



Supreme Court to Review Whether Policy Against Rehiring Recovered Addicts Violates ADA

The United States Supreme Court has agreed to review whether an employer violated the ADA by refusing to rehire a successfully rehabilitated former substance abuser pursuant to an unwritten policy against rehiring employees who were fired for misconduct. In *Raytheon Co. v. Hernandez*, Raytheon is challenging the Ninth Circuit's decision in *Hernandez v. Hughes Missile Systems Co.* that allowed Hernandez to proceed with his ADA claim against Hughes Missile Systems, a company Raytheon since has acquired. Hernandez resigned in lieu of discharge after he tested positive for cocaine while on the job. Two years later, after having successfully completed a drug rehabilitation clinic, Hernandez applied to be rehired. The employer rejected the application based on an unwritten policy of not rehiring former employees whose employment ended due to termination or resignation in lieu of discharge. Hernandez brought an ADA claim alleging he was not rehired because of his record of disability or because he was regarded as being disabled. The Ninth Circuit Court of Appeals held that the employer was not entitled to summary judgment, because "although the ADA does not protect an employee or applicant who is currently engaged in illegal drug use, it does protect qualified individuals with a drug addiction who have been successfully rehabilitated." The court held that the employer's general policy violated the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction, and who were rehabilitated when they applied for rehire. In its petition for Supreme Court review, Raytheon argued that the Ninth Circuit decision improperly "confers preferential treatment upon individuals who are fired for drug-related misconduct" and "draws into question the validity" of no-rehire rules, which many companies have adopted "to help ensure that failed former employees do not slip back into an organization simply because hiring personnel do not know (or have forgotten) why former employees earlier departed."

Second Circuit Revives Wrongful Termination Claim of Blind Employee Not Recalled After Reduction-in-Force

A Federal appellate court held that a legally blind employee who was the only person not to be recalled after a reduction-in-force (RIF) could proceed with his disability discrimination claim. In *Kinsella v. Rumsfeld, Patrick Kinsella* was a legally blind print shop worker at Griffiss Air Force Base in Rome, New York. In 1989, Kinsella moved to the nearby Rome Laboratories printing facility and took on additional responsibilities. In 1993, a new director took over at the printing facility and, after conducting efficiency surveys, decided to consolidate the two printing facilities. Eight employees, including Kinsella, were RIF'd in January 1995, but three employees subsequently were rehired to positions in the consolidated operation. The rest of the RIF'd employees—except Kinsella—were rehired by the Defense Department in other jobs at the same facility, including one

junior worker whom Kinsella had trained. The only position Kinsella was offered was unacceptable because it was more than 90 miles away and he was unable to drive due to his blindness.

Kinsella sued the Defense Department under the Rehabilitation Act of 1973, claiming he was denied continued employment because of his disability. The trial court granted the Defense Department's motion for summary judgment and dismissed the complaint. The Second Circuit (which encompasses New York, Connecticut and Vermont) reversed, holding that although there was little reason to doubt that the RIF was a legitimate response to inefficiencies of the printing facility, a reasonable factfinder could conclude that the Defense Department used this legitimate RIF as an opportunity to fire "the blind person" without raising the "specter of discrimination." The court pointed to evidence that prior to the RIF, the new director had made comments regarding Kinsella's blindness and stated that "this new organization was not going to be able to run with him" and that he "just did not believe that a blind person could run copiers and do print work." Employers should be careful both to scrutinize the reasons for reductions-in-force and to ensure that any subsequent rehiring is done in a fair, non-biased manner.

Maryland Court Finds Seventeen — Month Delay in Accommodating Disabled Employee "Unreasonable"

A Maryland appellate court has reinstated an employee's disability discrimination claim based on her employer's failure to timely accommodate her disability. In *Cohen v. Montgomery County Department of Health and Human Services, et al.*, Susan Cohen, a social worker, notified her supervisors when her multiple sclerosis began to make it difficult for her to drive to home visits. On several occasions, the county's doctors pronounced Cohen fit to perform her job if the county accommodated her difficulties in moving by requiring less fieldwork and typing. Nonetheless, it took the county over 17 months to work out a suitable arrangement. By that time, Cohen already had filed an administrative complaint, and she persisted in her suit after the accommodation was made. The trial court dismissed Cohen's claim as moot because the employer had accommodated her disability. The appellate court found, however, that the unreasonable delay in accommodating an employee independently violated the Maryland disability discrimination law (which is modeled on the ADA). The court found that "simply because appellant received the accommodation she requested does not make that accommodation, no matter how belated, a 'reasonable accommodation.'" This case underscores the importance of accommodating employees' disabilities in a timely fashion.

DID YOU KNOW?

In 2002, only 8.5 percent of private industry employees were union members, down from 8.9 percent in 2001.