

December 4, 2003

Supreme Court Rules That Neutral Employment Policy May Not Be Discriminatory Under ADA

In *Raytheon Co. v. Hernandez*, No. 02-749 (Dec. 2, 2003), the United States Supreme Court ruled that applying a neutral no-rehire policy generally shields the employer from an Americans with Disabilities Act ("ADA") disparate treatment claim. The Court did not consider whether the employee had an ADA claim under disparate impact theory, as the employee had failed to raise that claim in a timely fashion below. In so holding, the Court issued a limited opinion which does not address the tensions between neutral employment policies and the ADA's reasonable accommodation duty.

Factual Background

Joel Hernandez worked for Hughes Missile Systems (later purchased by Raytheon) for 25 years until he tested positive for cocaine use. Hernandez resigned under threat of termination, and Hughes recorded the reason for his separation as "discharge for personal conduct (quit in lieu of discharge)." Years later, Hernandez reapplied for his old position. Besides disclosing his prior employment, Hernandez submitted a letter from his Alcoholics Anonymous counselor stating that he attended meetings regularly and was in recovery. Hughes applied its unwritten policy of not rehiring employees terminated for workplace misconduct, and rejected Hernandez's application.

Procedural History

Hernandez's suit alleged that Hughes had failed to rehire him because of his record of drug addiction or because it regarded him as disabled. In response to Hughes' motion for summary judgment, Hernandez first alleged that Hughes' neutral policy violated the ADA because it had a disparate impact on him. He also alleged disparate treatment under the ADA.* The district court refused to consider the disparate impact theory because Hernandez had failed to include it in his complaint or otherwise raise it in a timely manner. The court granted Hughes' motion for summary judgment on the disparate treatment claim.

The Court of Appeals for the Ninth Circuit agreed that Hernandez had failed to properly raise disparate impact, but reversed the district court nonetheless. It held that Hernandez had made out a prima facie case, thus obliging Hughes to present a legitimate, non-discriminatory reason for its failure to rehire him. The Ninth Circuit recognized that the neutral no-rehire policy was lawful on its face. Yet it held that the policy was unlawful "as applied to former drug addicts whose only work-related offense was testing positive because of their addiction" and, consequently, did not constitute a lawful reason for the adverse action.

The Supreme Court's Decision

The Supreme Court reversed, holding that the Ninth Circuit had improperly applied disparate impact analysis in a disparate treatment case. The Court agreed that Hernandez had not raised the disparate impact theory in a timely manner. The only issue to be considered, therefore, was whether the employer decided not to rehire Hernandez because of his record of disability. Because the employer had a legitimate, non-discriminatory reason for its decision — its neutral no-rehire policy — the "decision not to rehire [Hernandez] can, in no way, be said to have been motivated by [his] disability." The Supreme Court concluded the Ninth Circuit had erred in ruling that Hughes' policy was not a legitimate, non-discriminatory reason because it had a disparate impact on former drug users.

The Supreme Court noted it made no difference that Hernandez's misconduct — testing positive for cocaine use — was arguably related to his protected status under the ADA. The Court added that if the decision-maker "were truly unaware [of Hernandez's record of drug addiction], it would be impossible for her hiring decision to have been based, even in part, on [his] disability."

* Hernandez apparently did not allege a violation of ADA's reasonable accommodation requirement. That may be because most courts have held there is no duty to accommodate employees who are not actually disabled but nonetheless protected under the statute (namely those with a record of disability or regarded as disabled). However, the Supreme Court did not explain or otherwise address this analytic hole.

Implications for Employers

The Court's decision is significant, but not enormously so. On the one hand, this is only the second time the Court has addressed the statute's substantive protections (the first time being in *U.S. Airways v. Barnett*). Accordingly, the case cannot be viewed as inconsequential. The result is pro-employer, like most of the Court's recent decisions under the ADA. On the other hand, the Court failed to address the vexing issue presented by many facially neutral employment rules and policies: whether those rules or policies must be bent to accommodate persons actually disabled under the ADA. For example, many employers have neutral attendance and leave of absence policies which may, when applied, disadvantage persons with disabilities (as well as many without disabilities). Whether such policies must be bent or waived as a reasonable accommodation is one of the big questions under the ADA: a question which remains unanswered after *Raytheon*.

That said, a few clear conclusions can be drawn from the decision:

- ◆ Employers who take adverse action based on employee misconduct are not liable for disparate treatment under the ADA, even if that misconduct is attributable to a disability.
- ◆ Since the ADA prohibits discrimination "because of" a disability, an employer who is unaware of an individual's disability cannot be rightly accused of violating the ADA.
- ◆ A plaintiff cannot establish disparate treatment under the ADA by showing that a company's neutral rule generally disadvantages persons protected under the ADA, be they actually disabled or regarded as disabled or those with a record of disability. This was the Ninth Circuit's "disparate impact" analysis which the Supreme Court squarely rejected. Rather, to prove disparate treatment under the ADA, as under Title VII and other laws, the plaintiff must prove s/he was intentionally discriminated against because of protected status or conduct.

ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON

700 Louisiana Street, Suite 3850
Houston, Texas 77002-2731
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

101 California Street, Suite 2900
San Francisco, California 94111-5858
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax

This newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact the firm's Labor and Employment Practice Group.