The question remains after Raytheon v. Hernandez: Whether no-rehire rules disparately impact alcoholics and former drug abusers

Authors: Christine Neylon O'Brien, Jonathan J. Darrow

Published in *University of Pennsylvania Journal of Labor and Employment Law*, vol. 7, no. 1, pp. 157-172, Fall 2004

UNIVERSITY OF PENNSYLVANIA
JOURNAL OF LABOR AND EMPLOYMENT LAW

VOLUME 7 FALL 2004 NUMBER 1

THE QUESTION REMAINS AFTER *RAYTHEON CO. v. HERNANDEZ*: WHETHER NO-REHIRE RULES DISPARATELY IMPACT ALCOHOLICS AND FORMER DRUG ABUSERS

CHRISTINE NEYLON O'BRIEN
JONATHAN J. DARROW

A publication of the Law School of the University of Pennsylvania

Casenote

THE QUESTION REMAINS AFTER *RAYTHEON CO. V. HERNANDEZ*: WHETHER NO-REHIRE RULES DISPARATELY IMPACT ALCOHOLICS AND FORMER DRUG ABUSERS

Christine Neylon O'Brien† & Jonathan J. Darrow††

Thousands of employers throughout the United States[1] have a so-called "no-rehire" rule, which usually means that if an employee is discharged, she is ineligible to reapply for employment at a later date. Such no-rehire rules serve several purposes. For example, they give teeth to an employer's rules and regulations, thereby increasing compliance. They can increase employee loyalty.[2] They prevent employees from repeating misconduct that led to the initial discharge. They reduce the chance of liability based on the negligent rehiring of someone with known past problems, such as a propensity for violence.[3] But are such rules necessary to businesses? Are no-rehire rules good human resource

† Professor and Chair, Business Law, Wallace E. Carroll School of Management, Boston College. B.A. Boston College 1975; J.D. Boston College Law School 1978.

†† B.S. Cornell University 1997; J.D. Duke University School of Law 2000; Lecturer and M.B.A. candidate, Wallace E. Carroll School of Management, Boston College 2005.

1. Oral Argument of Carter G. Phillips on Behalf of Petitioner at 3, Raytheon Co. v. Hernandez, 549 U.S. 44 (2003) (No. 02-749).

2. The theory is that if you leave for a competitor, and you cannot plan on coming back, an employee would be less likely to shop around for better job offers. Often employers seek to discourage employees from quitting by making known that there is a no-rehire policy and that going to work elsewhere contravenes the code of loyalty. *See* Michael S. Hopkins, *What Should You Say When an Employee Quits?*, INC., Mar. 1, 1998, at 54 (reporting an interview with Michael Bloomberg in which it is revealed that Bloomberg, Inc. has a formal no-rehire policy to encourage loyalty); Frederick C. Klein, *Former Employees - Back to the Fold?*, MGMT. REV., Jan. 1969, at 46 (noting that policies against rehire make it less attractive to quit).

3. *Should You Rehire – And If So, When and How?*, HR BRIEFING (ASPEN), July 15, 2002, at 5 (noting that case by case rehiring decision making is also an acceptable practice, that information gleaned from exit interviews can be valuable in terms of keeping simple records regarding eligibility for rehire, that in some respects rehiring former employees permits them to hit the ground running, and that last chance agreements may be used to set up special terms for rehiring questionable ex-employees).

policies?[4] Are simplicity, ease, and consistency of application the primary merit of no-rehire rules?

Although such no-rehire rules generally apply regardless of the reason for termination, and are thus facially non-discriminatory, they may have the potential to screen out certain classes of protected individuals and thereby violate federal anti-discrimination laws. Envision a pregnant woman who is discharged because of her fleeting inability to perform the functions of her job due to her pregnancy, or a person with Tourettes syndrome who is discharged for uncontrollable swearing. Finally, consider a person with alcoholism who is discharged for arriving at work intoxicated. Imagine then that the woman gives birth; the person with Tourettes controls this neurological condition with a newly available medication; and the alcohol-addicted individual successfully participates in an Alcoholics Anonymous program and remains alcohol-free for years. Applying a blanket no-rehire rule in the above hypothetical situations would prevent reapplication by qualified and experienced individuals who are no longer subject to the condition that led to the discharge.[5] Where no-rehire rules are applied

4. The management wisdom of no-rehire rules is subject to question in that "alumni" are known quantities, it costs half as much to rehire an ex-employee as it does a new person, rehires are forty percent more productive in their first quarter at work, and they tend to stay in the job longer. Cem Sertoglu & Anne Berkowitch, *Cultivating Ex-Employees*, HARV. BUS. REV., June 2002, at 20. One survey found that ninety percent of executives would "roll out the welcome mat for a valued former employee who left in good standing." Randall Poe & Coral Lee Courter, *Fast Forward, Welcome Prodigals*, ACROSS THE BOARD, Oct. 2000, at 5. Some employers prefer to leave the door open for the rehire of ex-employees but only for employees who leave on good terms and may have new experiences and skills that provide some added value. *See* Tiffini Theisen, *Here Come the Boomerangs; Some People Can Make a Career of Returning to Work*, SAN DIEGO UNION-TRIBUNE, May 15, 2000, at C-1 ("If employees leave in good standing, with positive work relationships, they can return with new experiences, a fresh perspective, new skills and perhaps even a renewed appreciation of the company they are returning to."); Deidra-Ann Parrish, *On the Rebound,* BLACK ENTERPRISE, May 1997, at 30 (noting that, although rehiring former employees has its perks and the percentage of rehires jumped from eighteen percent in 1995 to twenty-four percent in 1996, "you want to steer clear of employees who were fired").

5. The Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k) (2000), and the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 (2000), currently prohibit such discharges, but in accordance with the pertinent statutes, each requires a threshold number of employees for coverage. The PDA, as an amendment to Title VII of the Civil Rights Act of 1964 requires an employer to have fifteen employees to qualify as an "employer," 42 U.S.C. § 2000e(b), and in order for FMLA's protections to apply, an employer must have fifty employees, 29 U.S.C. § 2611(4)(a)(i) (2000) (defining "employer"). *See generally* Amy Stutzke, Note, *Reinstatement Claims Under the Family and Medical Leave Act of 1993: Leaving Behind the Inter-Circuit Chaos and Instating a Suitable Proof Structure*, 48 N.Y.L. SCH. L. REV. 577, 579-85 (2003) (discussing overview and purpose of FMLA). The Americans with Disabilities Act (ADA) provides protection from workplace discrimination for individuals who suffer a major life impairment and qualify as disabled. 42 U.S.C. §§ 12101-12213. In order to be a "covered entity" and thereby subject to the provisions of the ADA, an employer must have at least fifteen

uniformly, they leave no room for an individualized inquiry regarding the current qualifications and employability of former employees.

The theory behind anti-discrimination legislation is to prevent such unfair outcomes for individuals who are members of protected classes. This is true even where the questioned employer policies are facially neutral, provided that (1) it can be shown that the facially neutral policies have a "disparate impact" on members of protected groups, and (2) the policies cannot be justified by business necessity.[6] This paper analyzes the issues involved in disparate impact claims[7] regarding no-rehire rules, and it includes a discussion and analysis of the United States Supreme Court's recent decision regarding Raytheon's no-rehire rule.[8]

The *Raytheon* Court, for procedural reasons, alluded to but could not reach the issue of disparate impact, instead deciding the case based on the *McDonnell Douglas* burden shifting approach utilized in disparate treatment cases.[9] So the question remains: do the no-rehire policies that many of America's employers currently maintain tend to unfairly screen out – that is, do they have a disparate impact on – alcoholics or other former addicts in violation of the ADA?[10] The answer to this question depends on several issues that will be explored. Are alcoholics and former drug abusers even considered "disabled" under the ADA? Where misconduct is the proffered explanation for termination, should alcoholics and former drug abusers be given more leeway if the misconduct is caused

---

employees. 42 U.S.C. § 12111(5) (2000).

6. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

7. Disparate impact claims are distinguishable from "disparate treatment" claims in that the latter involve claims of *intentional* discrimination. *See* 42 U.S.C. § 2000e-2(k) (including codification of disparate impact claims).

8. Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) *remanded to* 362 F.3d 564 (9th Cir. 2004).

9. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this approach, plaintiff is required to first establish a prima facie case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by putting forth evidence demonstrating that the employer's explanation is pretextual. *Raytheon*, 540 U.S. at 44. As will be discussed, the Court noted in passing that disparate impact claims are "cognizable" under the ADA. *Id.* at 53.

10. The question remains whether facially neutral no-rehire rules "must be modified to accommodate persons who are actually disabled under the ADA" or those who have recovered but have a record of disability under the ADA. Gerald L. Maatman, Jr., *Latest Workplace Litigation a Mixed Bag; For Employers, the Year's Key U.S. Decisions and Settlements Include Some Big Wins, Losses,* BUS. INSUR., Aug. 30, 2004, at 10. *See also Question Remains: Must Employers Rehire Employees Dismissed for Cause?*, 27 Disability Compliance Bull. No. 2, Dec. 24, 2003, *available at* LEXIS, News Library, Legal News file (arguing that, because the Supreme Court remanded Raytheon, it did not answer the key question of "[w]hether the ADA confers preferential rehire rights on employees who are disabled if they were terminated for violating workplace conduct rules.").

by or at least related to the disability? Does the public policy favoring reintegration into the workforce of recovered drug abusers trump the public policy interest in providing meaningful penalties for the violation of workplace drug and alcohol regulations? Finally, if no-rehire policies do have a disparate impact on former alcohol and drug abusers, when (if ever) can such policies be justified on the basis of workplace safety or business necessity?

This paper focuses primarily upon the issues involved in disparate impact claims regarding no-rehire rules because such claims seem more likely to occur in future challenges to no-rehire policies than disparate treatment claims.[11] This is so because disparate impact does not require a showing of intent to discriminate, nor does it require a defendant's knowledge of a plaintiff's protected class status. Thus, the burden upon the plaintiff in a disparate impact case is in some respects lighter than in a disparate treatment case.[12] In the latter, the employer gaffes that would need to be proven to substantiate a claim are more obvious, and thus more likely to be avoided by employers. In contrast, a facially neutral no-rehire rule that has a disparate impact, in other words, a disproportionately negative effect upon a protected class, may violate the ADA and/or other anti-discrimination statutes, absent a showing that the rule is a business necessity for the employer. Employers may be more likely to make the error of preserving a facially neutral rule that has a negative impact upon protected groups because they may not weigh the impact of the rule upon protected classes and they also may not consider whether the rule could be justified as a business necessity. Nonetheless, the discussion that follows highlights disparate treatment theory as well as disparate impact in part

11. Christine Neylon O'Brien, *Facially Neutral No-Rehire Policies and the Americans with Disabilities Act*, 55 LABOR L.J. 130 (2004). *See* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 598 (2004) (advocating use of disparate impact theory as underutilized resource for plaintiffs but noting that it "is inherently a class-based theory and class actions are difficult, if not impossible, for private plaintiffs to undertake unless they involve the possibility of very large damage awards"). *Cf.*, Nicole J. DeSario, Note, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 494-98 (2003) (criticizing the plaintiff's burden of proof in New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979), a Title VII disparate impact case where transit applicants and employees who were methadone users were excluded from employment based on employer policy against use of narcotics where defendant's rule was presumed to be job related and necessary due to safety and efficiency goals).

12. On the other hand, it may be difficult to succeed on a disparate impact theory where probative statistical information cannot be easily obtained. In addition, because punitive damages are not available in disparate impact cases, plaintiffs (and plaintiffs' attorneys) may be less motivated to pursue expensive litigation. As one author noted, because disparate impact is "not a heavily litigated theory of discrimination, . . . many questions remain relatively unsettled regarding the nature of the plaintiff's proof and the character of the business necessity defense." Shoben, *supra* note 11, at 607.

because of the procedural posture of the case recently presented to the United States Supreme Court.

I. RAYTHEON CO. V. HERNANDEZ

A. Facts and Judicial History

The United States Supreme Court recently reviewed one employer's no-rehire rule that was challenged on the ground that it violated the Americans with Disabilities Act (ADA).[13] A brief summary of the facts and background of the case follows. The plaintiff, Joel Hernandez, had a history of alcohol abuse and absenteeism, and had previously submitted to rehabilitation during his twenty-five years of employment at the employer.[14] He was terminated in 1991 after arriving at work with alcohol on his breath and a subsequent blood test revealed cocaine in his bloodstream.[15] Mr. Hernandez reapplied to Raytheon in 1994, submitting a letter from his Alcoholics Anonymous counselor indicating that he was sober.[16] According to the testimony of Ms. Bockmiller, the Raytheon employee who received the application, the employer allegedly rejected his application because of the company's unwritten no-rehire rule.[17] She claimed that she did not look to see the reason for his previous termination and thus was unaware of the plaintiff's history of drug and alcohol use.[18]

The Equal Employment Opportunity Commission ("EEOC") reviewed a charge submitted by Hernandez and the subsequent investigation produced a letter from a George M. Medina, Raytheon's Manager of Diversity Development, which detailed that the plaintiff's "application was rejected based on [the plaintiff's] demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation. The company maintains it's [sic] right to deny re-employment to employees terminated for violation of Company rules and regulations."[19] Thereafter, the EEOC issued a right-to-sue letter finding cause to believe that the employer violated the ADA.[20] Armed with this letter, Hernandez brought suit in the United States District Court for the

13. *Raytheon*, 540 U.S. at 46, *citing* 42 U.S.C. § 12101 (2000). It should be noted that Hughes Missile System was actually the employer at the time that the cause of action arose in the case but that Raytheon thereafter acquired Hughes. *Id.* at 47 n.1. For simplicity, the employer will herein be referred to as "Raytheon."

14. *Id.* at 46-47.

15. *Id.*

16. *Id.* at 47.

17. *Id.*

18. *Id.*

19. *Id.* at 48.

20. *Id.* at 48-49.

District of Arizona.[21] There, the trial court granted the employer's motion for summary judgment.[22] It should be noted that in 1999 (during the course of litigation) the employer had offered the plaintiff a position, but at that time he was unable to pass the qualifying test.[23]

The Court of Appeals for the Ninth Circuit reversed the district court, finding that there were genuine issues of material fact.[24] The Court of Appeals noted that whether Hernandez was qualified for the position in 1994 when he first reapplied was critical to the determination of whether the ADA had been violated.[25] The real reason or basis for the employer's decision to reject the plaintiff's application was also uncertain. The Ninth Circuit also analyzed the facts and the application of the purported no-rehire rule from a perspective that the United States Supreme Court later concluded was disparate impact rather than treatment.[26] The Supreme Court vacated the judgment of the appellate court and remanded the case to the Ninth Circuit to apply the appropriate analytical framework, that of disparate treatment.[27]

In *Raytheon*, because of what was essentially a procedural error on the plaintiff's part, namely the failure to plead the issue of disparate impact in the first instance, the issue of whether Raytheon's rule had a disparate impact upon members of the plaintiff's protected class went unanswered by the Supreme Court.[28] However, the *Raytheon* Court made clear that disparate impact claims are cognizable under the ADA.[29] The Court also remanded the case for further consideration of the plaintiff's disparate treatment claim.[30] Upon remand, the Ninth Circuit once again found a sufficient basis to avoid summary judgment for the defendant, and sent the matter back to the trial court for a jury to decide whether Raytheon refused to rehire Hernandez because of his past record of addiction rather than because of a no-rehire rule.[31]

---

21. *Id.* at 49.
22. *Id.*
23. Hernandez v. Raytheon Co., 298 F.3d 1030, 1035 (9th Cir. 2002) (*Raytheon I*).
24. *Raytheon*, 540 U.S. at 49-50.
25. *Raytheon I*, 298 F.3d at 1034.
26. *Raytheon*, 540 U.S. at 53-54.
27. *Id.*
28. *Id.* at 49.
29. *Id.* at 53, *citing* 42 U.S.C. § 12112(b) (2000). Although the Supreme Court's statement indicating that disparate impact claims are cognizable under the ADA is technically dicta since it is not central to the holding in the case, lower courts are unlikely to take a contrary position given the Court's unequivocal statement and the language of the statute itself.
30. *Id.* at 55.
31. Hernandez v. Hughes Missile Sys. Co., 362 F.3d 564, 565, 568 (9th Cir. 2004).

B. The Raytheon Case Illustrates Disparate Impact and Disparate Treatment Issues Regarding No-Rehire Policies

How may no-rehire rules have a disparate impact upon the disabled? Let us look at the rule illustrated in the *Raytheon* case, for example, to see how their no-rehire policy could result in a disparate impact upon the disabled or upon those with a record of disability.[32] One problem with Raytheon's rule is that the individuals banned from rehire include those who have worked for the company in the past and were terminated for, or resigned because of, workplace misconduct. Where this misconduct related to alcohol or drug use, and the former employee is thereafter successfully rehabilitated and otherwise qualified for employment, the use of a no-rehire rule to automatically bar re-employment may violate the ADA because of its disparate impact on those who either have a record of disability or who remain disabled because of their ongoing problems with addiction. The disparate impact argument is simply that such a no-rehire rule disparately impacts those who have been terminated because of misconduct that is a direct product of the disability and who are now recovered but retain a record of disability. Where a former employee applies for a position for which he is qualified, and assuming that the former employee is fully rehabilitated, should this person at least be entitled to individual consideration of his application by his former employer? An automatic bar to re-application would appear to have a disparate impact on members of the protected class, namely rehabilitated drug or alcohol users who are otherwise qualified for the job.

Of course, in addition to a disparate impact claim, a disparate treatment claim could also arise. This is so because generally the employer will have a record as to why the employee was terminated and this record will likely substantiate that the employer had knowledge or scienter as to the former employee's disability or record thereof, thereby establishing one element of a disparate treatment claim. If an employer has knowledge of the disability or record, that is the first element in establishing that the negative employment decision was based upon a discriminatory reason rather than a purported neutral reason, such as an unwritten no-rehire rule. Defendant's knowledge that the plaintiff is a member of a protected class is critical to establishing a discriminatory motive.

In the *Raytheon* case, the employer maintained that it did not consult the former employee's full employment record prior to making the decision

32. Raytheon's rule was not in writing, which raised some question as to whether the rule really existed or was merely asserted as a defensive strategy after the employer's decision not to rehire was challenged. *See Hernandez*, 362 F.3d at 569 (noting "jury could infer from the fact that nobody at Raytheon could identify the origin, history, or scope of the alleged unwritten policy, that it either did not exist or was not consistently applied.").

to reject the plaintiff, Joel Hernandez.[33] Rather, the initial contact person to whom the plaintiff applied, Ms. Bockmiller, indicated that she simply followed the company's no-rehire rule without looking to see what constituted the cause for the termination.[34] Thus, Ms. Bockmiller maintained that she was unaware of his record of illegal drug use.[35] Nonetheless, Mr. Hernandez submitted a letter from his Alcoholics Anonymous sponsor along with his job application, and it would be reasonable for a jury to find that Ms. Bockmiller had access to this.[36] In contrast to this testimony, there was other evidence that in response to the EEOC charge, another company spokesman, George Medina, wrote that the complainant's "application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful rehabilitation."[37] Obviously this kind of factual conflict works against the employer in that it raises a genuine issue of material fact.[38] As the Court of Appeals for the Ninth Circuit noted upon remand, such dispute could be a basis for a jury finding that the employer's policy reason for rejecting Hernandez was a pretext, or a "post-hoc rationale."[39]

C. Differentiation Between New Applicants and Former Applicants in Raytheon

It is noteworthy that Raytheon's no-rehire rule was tougher on former employees than it was on new applicants.[40] This was so because applicants who tested positive for illegal drug or alcohol use were permitted to reapply within a set period of time whereas former employees were totally banned because of their previous misconduct.[41] Again, an argument can be made that this disparity between classes (applicants vs. re-applicants) violates the ADA, in particular because the employer has access to the record of disability with respect to former employees. While employers may and should set up such disability-related information in separate files

33. *Raytheon*, 540 U.S. at 47.
34. *Id.*
35. *Id.*
36. *Hernandez,* 362 F.3d at 569.
37. *Raytheon*, 540 U.S. at 49.
38. *Hernandez*, 362 F.3d at 570.
39. *Id.* at 569 (citation omitted).
40. *Raytheon I*, 298 F.3d at 1036, n.16.
41. *Id.* One justification for the harsher treatment of former versus new applicants could be that former applicants have notice of the consequences of their actions, whereas new applicants would generally not have such notice. O'Brien, *supra* note 11, at 138. Stated differently, the complete ban on rehire would serve to deter workplace misconduct by providing a severe penalty; this consideration is not present for those who are not currently employees.

from an employee's work record,[42] they nonetheless could have access to both sets of records. In this modern technological age, if such records are computerized, it is readily discoverable what records have been accessed at a particular time.

No-rehire rules that bar re-application would seem to bar future employment opportunities for former employees in a way in which new applicants are not similarly limited. Does it make sense for employers to set higher hurdles for former employees than for new applicants? In the *Raytheon* case, new applicants with drug or alcohol problems were treated less harshly than former employees who reapplied for employment. Some disabilities, by nature, may lift, dissipate, or essentially become corrected after the individual's departure from employment. Thus, the former applicant may be a better choice for the employer than the new applicant who currently has a problem, and yet policies that bar former employees prevent individualized consideration of former applicants' present condition.

II. WHAT IS THE LAW REGARDING ALCOHOL AND DRUGS IN THE WORKPLACE?

A. Statutory Objectives

There is a clear tension – or one might more optimistically describe it as a careful balance – in the ADA between the twin objectives of (1) taking a firm stand against the current abuse of alcohol and drugs, and (2) promoting the reintegration into the workforce of those who are no longer engaged in the illegal use of drugs.[43] Section 12114(a), for example, specifically excludes from the definition of "qualified individual with a disability . . . any employee or applicant who is *currently* engaging in the illegal use of drugs."[44] Section 12114(b) then clarifies that individuals who

42. Title I of the ADA requires the separation of medical-related information from the personnel files of all applicants and employees. *See* Stephen S. Pennington & Jamie C. Ray, *9th Circuit Lets Jury Decide Hernandez,* LEGAL INTELLIGENCER, May 25, 2004, at 6 (citing EEOC Technical Assistance Manual on the Employment Provisions [Title I] of the ADA, Section 6.5).

43. 42 U.S.C. § 12114 (2000).

44. 42 U.S.C. § 12114(a) (emphasis added). Courts have interpreted the phrase "not currently engaged" to mean that the person has been in recovery long enough to become stable. McDaniel v. Mississippi Baptist Med. Ctr., 877 F. Supp. 321, 327-28 (S.D. Miss. 1994), *aff'd*, 74 F.3d 1238 (5th Cir. 1995) (unpublished table decision). The exact amount of time that must pass is not clear. *See, e.g.*, Herman v. City of Allentown, 985 F. Supp. 569, 578-79 (E.D. Pa. 1997) (holding that nine months is sufficient); Montegue v. City of New Orleans, 1996 U.S. Dist. LEXIS 13795, at *10 (E.D. La. 1996) (finding that more than one year is sufficient); Baustian v. Louisiana, 910 F. Supp. 274, 277 (E.D. La. 1995) (holding that seven weeks is insufficient).

are *no longer* engaging in the illegal use of drugs, *and* who are participating in or have completed a drug rehabilitation program are not necessarily excluded from the definition of "qualified individual with a disability."[45] The ADA furthermore explicitly states that employers:

> (1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
> (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
> . . .
> (3) 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 performance or behavior is related to the drug use or alcoholism of such employee.*[46]

This is the only reference to disability-caused misconduct contained in the ADA[47] and signifies congressional intent to treat drug and alcohol addiction differently from other disabilities.[48] Because no-rehire rules are frequently applied to individuals who have been discharged for misconduct, this special treatment in the statute may make it more likely that no-rehire rules will be upheld in the context of drug and alcohol abuse.

B. Are Alcoholism and Drug Addiction "Disabilities" Under the ADA?

As a preliminary matter, one might wonder whether alcohol and drug addiction are even considered disabilities under the ADA. After all, section 12114 merely states that recovered or recovering drug users are not necessarily *excluded* from the definition of "qualified individual with a disability."[49] It does not affirmatively state that such individuals *are* "qualified individuals with a disability."[50] In *Raytheon*, the parties did not dispute that Hernandez was disabled,[51] and so the Supreme Court did not explicitly address the issue. Nevertheless, it appears clear that the courts will generally consider alcoholism and past drug addiction a disability

45. 42 U.S.C. § 12114(b).
46. 42 U.S.C. § 12114(c) (emphasis added).
47. Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1086 (10th Cir. 1997).
48. Walsted v. Woodbury County, 113 F. Supp. 2d 1318, 1342 (N.D. Iowa 2000).
49. 42 U.S.C. § 12114(b).
50. *Id.*
51. *Raytheon*, 540 U.S. at 50 n.4.

under the ADA,[52] particularly in light of *Raytheon*.[53] This is not to say that alcoholism or past drug addiction are *per se* disabilities, however.[54] The determination as to whether a plaintiff is disabled is based on whether the alleged disability affects her ability to perform a major life activity, a determination which requires " an individualized inquiry."[55]

C. *What is Reasonable Accommodation?*

The distinction between a person's condition and its classification as a "disability" under the ADA is especially relevant in the context of a reasonable accommodation claim. This is because the ADA requires employers to reasonably accommodate limitations, not disabilities.[56] That is to say, disabled individuals should be presumed to *not* have job-related limitations unless there is reason to believe otherwise. This presumption is firmly rooted in the same public policy that led to the passage of the ADA in the first place, namely, that disabled individuals are in many cases just as able as their non-disabled counterparts to be productive in the workplace.[57]

During oral argument in the *Raytheon* case, Hernandez' lawyer suggested that Raytheon's no-rehire rule should have been relaxed as a reasonable accommodation to Hernandez during the re-application process.[58] Justices Scalia and O'Connor seemed critical of this position:

---

52. *E.g.*, Brown v. Lucky Stores, 246 F.3d 1182, 1187 (9th Cir. 2001) ("alcoholism is a protected disability under the ADA"); Renaud v. Wyoming Dep't of Family Servs., 203 F.3d 723, 730 n.3 (10th Cir. 2000) (listing authorities and noting that whether alcoholism is a *per se* disability may raise additional issues); Peyton v. Otis Elevator Co., 72 F. Supp. 2d 915, 919 (N.D. Ill. 1999) ("alcoholism is a presumed disability for ADA purposes"); Flynn v. Raytheon, 868 F. Supp. 383, 385 (D. Mass. 1994) ("[Plaintiff] asserts correctly that, as an alcoholic, he is a disabled individual under the Americans with Disabilities Act."); State v. Jackson, 812 N.E.2d 1002, 1004 (Ohio Ct. App. 2004) ("We also agree that the term 'handicap' or 'disability' is defined in the ADA to include drug addiction and alcoholism.").

53. Shaina Walter, *ADA: Supreme Court Disallows Disparate Impact Analysis of Facially Valid Employment Procedures*, 32 J.L. MED. & ETHICS 373, 374 (2004).

54. Sullivan v. Neiman Marcus Group, 358 F.3d 110, 114-15 (1st Cir. 2004); Burch v. Coca-Cola Co., 119 F.3d 305, 314-16 (5th Cir. 1997).

55. Sutton v. United Air Lines, Inc., 527 U.S. 472, 483 (1999). *See also* Albertson's Inc. v. Hallie Kirkingburg, 527 U.S. 555, 566 (1999) (noting that there is a "statutory obligation to determine the existence of disabilities on a case-by-case basis"); *Sullivan*, 358 F.3d at 115 (describing an employee's Catch-22 situation, in which he was attempting to prove he was disabled or regarded as disabled under the ADA by demonstrating that his ability to work was substantially impaired, but realizing that this evidence might also demonstrate that he was unqualified and thus not entitled to protection of the ADA).

56. Taylor v. Principal Fin. Group, 93 F.3d 155, 164 (5th Cir. 1996).

57. *Id.*

58. Oral Argument of Stephen G. Montoya on Behalf of the Respondent at 34-37, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (No. 02-749).

QUESTION: What disability would you be accommodating?

HERNANDEZ'S LAWYER: You would be accommodating the disability of disabling addiction to drugs and alcohol.

QUESTION: He doesn't have that disability . . . .

HERNANDEZ'S LAWYER: [U]nder the definition of disability set forth by the ADA, Justice Scalia, someone with a record of a disability is in fact disabled under the statute.

QUESTION: He is in fact disabled, but—but what—what disability of his are you accommodating?[59]

The Justices' comments highlight the difficulty a plaintiff would face in challenging a no-rehire rule on the grounds that he is no longer engaged in the illegal use of drugs. Hernandez claimed – as he had to claim[60] – that he was no longer engaging in the illegal use of drugs, and that he was "clean and sober."[61] There is no question that someone who has a record of a disability is "disabled" for purposes of the ADA.[62] However, because limitations, but not disabilities, must be reasonably accommodated, it is not clear how a plaintiff in Hernandez's situation could ever succeed on a reasonable accommodation theory. What job-related limitations might a former drug addict or alcoholic have? Not surprisingly, courts have suggested that failure-to-rehire claims are not properly viewed in the framework of reasonable accommodation.[63]

D. Leaves of Absence and Last Chance Agreements

Where an individual suffers relapse of addiction, a leave of absence for rehabilitation is a useful accommodation, but at some point an employer may decide that repeating such an accommodation is too much of a burden on the business.[64] In the context of safety concerns or even in the interest

59. *Id.*

60. 42 U.S.C. § 12114(a) (2000).

61. *Hernandez*, 362 F.3d at 566 (9th Cir. 2004).

62. 42 U.S.C. § 12102(2).

63. *Peyton*, 72 F. Supp. 2d at 921; Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995) ("'A second chance.' . . . is not an accommodation, as envisioned in the ADA.").

64. It has been noted that a reasonable accommodation for alcoholics would be to allow the alcoholic a leave from work to complete a rehabilitation program. *See* Beverly W. Garofalo & Nicole Anker, *Alcoholism and Drug Abuse Under the ADA*, CORP. COUNSELLOR, Mar. 23, 2004 at 1 (noting the EEOC recommends that providing a leave of

of maintaining the quality of its products, an employer could argue that employing individuals who have previously and repeatedly proven themselves unreliable in terms of sobriety on the job is foolhardy, irresponsible, inefficient, and unprofitable.[65]

Should an employer be forced to reconsider those who have been terminated because of misconduct, even if the misconduct is related to a recognized disability? The statute and the courts have made clear that employers can hold employees with addictions to the same standards of workplace conduct as employees without addictions.[66] Progressive discipline and discharge policies for misconduct are a standard method of maintaining safety and order in the workplace. Where an employer thoughtfully fashions such policies, as well as uniformly and fairly applies them to all employees, it is likely that the policies will withstand most legal challenges.

So what hope is there for recidivist employees to avoid the fatal and final impediment of an employer's facially neutral no-rehire rule? Several avenues may be helpful. First, an employee who is on the verge of discharge might request a leave of absence along with a last chance agreement ("LCA"). A LCA is illustrated in *Longen v. Waterous Company*.[67] The *Longen* case involved an employee with ongoing substance abuse problems who had entered chemical dependency treatment five times in three years during his employment with the defendant.[68] In upholding the district court's summary judgment for the employer, the Court of Appeals for the Eighth Circuit noted that "courts have consistently found no disability discrimination in discharges pursuant to such agreements" because by their nature, these return to work agreements impose different employment conditions.[69] In *Longen*, the plaintiff was given multiple LCAs, the last of which prohibited future use of mood

absence to an alcoholic employee is a reasonable accommodation and also advocating the use of last chance agreements for employees who are found to be under the influence at work, providing the employee the opportunity to obtain treatment in the context of a signed agreement that any further violations will result in termination).

65. *See* Jacquelyn Lynn, *Management Smarts, Just Say No,* ENTREPRENEUR, Dec. 1997, at 36 (arguing that hiring a substance abuser results in loss of productivity, and increases in absenteeism, medical claims, pilferage, and accidents and workers' compensation claims).

66. *See* Despears v. Milwaukee County, 63 F.3d 635, 636-37 (7th Cir. 1995) (involving alcoholic employee's demotion due to lost license resulting from DUI, where court noted it is not "a reasonably required accommodation to overlook infractions of the law."); O'Brien, *supra* note 11, at 136 (discussing Harris v. Polk, 103 F.3d 696, 697 (8th Cir. 1996), and finding that the "employer may hold disabled employees to the same standard of law-abiding conduct as all other applicants").

67. 347 F.3d 685 (8th Cir. 2003).

68. *Id.* at 687.

69. *Id.* at 689.

altering chemicals including alcohol.[70] The plaintiff was thereafter terminated because of a DUI committed while on a leave due to a workers' compensation injury.[71] Plaintiff Longen objected to the restriction of alcohol use that extended beyond the workplace but the court of appeals noted that he had agreed to such restrictions on his conduct in order to continue working at the defendant employer and found that the plaintiff failed to show that the ADA forbids such agreements.[72]

E. Making a Case Based on Disparate Impact Theory

Another avenue that may be available for terminated addicts to avoid the barrier of a facially neutral no-rehire rule is through a lawsuit based upon a disparate impact claim. The plaintiff must prove statistically that former addicts and recovered alcoholics are disproportionately disadvantaged or prevented from consideration for re-employment, and then if the employer is unable to establish the business necessity of the no-rehire rule, because the no-rehire policy is not truly necessary to the business, then a plaintiff could argue that he should be given relief in the form of individualized consideration of his qualifications and readiness to return to work. In some cases, a return to work agreement would contain a last chance agreement and such could balance the needs of both parties.

The disparate impact portion of this approach could be established with statistics showing that significantly more rehabilitated drug and alcohol abusers would be excluded by such policies than employees who are not so afflicted. For example, a plaintiff might put forth the following statistics. A company employs 10,000 people, eight percent of whom are alcoholics or drug abusers and ninety-two percent of whom are not.[73] Two hundred people are fired for misconduct, 160 of whom are discharged for misconduct not related to being an alcoholic or drug user and forty of whom are discharged for misconduct that is so related. Finally, fifty of those 200 reapply and are rejected based on a no-rehire rule, fourteen of whom are recovered alcoholics or former drug users and thirty-six of whom are not.

These figures could be used to illustrate disparate impact. A court may view critically the fact that twenty-eight percent (14/50) of those

70. *Id.* at 687.

71. *Id.* at 687-88.

72. *Id.* at 689.

73. This statistic may be difficult to ascertain; in that case a plaintiff's best course of action may be to present statistics showing alcohol and drug abuse rates in the general population, or statistics illustrating higher misconduct rates for alcoholics and drug abusers. Of course, the ideal statistic would simply be one indicating a higher rate of misconduct-related discharge for alcoholics and drug abusers than for those who do not fall into either of these categories.

denied re-employment based on the no-rehire rule are recovered alcoholics or former drug abusers, when only eight percent of the overall workforce and twenty percent (40/200) of those discharged for misconduct fall into these categories. As a practical matter, it may be that none or very few of those discharged ever apply for rehire due to the perceived futility of doing so based on the no-rehire rule itself, rendering statistics regarding those actually denied rehire unavailable. This need not be fatal to a plaintiff's case, however. It should be enough to show that alcoholics and drug abusers are substantially more likely to be discharged for misconduct – and therefore ineligible for rehire – than non-alcoholics/drug abusers. In the present hypothetical, these figures would be five percent (40/800) and 1.7% (160/9,200), suggesting that alcoholics and drug abusers are around three times more likely (5%/1.7%) to be discharged for misconduct than those who are not alcoholics or drugs abusers.[74]

III. CONCLUSION

The preceding analysis of the current state of the law provides guidance for both employers and employees when dealing with misconduct related to alcohol and drug abuse in the presence of a neutral no-rehire rule. Employees should be aware that the use of alcohol in the workplace need not be accommodated by employers, even where such employee is an alcoholic and would be considered disabled under the ADA. Similarly, current illegal drug users are specifically excluded from ADA protection. Employees who are alcoholics and seek to overcome this condition should request a leave of absence from the employer as a reasonable accommodation.[75] The request should occur prior to any conduct violation in order to avoid being excluded from ADA protection based on section 12114(c).

Employers desiring to maintain their neutral no-rehire policies should be certain that such policies are written and unambiguous in order to avoid raising an issue of fact as to whether the policy actually exists. Furthermore, employers should be sure to apply the policy in a consistent manner, since selective enforcement of a no-rehire rule could constitute disparate treatment.[76] On the other hand, consistently applying a no-rehire policy may open the door to a disparate impact claim. To lessen the

74. Once disparate impact is shown, employers may still be able to successfully defend by showing that the no-rehire rule is consistent with business necessity. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

75. Brown v. Lucky Stores Inc., 246 F.3d 1182, 1188 (9th Cir. 2001) (acknowledging that "the general rule [is] that an employee must make an initial request [for accommodation]").

76. Flynn v. Raytheon, 868 F. Supp. 383, 388 (D. Mass. 1994).

possibility of such a claim, employers desiring to make exceptions to the no-rehire rule should document the decision process, being careful to not make adverse employment decisions on the basis of a protected characteristic.[77] Finally, last chance agreements may be the favored mechanism for both employers and employees to deal with alcohol and drug-related misconduct issues. On the one hand, employers can be reasonably confident that termination based on violation of a last chance agreement will be upheld by a court. Equally important, last chance agreements provide clear notice to employees on the consequences of their actions and, if properly crafted, can assist the employee in remaining employed while protecting the legitimate safety and business interests of the employer.

77. Garofalo & Anker, *supra* note 64.