Facially neutral no-rehire rules and the Americans with Disabilities Act

Author: Christine Neylon O'Brien

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FACIALLY NEUTRAL NO-REHIRE RULES AND THE AMERICANS WITH DISABILITIES ACT
By Christine Neylon O'Brien
Imagine a man who works as a technician for a large federal defense contractor, arriving at work with alcohol on his breath. He consents to a drug test that reveals cocaine in his system, and then quits in the face of almost certain termination. Several years later, after getting his act together through Alcoholics Anonymous, the former employee reapplies to the same employer. The employer refuses to rehire him because of its universal, albeit unwritten, company policy not to rehire employees who quit rather than be fired for violation of misconduct rules. The employee sues, maintaining that he is clean and sober and that the employer’s refusal to reconsider him once he was qualified again is a violation of the Americans with Disabilities Act (ADA).  

Is the employee correct?

It is common for businesses to promulgate rules regarding discipline and discharge for alcohol and illegal drug use while on duty. It is also not uncommon for employers to test employees for alcohol or drugs where the employee appears to be impaired while at work. Employers often require applicants for employment to submit to such tests prior to finalizing offers of employment. Certainly employers have legitimate business concerns about safety and sobriety in the workplace. Intoxicated employees may harm themselves or others while under the influence of alcohol or drugs. Substance abuse of either drugs or alcohol may be categorized as “dangerous miscon-
duct" that employers should be able to regulate with workplace rules.4 When substance abuse impairs an employee at work, it negatively impacts the quality of products produced and services performed and, consequently, detracts from the profitability of the business.

A flip side to employers’ safety and economic concerns is embodied in the language and legislative history of the ADA.5 An important goal of the ADA is the integration into the workforce of those who have a disability or a record of disability.6 Included among those protected by the ADA are rehabilitated drug or alcohol addicts if they are otherwise qualified for an open position.7 Discrimination against recovered addicts is a reality. Advocates for recovered addicts note that if job applicants admit their history of addiction, they will be rejected for employment 75 percent of the time.8 Where an employee’s disability, former disability, or record of disability correlates to previous workplace misconduct, what protection, if any, should be afforded by the ADA?

This paper discusses the issues involved in the United States Supreme Court’s recent decision in Raytheon Co. v. Hernandez arising out of an employer’s refusal to rehire a former drug and alcohol abuser.9 The Court decided the case narrowly, leaving a key question unanswered: does the ADA protect recovered workers from broad facially neutral “no-rehire” policies?10 As the employer’s lawyer noted, “[t]housands of employers have precisely this rule.”11 This article analyzes the Court’s decision, outlines what the ADA requires in this area, and recommends guidelines for employment policies that will not run afoul of the purposes of the ADA.

RAYTHEON CO. V. HERNANDEZ

A. EEOC decision

Facts. On July 11, 1991, Joel Hernandez came to work with the smell of alcohol on his breath.12 His employer, Hughes Missile Systems Company (Hughes or the company) requested a blood test, which revealed the presence of cocaine in Hernandez’s system.13 Hernandez, who had worked for 25 years at Hughes as a janitor and later as a Calibration Service Technician, submitted his resignation in the face of certain termination.14 Previously, in 1986, the company had allowed Hernandez to seek rehabilitation for alcoholism after the condition had caused excessive absenteeism, but he later returned to work.15 During his treatment, it was determined that he was alcohol dependent, cannabis dependent, and a “cocaine abuser.”16 In 1992, Hernandez promised himself to forswear drugs and alcohol, and became a “faithful and active member” of his childhood church.17 He regularly attended Alcoholics Anonymous meetings between 1992 and 1995.18 On January 24, 1994, Hernandez reapplied to the company for the position of “Calibration Service Technician” or “Product Test Specialist,” but his application was summarily rejected, purportedly because of the company’s no-rehire policy.19

In June of 1994, Hernandez filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC).20 The company explained its decision in its July 15, 1994 letter to the EEOC: “[Hernandez’s] application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation. ... [t]he company maintains it’s [sic] right to deny re-employment to employees terminated for violation of Company rules and regulations.”21 In November of 1997, the EEOC issued a Letter of Determination finding reasonable cause to believe that the company had violated Hernandez’s rights under the ADA.22

B. District court decision

Hernandez filed suit against Hughes in the United States District Court for the District of Arizona.23 Hughes maintained that Hernandez’s application had been rejected because of an unwritten company rule prohibiting the rehire of former employees who were terminated for any violation of misconduct rules.24 Interestingly, Hughes’s written policies provide that if a job applicant for employment tests positive for drugs or alcohol, the applicant is
only rendered ineligible for employment for the following twelve months. In February 1999, Hughes offered Hernandez the position of Product Test Specialist if he passed the necessary examination. This examination was identical to the one he would have had to pass in 1994 if he had not been found ineligible for rehire. Hernandez completed only four out of the eight sections and failed to receive a passing score on any of them.

The district court granted Hughes' motion for summary judgment on January 30, 2001 without an explanation of its reasons.

C. Ninth Circuit decision

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

As the court of appeals viewed the case, Hernandez could establish a prima facie case of discrimination upon remand by presenting "sufficient evidence that he was not rehired by Hughes because of his record of drug addiction or because he was perceived as being a drug addict, as well as demonstrating that he is qualified for the position he seeks."

The court noted that even if Hernandez was qualified in 1994 but was no longer qualified, he could still receive damages.

D. Supreme Court decision

The question. On February 24, 2003, the United States Supreme Court granted certiorari in Raytheon Company v. Hernandez. The question certified to the Court was stated as follows: "Does the Americans with Disabilities Act confer preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use?" Oral argument was heard on October 8, and the Court issued its decision on December 3, 2003. During oral argument, one Justice expressed concern about the rule adopted by the Ninth Circuit that "where you have such a [no-hire] policy, it will not be applicable to someone who’s a rehabilitated drug addict," rather than the factual disputes underlying the grant of summary judgment. One member of the Court boldly stated, "I don’t care about all these factual controversies."
during the arguments brought into focus what at least some members of the Court considered the important issue underlying the case: whether a company violates the ADA when it refuses to consider a discharged employee for re-employment, where the discharge was due to misconduct related to illegal drug use.

The decision. Justice Clarence Thomas authored the opinion of the Court, with all joining except for Justice Souter who took no part in the decision, and Justice Breyer who recused himself prior to consideration of the case. Without reaching the question certified, the Court vacated the judgment of the Ninth Circuit and remanded the case because the court of appeals “improperly applied a disparate impact analysis in a disparate treatment case.”

Reviewing the facts, the majority noted that the EEOC’s letter found that there was reasonable cause to believe that Hernandez was denied hire because of his disability. During discovery, Hernandez relied upon the theory that the company rejected him because of his record of drug addiction. It was only in response to the employer’s motion for summary judgment that Hernandez raised the alternative theory of disparate impact, but the district court refused to consider it because it was not raised in a timely manner. The court of appeals agreed with the district court.

The Supreme Court reviewed the court of appeals’ application of the traditional burden-shifting paradigm for disparate treatment cases and found that the appellate court “erred by conflating” the two frameworks. As the Court explained, in disparate treatment cases, the protected trait is a motivating factor in the decision-making process of the employer whereas in disparate impact cases, the facially neutral employment practice impacts more harshly on a protected group and cannot be justified by business necessity. While both of these claims are valid under the ADA, “courts must be careful to distinguish between these two theories.” Only disparate treatment theory remained available to Hernandez, and pursuant to this theory, Raytheon’s neutral no-rehire policy provided a legitimate, nondiscriminatory reason for its decision not to rehire him. Beyond this, the only way for Hernandez to succeed with a disparate treatment theory would be by providing evidence to convince a jury that the employer made its employment decision based upon Hernandez’s disability status.

The Court disagreed with the Ninth Circuit’s implication that because the misconduct was related to his disability, “petitioner’s refusal to rehire respondent on account of that misconduct violated the ADA.” Finally, the Supreme Court noted that the Ninth Circuit exhibited flawed reasoning in stating that Raytheon’s policy violates the ADA because it could result in employees such as Ms. Bockmiller making employment decisions while unaware of a disability. If an employer had no knowledge of the respondent’s disability status, such could not motivate the employment decision, and thus no disparate treatment claim would be available.

Analysis. The Supreme Court could not allow the Ninth Circuit’s decision to stand because it was decided on the wrong theory: disparate impact rather than the available disparate treatment analysis. Counsel for Hernandez lost his right to raise a disparate

There is some question as to whether employers may need to reconsider recovered individuals, essentially bending the rules to accommodate the disabled, or those who have a record of disability, because of the ADA’s prohibition of discrimination against recovered drug and alcohol addicts.

No-Rehire Rules and the ADA
impact claim because he did not raise it in the first instance. This left Hernandez with a disparate treatment claim, yet the court of appeals applied a disparate impact analysis in order to find for the Plaintiff. For this reason, the Supreme Court vacated the decision of the Court of Appeals for the Ninth Circuit, ruling that the appellate court’s analysis of the impact of the employer’s policies was incorrect for a disparate treatment claim, and also noting that the appellate court should have considered discriminatory intent of the employer.

In addition, the Ninth Circuit made some bold assertions that were not supported by the well-settled law of employment discrimination. The Supreme Court remanded the case for reconsideration under the appropriate analysis. After Raytheon, the lower courts must abide by the Supreme Court’s explicit finding that “a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA.” Under well-established precedent, the only remaining question is whether Respondent can produce sufficient evidence that the stated reason was pretextual. The Supreme Court deferred to the Ninth Circuit’s determination that there were genuine issues of material fact remaining as to whether Hernandez was qualified for the position and whether Hughes refused to rehire him because of his past record of drug addiction. The High Court did not disturb the appellate court’s conclusion that Hernandez had established sufficient evidence of genuine issues of material fact relating to establishment of a prima facie case of discrimination to preclude summary judgment because the employer did not challenge this finding. Thus, upon remand to the trial court, Hernandez’s first hurdle will be to establish that he was qualified for the position for which he applied in 1994.

Thereafter, Raytheon will likely assert its unwritten no-rehire rule as its legitimate, nondiscriminatory reason for its refusal to rehire Hernandez. Whether the policy existed, and whether the “petitioner did indeed apply a neutral, generally applicable no-rehire policy in rejecting respondent’s application,” may be questioned, but the Supreme Court made clear that if such a policy exists, it is “a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules.” If Raytheon “did indeed apply a neutral, generally applicable no-rehire policy in rejecting respondent’s application, petitioner’s decision not to rehire respondent can, in no way, be said to have been motivated by respondent’s disability.” The Court noted that upon remand, if the facts are established that Raytheon’s employee, Bockmiller, was indeed unaware of Hernandez’s record of disability, then she could not have refused to rehire him because of his past record of drug addiction, and thus no disparate treatment claim would lie.

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

Further, the appeals court questioned the very existence of a uniform no-rehire policy for those fired for misconduct, wondering why such was not written in light of the “extensive set of written personnel policies covering various subjects, including substance abuse.” The court noted that there was no mention of the policy by Raytheon until after EEOC conciliation efforts concluded and the litigation ensued. The Ninth Circuit also withdrew one footnote from its earlier opinion in the case, one that “overstated the record” with respect to the existence of Raytheon’s purported no rehire policy. The court of appeals reversed and remanded the case to the trial court since “Hernandez has presented sufficient evidence from which a reasonable jury could determine that Raytheon refused to re-hire him because of his past record of addiction and not because of a company rule barring re-hire of previously terminated employees.” In light of the Supreme Court’s decision in the Raytheon case, the trial court’s analysis will be limited to the narrow question of whether disparate treatment occurred.

**REMAINING QUESTION: WILL A NO-REHIRE RULE SURVIVE A DISPARATE IMPACT CHALLENGE?**

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

The Supreme Court did not reach the question presented, the wording of which was somewhat startling in that it queried whether the ADA confers “preferential” rehire rights. In advance of the Raytheon opinion’s issuance, it seemed unlikely that the current Court would endorse a preferential rehire right for former drug abusers, particularly since such a right would interfere with employers’ rights to discipline and discharge in order to enforce a drug free workplace. As Raytheon argued in its brief, under the ADA, the disabled are entitled to an equal opportunity, not “a second chance that others would not get.” Yet during oral argument in the case, one of the Justices remarked that an employer’s duty of reasonable accommodation is “always a discrimination in favor of the applicant.”

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

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

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

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

The Solicitor General made some compelling arguments in support of the employer in Raytheon. It is clear that the ADA’s provisions spell out an employer’s right to prohibit the illegal use of drugs and alcohol at work and to “hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.” This employer right includes the right to test for illegal drug or workplace alcohol use and make employment decisions based on the test result.

The argument can be made based upon the Supreme Court’s decision in Hazen Paper Co. v. Higgins that there is no legal problem, at least under a disparate treatment claim, with making an employment decision based upon misconduct that is correlated with a disability, if an analytical distinction can be made between the two. However, in Hazen Paper, as in the Raytheon case, the plaintiff only claimed disparate treatment, so that the Hazen Court also focused on whether the protected trait actually motivated the employer’s decision. The Hazen Court noted that the employee could not suc-

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

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ceed on a disparate treatment claim “unless the employee’s protected trait actually played a role in that process [of decision-making] and had a determinative influence on the outcome.” Once again, how a facially neutral rule, such as a no-rehire rule, will fare when met with a disparate impact challenge remains unanswered.

**Disparate impact framework**

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

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

In general, a plaintiff who seeks to establish a prima facie case of disparate impact must show “(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant’s facially neutral acts or practices.” A neutral no-rehire policy of the type described in Raytheon would clearly meet the first required showing. To establish significantly adverse or disproportionate impact in an employment discrimination context, “plaintiffs are ordinarily required to include statistical evidence to show disparity in outcome between groups.” Certainly a plaintiff challenging a facially neutral no-rehire rule on the basis of its disparate impact would need to establish statistical evidence of the policy’s disproportionate impact upon the protected group. An employer could then defend by demonstrating that the policy did not cause a disparate impact or that the rule was job-related and consistent with business necessity.

**CONCLUSION AND RECOMMENDATIONS**

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

The Ninth Circuit noted that Raytheon’s unwritten no-rehire policy placed former employees such as Hernandez in a worse position than new applicants who test positive for drugs or alcohol at the time of hiring. Under the policy, the latter were barred from employment for 12 months while former employees were permanently barred. Should former employees be treated less favorably than new applicants? An argument can be made that employment policies should place a person like Hernandez in the same position as a new hire for purposes of employment consideration. After all, former employees are already trained, and are of more value than a new applicant because of their experience. Thus, it could be argued that a person should be able to apply for a position for which he is qualified, despite prior problems that have since dissipated, and should not be barred from applying for a job for any longer than a new applicant who is similarly situated.
Arguments against treating former employees the same as prospective employees can also be made. One argument is that current employees have notice of company rules and the consequences for violation, whereas prospective employees generally do not. Secondly, and perhaps more importantly, what clout does an employer’s disciplinary code have if employees can circumvent it by quitting and reapplying after termination? No-rehire rules encourage employee compliance with workplace conduct rules. Companies need to maintain drug and alcohol-free environments and to some extent, the threat of termination is the ultimate one that may keep current employees sober and drug free. Advantages of a blanket no-rehire rule also include that it saves an employer from dealing with many former employee applicants individually, a process that can be time consuming and expensive.

Nonetheless, perhaps the best hiring/rehiring policy for an employer to utilize would include an individualized inquiry rather than a blanket “no-rehire” rule. Otherwise, it is probable that an employer will encounter difficulties with its no-rehire rule under a disparate impact theory in an ADA claim. If an employer refuses to depart from its facially neutral no-rehire rule, inevitably there will be a disabled individual who will challenge the policy that automatically bars her from seeking a position for which she is otherwise qualified, and from receiving reasonable accommodation where such is not an undue hardship to the employer.100

After the Raytheon decision, such a facially neutral rule will generally withstand a disparate treatment challenge. Even under a disparate treatment analysis, however, an employer may encounter the same legal pitfalls whether using a no-rehire rule or not. This is so because once an employer has knowledge of an applicant’s disability or record of disability, or the applicant is perceived as having a disability, the applicant will often raise the question whether the decision not to hire or rehire was motivated by the disability, using a disparate treatment theory. If the decision is deemed not to have been based upon illegal motivation, but rather is shown by the employer to involve a legitimate business reason, there is then no duty to reasonably accommodate the disabled person unless he or she can establish that the business reason defense was a pretext. Factually neutral no-rehire rules will withstand this disparate treatment analysis unless a plaintiff establishes improper motivation with respect to the business decision.

Under a disparate impact analysis, facially neutral no-rehire rules are more problematic and thus also more likely to result in litigation if employers continue to insist upon them. While the Supreme Court in Raytheon characterized a neutral no-rehire rule as a legitimate business reason, this is not the same thing as saying that such a rule is a business necessity. If a facially neutral no-rehire rule is shown to have a disparate impact on protected individuals, the employer must show that the rule is job-related and consistent with business necessity in order to defend its use. The Supreme Court did not

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**IT IS OF INTEREST THAT THE U.S. SOLICITOR GENERAL’S BRIEF IN SUPPORT OF THE EMPLOYER CONCEDED THAT A POLICY PROHIBITING THE REHIRING OF EMPLOYEES DISCHARGED FOR MISCONDUCT COULD PERHAPS GIVE RISE TO ADA LIABILITY UNDER CERTAIN CIRCUMSTANCES, BECAUSE INSTEAD OF ANALYSIS UNDER DISPARATE TREATMENT, “SUCH A POLICY WOULD BE PROPERLY ANALYZED AS A DISPARATE IMPACT CLAIM.”**
provide guidance on this issue and thus there is some question as to whether employers may need to reconsider recovered individuals, essentially bending the rules to accommodate the disabled, or those who have a record of disability, because of the ADA’s prohibition of discrimination against recovered drug and alcohol addicts.

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

ENDNOTES

* The author wishes to thank Jonathan J. Darrow, Esq., M.B.A. candidate, Carroll School of Management, for his research and assistance.
1 42 U.S.C. § 12101 [2000].
3 See id. at 635-36, 643-44.
4 See Brief for the United States as Amicus Curiae Supporting Petitioner at 6, Raytheon Co. v. Hernandez, 124 S. Ct. 513 [2003] (No. 02-749), citing Despears v. Milwaukee County, 63 F.3d 635, 637 [7th Cir. 1995] (No. 02-749).
7 Id. at 14.
8 Brief of the Betty Ford Center at 14, Raytheon, [No. 02-749] citing Marks, Jobs Elude Former Drug Addicts, CHRISTIAN SCIENCE MONITOR (June 4, 2002).
13 Hernandez, 298 F.3d at 1032. Petitioner Raytheon Company acquired Hughes Missile System during the course of litigation. 124 S.Ct. at 516, n.1.
14 Id.
16 See Respondent’s Brief at 12, Raytheon (No. 02-749).
17 Id. at 13.
18 Id. at 2.
19 Hernandez, 298 F.3d at 1032.
20 Id.
21 Id. at 1033. George M. Medina, Sr., Manager of Diversity Development for Hughes, wrote the letter for the company. Id.
22 Id.
23 Id. at 1032.
24 Hernandez, 298 F.3d at 1032, 1036.
25 Id. at 1036, n.16.
26 Id. at 1035.
27 Id. at 1035, n.13.
28 Id. at 1035.
29 Respondent’s Brief at 20, Raytheon (No. 02-749).
30 Hernandez, 298 F.3d at 1034-5 (the opinion was amended on denial of rehearing en banc, August 12, 2002).
31 Id. at 1035.
32 Id.
33 Id.
34 Id. at n.15. The court also reviewed the evidence from Raytheon’s human resource person, Ms. Bockmiller, who rejected Hernandez’s application. The court noted that it “permits an inference that she was aware of Hernandez’s positive drug test” and thus did “not eliminate the question of fact that arises as a result of Hughes’s explicit statements to the EEOC that the application was rejected because of Hernandez’s prior drug addiction.” Id. at 1034.
35 Hernandez, 298 F.3d at 1033. Id. at 1035, n.14.
36 Id.
37 Id. at 1036. Ms. Bockmiller was the employee in Hughes’s Labor Relations Department who concluded that Hernandez was ineligible for rehire.
38 Id.
39 Id.
40 Hernandez, 298 F.3d at 1036.

62. Raytheon, 124 S. Ct. at 519.

63. Raytheon, 124 S. Ct. at 518.

64. Id. at 521.

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

66. Id. & n.7.


68. Id. at *2.

69. Id. at *5-8.

70. Id. at *14.

71. Id. at *18.

72. Id. at *13.

73. Id. at *15, n.5, [referring to Hernandez v. Hughes Missile Systems Co., 298 F.3d 1030, 1036, withdrawing footnote 17].


76. This seems particularly true in light of the fact that Justices Breyer and Souter did not take part in the Raytheon decision. The notion of equal opportunity is one thing, but the label of preference smacks of reverse discrimination.


80. Brief for the United States at 8, Raytheon (No 02-749).

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

82. Id. at 696.

83. Id. at 696-97.

84. Id. at 697.

85. Despreaux v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995).

86. Id. at 636-7.

87. Solicitor General’s Brief, at 3 & 6-9, Raytheon [No 02-749].


89. Id., citing 42 U.S.C. §12114 (d)[2].


91. Id. at 604 & 610.

92. Raytheon, 124 S. Ct. at 519.


95. Tsombanidis v. West Haven Fire Department, 352 F.3d 565 (2d Cir.), 2003 U.S.App. LEXIS 25227, at *19 (emphasis, internal quotations, and internal citations omitted).

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