior history of drug addiction into consideration when deciding to deny his application for rehiring.[224] The court held that a reasonable person could deduce from Bockmiller's testimony that Hernandez's prior drug addiction was a factor in her decision.[225] Thus, the court decided that there was a material issue of fact which should be left to a jury to decide.[226]

Thus far, the Ninth Circuit's decision has been consistent with the majority of precedent regarding the ADA; however, the remainder of the decision presents a significant departure from traditional ADA analysis. In holding that blanket non-rehiring policies violate the ADA as applied to rehabilitated employees who were terminated due to drug addiction, the court had created a startling new precedent.[227]

The court made clear that non-rehiring policies do not facially violate the ADA; the court however made the distinction that these policies are violative of the ADA as applied to rehabilitated drug addicts who were fired solely for their drug usage.[228] The court stated the rational for its decision as follows:

> Maintaining a blanket policy against rehire of *all* former employees who violated company policy not only screens out persons with a record of addiction who have been successfully rehabilitated, but may

222. *Id.* at 1035.

223. *Id.* at 1033. The court relied on traditional federal precedent in holding that in order to establish a *prima facie* case of discrimination under the ADA, Hernandez needed to show "1) he was disabled within the meaning of the ADA; 2) he is a qualified individual able to perform the essential functions of the job; and 3) his employer terminated or refused to rehire him because of his disability." (citing Nunes v. Wal-Mart Stores, Inc. 164 F.3d 1243, 1246 (9th Cir. 1999)).

224. *Hernandez*, 298 F.3d at 1034.

225. *Id.* at 1034. Bockmiller testified to pulling Hernandez's whole file which contained his resignation and the two letters concerning his rehabilitation; the court held that a reasonable inference could be made that because of the presence of this letter, Bockmiller was aware of Hernandez's problem with alcohol and as a result she would have checked the personnel file to determine why he was terminated. *Id.*

226. *Id.* at 1036.

227. *See* Guedes, *supra* note 10. To show how drastic of a departure this is from current understanding of the ADA, Guedes relies on several district court decisions that contradict the Ninth Circuit's decision in *Hernandez*.

228. *Hernandez*, 298 F.3d 1037.

> well result, as Hughes contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is committing an unlawful act. Having willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on the lack of knowledge.[229]

Based on this interpretation of the ADA, that blanket non-rehiring policies are discriminatory as applied to recovered drug addicts, the court held that Hernandez had made a *prima facie* case of discrimination based on disability.[230]

The Ninth Circuit provided no precedent in making this decision; in fact the court went against several well-established precedents, and, in the eyes of some commentators, against the very purpose and policy of the ADA.[231] The Ninth Circuit took it upon itself to expand the protections of the ADA; in doing so it departed from the goal of placing individuals with disabilities in comparable position to other applicants and employees.[232] This decision elevated qualified individuals under the Act to a preferential status based on "misguided and paternalistic notions that such individuals are incapable of adhering to established norms of workplace behavior."[233] Seeing this departure from ADA precedent and the ensuing division amongst circuit courts, the Supreme Court granted certiorari in order to elucidate Congress' true statutory intentions towards non-rehiring policies within the context of the ADA.

VI. DECISION OF THE SUPREME COURT

A. Background

In December 2003 the Supreme Court released its unanimous decision[234] regarding the claims brought by Hernandez against Raytheon. The Court analyzed the logic that guided the Ninth Circuit's decision and held that the Ninth Circuit had erred by applying a disparate impact

229. *Id.* at 1036.

230. *Id.*

231. Guedes, *supra* note 10, at 66-68.

232. *Id. See* Michael I. Leonard, '*Recovered' Worker Says He Should be Rehired*, 149 CHI. DAILY L. BULL. 5, 8 (2003).

233. Guedes, *supra* note 10, at 68.

234. Raytheon Co. v. Hernandez, 540 U.S. 44 (2003). Justice Souter and Justice Breyer took no part in the consideration or the decision in the case. *Id.* at 55.

standard on a claim brought for disparate treatment.[235] The Court held that the Ninth Circuit was misguided in making the assertion that no-rehiring policies could not be legitimate non-discriminatory rebuttals to a claim of discrimination under the disparate treatment rubric. Furthermore, the Court remanded the case with directions stating the appropriate scope of review.[236] Despite this holding, the Court left no-rehire policies, such as the one in question, vulnerable to an attack under the theory of disparate impact. The following sections will detail the Court's analysis of the issues presented before it and how it came to its conclusions.

The Court was charged with reviewing whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules.[237] However, it made no determinations regarding this question, but merely, went so far to state that the Ninth Circuit had erred in applying the correct standard of review.[238] The Court agreed with the Ninth Circuit's determination that Hernandez's argument represented a claim under a disparate treatment theory, however, it disagreed with the Ninth Circuit's inappropriate application of a disparate impact analysis.[239] The Ninth Circuit used this theory despite the fact that all three courts of review had agreed that Hernandez failed to timely raise a disparate impact claim.[240]

The Court of Appeals began its analysis of Hernandez's disparate treatment claim by utilizing the traditional *McDonnell Douglas* burden-shifting approach discussed previously.[241] The Court of Appeals then determined that Hernandez did establish a prima facie case of discrimination and had proffered sufficient evidence that could lead a reasonable person to the permissible inference that he was denied re-employment as a result of his disability.[242] As a result of this finding, the burden then shifted to Raytheon to demonstrate that it had a legitimate non-discriminatory reason for the adverse employment action, namely the neutral no-rehiring policy.[243] It is at this step that the Supreme Court determined the Ninth Circuit erred in application of the disparate treatment standard.

235. *Id.* at 46, 55.
236. *Id.* at 46, 52-55.
237. *Id.* at 46.
238. *Id.*
239. *Id.* at 49-52.
240. *Id.* at 49.
241. *See* Disparate Treatment Section, *supra* at 247.
242. *Raytheon*, 540 U.S. at 49-50.
243. *Id.* at 50-51.

The Court of Appeals held that although Raytheon's no-rehire policy was facially neutral the policy was discriminatory as applied to former drug addicts whose only misconduct in the workplace was testing positive for drugs.[244] In doing so the court held that the no-rehire policy was not a legitimate, non-discriminatory reason for the adverse employment decision.[245] The court reasoned that because such a policy had the effect of screening out terminated employees who have recovered from their drug addiction it could not stand up to disparate treatment scrutiny.[246]

The Supreme Court reasoned that by making this determination, the Ninth Circuit mistakenly applied a disparate impact standard of review instead of applying that of disparate treatment.[247] The Supreme Court also rejected the Court of Appeals assertion that a neutral no-rehire policy, when applied to an employee terminated for drug use, could never be legal under the ADA.[248] The Court stated that under a traditional *McDonnell Douglas* approach the Ninth Circuit should have concluded that Raytheon's policy was a legitimate reason for not rehiring Hernandez and then shifted the burden back to Hernandez to show that the policy was merely a pretext.[249] Essentially, the Ninth Circuit combined two separate standards of review into one singular standard.[250]

The Supreme Court made it clear that if the Court of Appeals had followed the correct burden shifting approach, Hernandez would have been required to present evidence that would tend to show, to a sufficient degree, that the employment decision was made based on his dis-

244. *Id.*

245. *Id.* at 51-52.

246. *Id.* at 51. In reaching this conclusion the Court stated that:

> Maintaining a blanket policy against rehire of all former employees who violated company policy not only screens out persons with a record of addiction who have been successfully rehabilitated, but may well result, as [petitioner] contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is committing an unlawful act . . . . Additionally, we hold that a policy that serves to bar the reemployment of a drug addict despite his successful rehabilitation violates the ADA.

Id. (citing Hernandez, 298 F.3d at 1036-37).

247. *Raytheon*, 540 U.S. at 51.

248. *Id.*

249. *Id.*

250. "This Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact." *Id.* at 52. The Court went on to state that because the presentation of evidence and facts differ between a claim of disparate treatment and that of disparate impact, courts must be careful to distinguishes between the application of the two theories. *Id.* at 53.

ability regardless of the neutral policy.[251] The Supreme Court chided the Ninth Circuit for skipping this crucial step in disparate treatment analysis. The Court made clear that Ninth Circuit's holding that the policy screened out individuals with addictions and that Raytheon had not raised a business necessity defense would only be relevant factors under a disparate impact claim.[252]

The Supreme Court stated that if Raytheon did in fact apply its neutral policy to Hernandez then their decision not to rehire him could not have been based on his disability.[253] Based upon this finding, and the fact that the Ninth Circuit had incorrectly applied a disparate impact analysis, the Supreme Court vacated judgment and remanded the case for further proceedings under the correct standard of review.[254]

Despite reinforcing traditional ADA analysis in holding that the Ninth Circuit had incorrectly applied disparate impact scrutiny to the issue at hand, the Supreme Court left open the possibility for future plaintiffs to defeat a neutral no-rehire policy under a theory of disparate impact.[255] The Court did not foreclose the possibility that if a plaintiff could show that a neutral no-rehire policy tends to fall disproportionately on individuals with disabilities, then the employer would be required to demonstrate that the policy was justified by a business necessity.[256]

Although the Supreme Court decided that a company's neutral no-rehire policy is a "quintessential legitimate, nondiscriminatory reason" for denying rehiring to an employee who violated workplace rules,[257] it did not decide the issue for which it granted certiorari. As a result of its holding, the Supreme Court established that a defendant could defeat a discrimination claim based on disparate treatment by showing that it had adhered to a neutral nondiscriminatory policy. However, the Court did not foreclose the possibility that such policies could be defeated under a disparate impact theory.[258]

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251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 55.

255. *See generally id.* at 44 (holding that the disparate impact analysis was incorrectly applied to a disparate treatment claim, but upholding the Ninth Circuit's framework if applied to a proper disparate impact claim). *See* Mook, *supra* note 15, at 38.

256. *See Raytheon*, 540 U.S. at 52; Mook, *supra* note 15, at 38 (stating that, "even if a plaintiff could make a showing that a no-rehire policy has a disparate impact upon the disabled, an employer should not be hard pressed to establish a sufficient business necessity for the policy.").

257. *Raytheon*, 540 U.S. at 54.

258. Mook, *supra* note 15. As a result of Hernandez being unable to raise a timely claim under disparate impact the Court was unable to analyze the case under this theory and therefore,"[t]hat assessment, however, will need to wait another day and another plaintiff." *Id.*

B. Analysis

By not immunizing neutral no-rehire policies from scrutiny under any analysis, other than pretext, the Supreme Court confers gross rehire policies upon qualified individuals with a disability. Two employees, F and D work for the same employer. Both are fired for workplace misconduct; F is terminated for a physical altercation involving another employee and D is terminated for testing positive in a random drug test, later found to be a result of his drug addiction. Two years pass and both apply to be rehired. With no record of why they were terminated, both applications are denied because of a company wide policy, which forbids the rehiring of employees who were terminated for violating company policies. As a result D files a complaint with the EEOC alleging discrimination based on his past drug addiction.[259]

The case proceeds to a district court under a claim that the policy has a disparate impact upon disabled people. D is able to present statistical evidence that satisfies the court that the policy does create a disparate impact. Although the company is able to show a business necessity for its decision, the court finds that the business necessity is not sufficient to overpower the disparate impact. Holding the policy invalid, the court forces the employer to review D's application a second time. Thus, long after F's application has been thrown in the trash, D has an opportunity to be rehired. Thus creating a reasonable accommodation, that as we will explain below is clearly abhorrent to the ADA.

Disparate impact and reasonable accommodation are distinct and independent claims under the ADA, and for each there is an independent analysis.[260] The reason for this according to the Americans with Disabilities Handbook,[261] is that "disparate impact and reasonable accommodation are textually distinct in the statute and they have different conceptual antecedents."[262] The Supreme Court's decision goes against a wealth of common law precedent by conflating disparate impact and reasonable accommodation analysis. The Court has intertwined these two theories to create a disparate impact claim, by which, employers will be

259. D has fulfilled all the requirements of the ADA to be considered a qualified individual with a disability.

260. *See* Henrietta D. v. Bloomberg, 331 F.3d 261, 275 (2d Cir. 2003) (stating that while similar and seemingly intertwined, reasonable accommodation and disparate impact require different analysis).

261. HENRY H. PERRITT, JR., AMERICANS WITH DISABILITIES ACT HANDBOOK § 4.4 (3d ed. 1997).

262. *Id.*

forced to give the reasonable accommodation of a "second chance" to individuals with a disability. The decision confers gross rehiring preferences to disabled individuals, which is clearly abhorrent to the stated purpose and the proffered goals of the ADA. Regardless of the burden the Court places on plaintiffs, it has created an ambiguous framework from which lower courts could invalidate employer policies at will.

In leaving open the possibility for plaintiffs to challenge otherwise valid neutral no-rehiring policies, the Court has created an impermissible reasonable accommodation for qualified individuals under the ADA. By allowing lower courts to force employers to give a second chance, the Court has chiseled away at the stated purpose of the ADA, that of creating a level playing field.[263] In order to achieve the goal of not giving disabled individuals preferential status courts have interpreted the ADA in such a way that a second chance cannot be considered a reasonable accommodation which the employer must make.[264] The Supreme Court's decision will allow plaintiffs to circumvent traditional reasonable accommodation theory, by forcing employers to give disabled individuals a second chance if they can show disparate impact.

Neutral no-rehire policies have always been held valid under the ADA and should not be attackable, under any theory, unless proven to be a pretext. The Supreme Court's decision allows lower courts to examine these policies on a case by cases basis with the possibility of invalidating them. Decisions such as the one in the Ninth Circuit show a willingness to arbitrarily quash valid employer policies, regardless of the strictness of the burden placed, because these policies have not been effectively immunized from attack. The decision allows for ad hoc application of unspecified analysis, significantly destroying an employer's rights to make nondiscriminatory business decisions.

263. Seifken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995) ("Congress enacted the ADA to 'level the playing field' for disabled people.").

264. *Id.* The court clearly stated that a "second chance" is not an envisioned reasonable accommodation under the ADA. *Id.* The court carved out what a permissible reasonable accommodation can be in stating that,"[t]he employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." *Id.* (citing Vande Zande v. State of Wis. Dept. of Admin., 44 F.3d 538, 543 (7th Cir. 1995). Finally the court stated that what the plaintiff was seeking fell wholly outside of reasonable accommodation and could only be characterized as a second chance, which is in an of itself, distinct from a reasonable accommodation. *Id.* at 666-67. *See also* Caniano v. Johnson Controls, Inc., No 98-25159, 1999 U.S. App. LEXIS 20648, at *4 (9th Cir. Aug. 26, 1999) (stating that reinstatement is not a required accommodation under the ADA); U.S. E.E.O.C. v. United Airlines, Inc., No. 98 C 7829, 2000 WL 1738346, at *12 (N.D. Ill. Nov. 21, 2000) (stating that while the ADA requires a reasonable accommodation, this does not carry with it the responsibility of the employer to give a second chance).

Being successful under this new disparate impact claim does not necessarily mean that a court will force an employer to rehire an individual, it does however, force the employer to reconsider the disabled employee's application for rehire. This "second chance" far exceeds the bounds of traditional reasonable accommodation under the ADA. It confers a preferential status upon disabled individuals because these applications are now allowed the opportunity to be reviewed a second time, while a non-disabled person's application has long since been dismissed. This second level of review, regardless of whether or not the applicant is rehired, is an elevation of status and is the second chance the ADA specifically forbids.

While under the ADA the disparate impact theory can and has been applied to attack employer's hiring policies that tend to disproportionately screen out disabled people,[265] this application has typically gone to the method by which employers make personnel decisions. Courts have invalidated these policies where some subjective characteristic of the hiring procedure causes disproportionate numbers of disabled individuals to be screened out. When a court strikes down a subjective portion of a procedure it is because that particular aspect of the procedure creates a discriminatory impact. While employer's are forced to remove that particular subjective characteristic, the policy as a whole can remain intact.

It is our contention that the Court errs in not foreclosing the possibility of extending this analysis to objective non-rehiring policies. This decision allows the employer's entire means of making an objective business decision, regardless of the method by which they choose, to fall under impermissible scrutiny. Neutral non-rehiring policies are a legitimate objective method to further a company's business interests; striking them down as a whole as applied to disabled individuals takes crucial personnel imperatives out of the hands of American businesses.

Besides being abhorrent to the ADA, the decision of the Supreme Court creates huge foreseeable complications with its application throughout the circuits. As a matter of policy concern, the Court's decision creates a vacuum of interpretation for which lower courts can fill with their own subjective analysis. The Court has opened the door for massive circuit splits, not to mention the mass amounts of litigation which will arise when such policies are made open to attack.

A policy such as this is nearly impossible to be uniformly applied; each circuit will be able to apply this new disparate impact theory in whatever way that will lead them to the most permissible conclusion in

265. *See* Disparate Treatment Section, *supra* at 247.

their minds. Circuits concerned with employee rights will not find it difficult to invalidate such policies by simply stating that the disparate impact caused far exceeds the proffered business necessity. While courts more concerned with employers' rights to make business decisions will invalidate these disparate impact claims because of the employers' business necessity. As a result of these differences this issue will undoubtedly return to the Supreme Court, forcing them to finally make clear whether neutral non-rehiring policies should be immunized from judicial scrutiny.

In addition to circuit splits, a foreseeable problem that may arise from this decision is the amount and type of litigation that will follow. The Court's decision allows for any individual who is fired and subsequently applies for rehire, who is not rehired due to a non-rehiring policy, to claim that he has a disability and challenge the non-rehiring policy under a disparate impact claim. Even if the plaintiff cannot establish that there is a disparate impact the defendant will be forced to suffer the costs and publicity of the litigation.

The real problem arises, however, when the court decides that the there is a disparate impact and that the proffered business necessity is not satisfactory. Despite the fact that the court will only force the employer to reconsider the plaintiff's application, the employer is ostensibly handcuffed. If an employer is ordered by the court to reconsider the application, he faces a decision that he cannot make. If the employer decides not to rehire the plaintiff, after reconsidering his application, he runs the risk of opening himself up to a disparate treatment or reasonable accommodation claim which he then must litigate. Facing this prospect an employer may just decide to rehire the applicant to avoid future litigation and/or other legal problems, effectively taking all decision making out of his hands.

The final problem that arises from this decision is the removal of the ability for companies to make critical business decisions based on non-discriminatory policies. The Court interjects its own objective standards in place of the company's, thereby stepping out of the courtroom and into the personnel department. The Court itself cannot observe the punctilio of business judgment required to legitimately interject its policies into this forum. In other words, legitimate non-discriminatory business decisions are best left to those in business.

VII. CONCLUSION

The ADA attempts to place those with disabilities on equal ground as those who are not within the protected class. In order to achieve this goal the act provides several different avenues that a plaintiff can use if he believes that an employers practice is either discriminatory on its face, or is discriminatory in effect. While disparate treatment, reasonable accommodation, and disparate impact have some similar features, they are all cognizably different claims that require separate evidentiary analysis. While the Supreme Court, in *Raytheon*, correctly overturned the Ninth Circuit's decision that neutral non-rehiring policies are not valid to rebut a claim of disparate treatment, the Court incorrectly kept the Ninth Circuit's framework as applied to disparate impact claims. The Court's decision creates a hybrid form of reasonable accommodation by way of the disparate impact theory. By forcing employers to reconsider disabled applicants who are rejected for legitimate reasons the court has created the opportunity for a second chance for these disabled individuals, which is clearly an anathema to the stated purpose of the ADA. The foreseeable problems arising from this are numerous and complicated, leaving one to question why the Supreme Court stepped out of the courtroom and interjected its own business judgments into America's personnel departments.

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