No. 02-749

IN THE
# Supreme Court of the United States

RAYTHEON COMPANY,

*Petitioner,*

*v.*

JOEL HERNANDEZ,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Whether the Americans with Disabilities Act confers preferential rehire rights on employees lawfully terminated for misconduct, such as illegal drug use.

## PARTIES TO THE PROCEEDING

Joel Hernandez, the plaintiff in the trial court and the respondent here, formerly was employed by, and later sued, Hughes Missile Systems Company, a subsidiary of Hughes Aircraft Company. (As noted in the Corporate Disclosure Statement, Raytheon Company subsequently purchased Hughes Aircraft Company and its subsidiaries.)

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Raytheon Company states that it purchased Hughes Aircraft Company (and, with it, the subsidiary Hughes Missile Systems Company). Raytheon issues shares to the public.

Neither Hughes Electronics Corporation (Hughes Aircraft Company's former parent) nor General Motors Corporation (formerly part owner of Hughes Electronics Corporation) has any financial interest in this litigation.

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**MISCELLANEOUS**

## OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit, dated June 11, 2002, is not reported, but it is reproduced at 2002 U.S. App. LEXIS 16163. In response to a petition for rehearing, the panel amended its initial opinion; that amendment is reproduced in the Appendix to the Petition for Certiorari ("Pet. App.") at page 14a and the entire opinion as amended is reported at 298 F.3d 1030 and reproduced at Pet. App. 1a-13a. The order of the district court granting the Company's motion for summary judgment is not reported, but it is reproduced at Pet. App. 16a-17a.

## STATEMENT OF JURISDICTION

Jurisdiction existed in the district court under 28 U.S.C. § 1331. The initial panel opinion was issued on June 11, 2002. A timely petition for rehearing and suggestion for rehearing *en banc* was filed. The panel denied rehearing but issued its amended opinion on August 11, 2002. The suggestion for rehearing *en banc* was denied the same day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act ("ADA") is codified at 42 U.S.C. §§ 12101-12213. The relevant provisions of the Act are included in an Appendix to this brief.

## STATEMENT OF THE CASE

### Overview

The question posed in this case is whether Hughes Missile Systems was obligated to excuse respondent Joel Hernandez from the consequences of his aggravated workplace misconduct because (he now claims) that misconduct was causally related to a disability.

Hernandez was caught at work with cocaine in his system. He suffered the sanction Hughes invariably imposed for such misconduct: He was (a) terminated; and (b) disqualified from future re-employment. The court of appeals held, however, that the ADA requires that such a "no-rehire" rule be waived as to someone, like Hernandez, who claims to have been a drug addict at the time of his termination. Employers, the court held, must make special dispensation for those who attribute their workplace misconduct to a disability.

The ADA requires no such preferential treatment. The Act certainly requires employers to treat the disabled evenhandedly (*i.e.*, without disparate treatment), but Hughes unquestionably did that. The Act also can require preferential treatment (reasonable accommodation) for the disabled in certain, specified circumstances — when preferences are necessary to accommodate "the physical or mental impairments of [an] employee or applicant." 42 U.S.C. § 12112(b)(5)(B). But Hernandez had no such impairment when he applied for rehire, and he thus was entitled to no preference.

Hughes's policy is common in industry. Many employers adopt and uniformly apply a rule against rehiring individuals who previously were discharged (or permitted to resign in lieu of termination) because of aggravated workplace misconduct. A no-rehire rule like the one adopted by Hughes serves many important business interests. These rules preserve the employer's institutional memory, because human recollections fade and the managers involved in the original termination decision may not be there to remind those then in charge of the offense and its seriousness. Even where those managers *do* remain, there will almost inevitably be friction between the fired employee, now returned, and the managers who were responsible for the decision. Moreover, a blanket prohibition serves as a safeguard against questions of unfairness (or even discrimination) that would inevitably arise if the rule permitted exceptions. To avoid these difficult problems, many employers prefer to adopt the sort of flat prohibition at issue in this case.

Hughes's no-rehire rule is straightforward, as was its application in this case. Hernandez was not discharged illegally. He was permitted to resign in lieu of termination because of a serious breach of company policy. When he reapplied, his application was rejected summarily because of Hughes's no-rehire rule. The question presented, then, is whether Hernandez's contention that his previous misconduct may have been related to drug addiction compels Hughes to exempt him from the no-rehire rule. Because Hughes's rule does not discriminate against anyone on the basis of his or her disability, and because there is no basis for imposing on Hughes an exemption from its ordinary rehire rules as a "reasonable accommodation," summary judgment should have been affirmed by the court of appeals. Its judgment should now be reversed.

**Statutory Framework**

The ADA provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

An individual can qualify as "disabled" within the meaning of this prohibition in three different ways: (a) the individual actually may have a "physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (b) the individual may have "a record of such an impairment"; or (c) the individual may be falsely "regarded as having such an impairment." *Id.* at §§ 12102(2)(A)-(C); *see also Sutton v. United Airlines Inc.*, 527 U.S. 471, 488-89 (1999) (the "regarded as" aspect of the statute is limited to cases in which the employer inaccurately believes that the employee has a substantially limiting physical or mental impairment).

The word "discrimination" in 42 U.S.C. § 12112(a) ordinarily would suggest that the employer's statutory duties are fulfilled if it refrains from disparate treatment. The statute, however, defines "discrimination" also to include the failure to grant preferences ("reasonable accommodations") in certain limited circumstances. Specifically, an employer "discriminates" if it (a) does not "mak[e] reasonable

accommodations *to the known physical or mental limitations of an otherwise qualified individual with a disability* who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity"; or (b) "den[ies] employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation *to the physical or mental impairments of the employee or applicant*. . . ." *Id.* §§ 12112(b)(5)(A)-(B) (emphasis added). Under both subdivisions, the reasonable accommodation obligation extends only to those who actually have "physical or mental impairments" or "limitations."

Finally, the Act provides special rules for the treatment of users of illegal drugs. Individuals currently using illegal drugs are expressly excluded from statutory protection. 42 U.S.C. § 12114(a). The Act also explicitly provides that employers

> may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees; may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace; . . . [and] *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*.

*Id.* §§ 12114(c)(1)-(4) (emphasis added).

**Factual Background**

Hernandez formerly worked on U.S. military programs for Hughes Missile Systems. One day in July 1991, Hernandez came to work with cocaine in his system and alcohol on his breath. J.A. 18a, 33a. Hernandez (as he later would admit in deposition) had been up much of the previous night, drinking alcohol and snorting cocaine. J.A. 34a, 36a. Company supervisors noticed the odor and suspected that Hernandez was impaired. J.A. 34a. Hernandez was given a blood test, which revealed the cocaine use. The Company gave Hernandez a choice: resign or be terminated. Hernandez chose to resign. The parties and the courts below treated his departure as an involuntary discharge. *See* Pet. App. 4a n.4 ("[F]or the purposes here — the rehiring of former employees — there appears to be no difference in Hughes's treatment of employees who were terminated as opposed to those who resigned under threat of termination."); *id.* at 12a n.17 ("There is no question that Hughes applied this policy [against rehiring those who are discharged or quit in lieu of termination] in rejecting Hernandez's application.").

In completing a one-page Employee Separation Summary form on Hernandez at the time of his departure, the Company did not spell out all the facts and circumstances surrounding his separation. It simply noted that Hernandez had been "[d]ischarge[d] for personal conduct (Quit in lieu of discharge)." J.A. 37a-38a.[1]

1. This was not the first time that Hernandez's substance abuse had resulted in discipline at Hughes. In 1986, Hughes was about to terminate Hernandez for excessive absenteeism, but he told the Company that his absences were caused by alcoholism. He was given the opportunity to seek rehabilitation in lieu of termination. Although

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Hernandez then went to work for Marathon Resources, Inc. J.A. 38a. Hernandez lied to get that job, telling Marathon that he had taken "early retirement" from Hughes. J.A. 41a-42a. Hernandez was disciplined by Marathon for substance abuse in 1992. J.A. 43a-46a. (The record does not reveal the nature of the abuse.) Hernandez never sought "treatment of any kind" for drug addiction (J.A. 39a); he asserted that he simply stopped using drugs in 1992. J.A. 44a.

In 1994, Hernandez reapplied to work at Hughes. As part of his application, Hernandez submitted two nine-month-old letters of reference. J.A. 54a. The first, a four-sentence note from Hernandez's pastor, praised Hernandez as a "faithful and active" member of the church. *Id.* at 13a. The second letter, from a social worker, claimed that Hernandez had "frequently" attended Alcoholics Anonymous meetings and asserted that Hernandez had made "steady and consistent progress" in dealing with alcoholism. J.A. 14a. Neither the application nor the reference letters indicated that Hernandez had ever used drugs (much less that he ever was addicted to them), or that he had successfully overcome a drug addiction.

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(Cont'd)

he completed the prescribed course of treatment, he (unbeknownst to the Company) immediately lapsed into further abuse. After his release from treatment, he admittedly "was doing it again . . . abusing drugs and alcohol." J.A. 32a. Because Hughes did not know this, it permitted Hernandez to return to work. Hernandez's absenteeism problems returned in 1991, and only a few months before he failed the drug test, Hernandez was given a formal reprimand for excessive absenteeism. J.A. 33a.

Hernandez's 1994 application indicated that he previously had worked for Hughes, and for that reason, the application was referred to Joanne Bockmiller in Hughes's Labor Relations Department. Bockmiller pulled Hernandez's personnel file and reviewed the Employee Separation Summary form. J.A. 48a-49a. As noted above, that form revealed only that Hernandez had been "[d]ischarge[d] for personal conduct (Quit in lieu of discharge)." J.A. 48a. Because the Company had (and still has) a uniformly applied "policy against rehiring former employees who were terminated for any violation of its misconduct rules," Pet. App. 11a, Bockmiller summarily rejected Hernandez's application. Bockmiller did not then know *which* Hughes rule of conduct Hernandez had breached to get himself fired, and she did not know that he had ever used drugs. J.A. 54a-55a. She only knew that Hernandez had been terminated for some unspecified form of misconduct and, like any other formerly discharged employee of Hughes, Hernandez was ineligible for rehire. J.A. 56a-57a.

**Hernandez's Charge of Discrimination**

Hernandez filed an administrative charge with the Equal Employment Opportunity Commission ("EEOC") alleging a violation of the ADA. In its position statement responding to the charge, the Company pointed out that current drug users are not protected by the Act, and that (for all the record showed) he still was using drugs. There was no basis for believing that Hernandez had ever had a drug-related disabling impairment, much less that the decisionmaker — Bockmiller — knew it and denied him a job because of it. The Company's position statement said, in relevant part:

> The ADA prohibits discrimination against a "qualified individual with a disability." The ADA

> specifically exempts from protection individuals currently engaging in the illegal use of drugs . . . . Contrary to Complainant's unfounded allegation, *his non-selection for re-hire is not based on any legitimate disability*. Rather, Complainant's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.
>
> *The Company maintains its right to deny re-employment to employees terminated for violation of Company rules and regulations. Complainant was discharged for violation of Company Rule and Regulation No. 7 [relating to use of illegal drugs]. . . . Complainant's conduct while employed by [Hughes] makes him ineligible for rehire*.

J.A. 19a-20a (emphasis added).

**The Lawsuit**

Hernandez sued Hughes under the ADA in the United States District Court for the District of Arizona. He did not challenge his 1991 termination; his complaint was aimed solely at his unsuccessful rehire application in 1994. He did not claim to have had a "disability" within the meaning of the ADA at the time of his termination, and he did not claim that, when he reapplied to work at Hughes in 1994, he suffered from any physical or mental condition that might have impaired his ability to perform any major life activity. J.A. 1a-5a.

Instead, Hernandez claimed that, at the time his reapplication was rejected, he had a "record of . . . an impairment," 42 U.S.C. § 12102(2)(B), and that Hughes "regarded [him] as" having such an impairment, *id.* § 12102(2)(C). J.A. 19a n.2; Pet. App. 6a n.8 ("The parties agree that Hernandez's claim of discrimination is limited to either a 'regarded as' or a 'record of' definition of disability."). Hernandez contended that his drug use in 1991 had been causally related to an addiction from which he subsequently had rehabilitated himself. Thus, Hernandez argued, Hughes acted unlawfully when it applied to him its facially neutral rehire-disqualification policy.

The district court granted Hughes's motion for summary judgment. J.A. 5a. The Ninth Circuit reversed. Pet. App. 1a-13a. The court of appeals acknowledged that when Hernandez was terminated in 1991, he was not a "person with a disability" protected by the ADA. This is because in 42 U.S.C. § 12114, Congress had expressly excluded "current" drug users from ADA coverage. Pet. App. 11a. The court held, however, that there were materials in Hughes's files evidencing his 1991 drug use, and that these documents constituted a *record* of an impairment when he reapplied in 1994. Although Hughes simply had imposed on Hernandez the same consequences it always imposes for serious rules violations — consequences imposed on the disabled and nondisabled alike — the court determined that Hughes's facially neutral, nondiscriminatory rule had to give way. The court of appeals recognized that Hughes was entitled to reject summarily an application for employment submitted by an individual previously fired for nearly any form of misconduct. If, however, the prior misconduct was related in some fashion to illegal drugs (or, presumably, some other

disability), the court held that the ADA confers preferential rehire rights, in the form of a second chance:

> Hughes's . . . policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, *violates the ADA as applied to former drug addicts whose only work-related offense was testing positive* [*for drug use but who*] *ha*[*ve*] *been successfully rehabilitated*. . . .

Pet. App. 11a (emphasis added).

This Court granted certiorari. __ U.S. __, 123 S. Ct. 1255 (Feb. 24, 2003).

## SUMMARY OF ARGUMENT

Disability discrimination under the ADA can occur in two ways: disparate treatment and failure to provide reasonable accommodation. Neither occurred here.

A. The Company treats identically all employees terminated for violating its personal conduct rules: they all lose their jobs, and they all permanently lose the right to be considered for future employment. Both consequences flow from the misconduct whether or not the terminated employee happens to have a disability. Sexual harassment is treated this way, whether it stems from a personality disorder or poor judgment. The same is true for workplace assaults, whether they stem from mental illness or merely an uncontrolled temper. Drug use falls in the same category: Hughes imposes the same consequences on all employees who arrive at work with cocaine in their systems, whether the use of drugs is

"recreational" or habitual. Hughes has a zero-tolerance drug policy and thus does not "discriminate" in any ordinarily understood sense of that word. Accordingly, Hernandez can make no serious claim of disparate treatment.

B. Hernandez was not entitled to any accommodation when he applied for rehire. He was not suffering at that time from any "physical or mental impairment that substantially limit[ed] [him] in [any] major life activit[y]." 42 U.S.C. § 12102(2)(A). Thus, if Hernandez was covered by the ADA, it could only have been under the "regarded as" or "record of" aspects of the definition of "disability." Although "regarded as" and "record of" plaintiffs are entitled by the statute to equal treatment, they are *not* entitled to reasonable accommodation because they do not have the actual "physical or mental impairment" or "limitation" that is the statutory precondition to such an accommodation.

But even if the ADA required some form of accommodation, the accommodation Hernandez now seeks — a "second chance" — would not be reasonable. The ADA does not prevent employers from enforcing nondiscriminatory standards of conduct or meting out nondiscriminatory discipline. As the EEOC has said, "[a]n employer *never* has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity [and it] may discipline an employee with a disability for engaging in such misconduct *if it would impose the same discipline on an employee without a disability*." EEOC Enforcement Guidance on Reasonable Accommodation, EEOC COMPL. MAN. NO. 290, 902:0167 (Q&A NO. 35) (2002) (emphasis added). That is what Hughes did here. It imposed on Hernandez "the same discipline" — termination, coupled with ineligibility for rehire — it indisputably would have imposed on an employee without a record of impairment.

Nothing in the ADA requires that a person with a disability get a second chance that others would not get. An employer may be obligated to provide a disabled applicant with a reasonable accommodation when the accommodation is necessary to give the applicant "an *equal* opportunity to participate in the application process and to be considered for a job." EEOC Enforcement Guidance on Reasonable Accommodation, EEOC COMPL. MAN. NO. 290, 902:0152 (2002) (emphasis added). Here, however, Hernandez asked to be considered for a job that a similarly situated applicant without a disability never would get.

A rule permitting employers to impose evenhanded discipline would be sensible enough as a general proposition — when applied to disabilities unrelated to substance abuse — but its application in this circumstance stands on even firmer ground. This case involves repeated alcohol and felony drug use by a senior technician working for a U.S. government contractor on missile systems. Congress carefully considered and set precise rules for drug cases, applicable even as to less safety-critical jobs. The ADA excludes current drug users from its protections and expressly permits an employer 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 [it] holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

42 U.S.C. § 12114(c)(4). The ADA thus does not give drug addicts or drug users (or former drug users) a free pass; it simply expects employers to consider them without discrimination. That is exactly what Hughes did here.

C. The court of appeals erred in holding that the availability of information about Hernandez's drug use somehow imposed on Hughes a duty to create a special exception to its no-rehire policy. Hernandez now asserts that he was a drug addict when he was fired in 1991, but there was no evidence in the record that anyone at Hughes knew of the alleged addiction, either then or when he later reapplied. When he was terminated, Hughes knew simply that Hernandez had cocaine in his system when he came to work that day. The Company was indifferent as to whether his drug abuse was "recreational" or habitual.

It is also undisputed that when Bockmiller rejected Hernandez's 1994 rehire application, she simply verified from a one-page form that his prior employment had ended involuntarily because of unspecified misconduct. Once she knew that Hernandez had earlier been terminated because of misconduct, she rejected the application. As a disparate treatment case, then, Hernandez's claim fails because Bockmiller could not have been motivated by animus against recovering drug addicts or drug users because she did not know that Hernandez was one. As a reasonable accommodation case, Hernandez's claim fails because an employer need only provide "reasonable accommodations to the *known* physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). Under either theory, the decisionmaker's knowledge of Hernandez's disabled status would be a *sine qua non* of the claim.

The court of appeals held, however, that employers have an *affirmative obligation* under the ADA to disseminate such information to potential decisionmakers, and thus that Hughes had a duty to inform Bockmiller about Hernandez's past (Pet. App. 12a). The notion that employers should be

affirmatively required to broadcast information about an employee's medical condition and (putative) disability finds no support in the statute. Such a rule would undermine fundamental policies, including confidentiality, that the ADA was intended to further, and simply is illogical.

## ARGUMENT

### I. HERNANDEZ WAS SUBJECTED TO A UNIFORM COMPANY RULE, AND THUS THERE WAS NO DISPARATE TREATMENT

"'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion or other protected characteristics." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (brackets and citation omitted); *see also Watson v. Ft. Worth Bank & Trust Co.*, 487 U.S. 977, 985-986 (1988) (a disparate treatment claim exists when "an individual alleges that an employer has treated that particular person less favorably than others because of the [person's protected characteristic]"). When a statute, like the ADA, makes it unlawful for an employer to deny an employee or an applicant job opportunities "because of" the employee's protected status, "the disparate treatment theory is of course available." *Hazen Paper*, 507 U.S. at 609.

There was no disparate treatment in this case. Hernandez was not treated "less favorably than other[]" Hughes employees in similar circumstances. As the court below observed, Hughes applied to Hernandez its "blanket policy against rehire of *all* former employees who violated company policy. . . ." Pet. App. 12a (emphasis in original). With respect to its rules of conduct, Hughes treats all of its employees —

the disabled and the nondisabled alike — in precisely the same fashion. Every employee who engages in aggravated workplace misconduct like Hernandez faces two invariable consequences: (a) he or she is discharged; and (b) he or she never will be considered by the Company for reemployment.

The ADA requires nothing more. "[A]n employer is not required to excuse past misconduct even if it is the result of the individual's disability." Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002), *reprinted in* EEOC COMP. MAN. No. 290, 902:0167 (Q&A No. 36). On matters of discipline, the employer is obligated only to treat the disabled and the non-disabled alike: "An employer never has to excuse a violation of a *uniformly applied* conduct rule that is job-related and consistent with business necessity. . . . An employer may discipline an employee with a disability for engaging in such misconduct *if it would impose the same discipline on an employee without a disability*." *Id.* (Q&A No. 35) (emphasis added).

This principle of nondiscrimination means that an employer is permitted to enforce its disciplinary rules so long as its enforcement is even-handed; an ADA plaintiff does not secure special protection by asserting that "the disability made me do it." A different rule would provide a dangerous safe harbor for conduct that threatens worker and public safety — *e.g.*, drunk driving and public intoxication, drug use at work, the use of other intoxicants at work, possession or use of firearms at work, and other felonious activities.[2]

2. *See*, *e.g.*, *Pernice v. City of Chicago*, 237 F.3d 783, 785-786 & n.1 (7th Cir. 2001) (the ADA did not prohibit the employer from terminating plaintiff for cocaine possession and disorderly (Cont'd)

Employers have to be able to respond to these threats by discharging offending employees. Of course, if the discharge is permissible, then there is no basis for attacking the correlative ban on rehiring.

The court of appeals dismissed the severity of Hernandez's misconduct, stating that "Hernandez's only work-related offense was testing positive for cocaine." Pet. App. 13a. The court was incorrect in two respects. First, simultaneously working on missiles and using cocaine poses grave risks to public safety that simply are not acceptable. Thus, the court of appeals' suggestion that Hernandez was "only" guilty of a minor offense represents a fundamental misapprehension of the problem. Second, *taking* drugs (although a crime) was not the offense that led to Hernandez's termination; his offense was *reporting to work* with drugs in his system. The drug test and its results were not the violation, but rather were the method of proving the violation.

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conduct notwithstanding claim that a disability caused the drug use); *Bekker v. Humana Health Plan*, *Inc.*, 229 F.3d 662, 671-672 (7th Cir. 2000) (a doctor was lawfully terminated after patients and others reported that she smelled of alcohol and had glassy eyes), *cert. denied*, 532 U.S. 972 (2001); *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 848 (6th Cir. 1995) (alcoholism may have compelled the plaintiff to drink, but it did not compel him to drive drunk); *Taub v. Frank*, 957 F.2d 8, 9 (1st Cir. 1992) (no Rehabilitation Act violation in terminating an employee for heroin possession, even though the plaintiff said that the possession was inextricably linked to addiction); *Hindman v. GTE Data Servs.*, *Inc.*, 3 A.D. Cas. (BNA) 641 (M.D. Fla. 1994) (plaintiff brought loaded gun to work allegedly because of a "chemical imbalance").

There was no disparate treatment here. Hernandez was terminated, and barred from later rehire, under the same rules applicable to all.

## II. BECAUSE HERNANDEZ SUFFERED FROM NO "IMPAIRMENT" WHEN HE REAPPLIED, HE WAS NOT ENTITLED TO A REASONABLE ACCOMMODATION

Under certain circumstances specified in the Act, equal treatment of the disabled may not be enough; preferences, in the form of a reasonable accommodation, sometimes can be required. *US Airways*, *Inc. v. Barnett*, 535 U.S. 391, 429 (2002). Although the Ninth Circuit here did not use the term "reasonable accommodation," the court held in effect that Hughes discriminated by acting evenhandedly; only through a reasonable accommodation analysis can an employer conceivably become obligated to provide special preferences. Here, the court of appeals declared that special allowances must be made if the plaintiff misbehaves and later claims that "a disability made me do it." But Hernandez was not entitled to preferential treatment in the form of a reasonable accommodation, as shown below.

### A. "Regarded As" And "Record Of" ADA Plaintiffs Are Not Entitled To Reasonable Accommodation

Three categories of persons are protected under the ADA: (a) those who suffer from a "physical or mental impairment that substantially limits one or more of the major life activities"; (b) those who have "a record of such an impairment"; and (c) those who are falsely "regarded as" having such an impairment. 42 U.S.C. §§ 12102(2)(A)-(C). Hernandez is not now, and never has been, in the first

category. Even if the Court were to assume, as did the court of appeals, that his drug use once had a substantial impact on some major life activity (and there is no evidence in the record in this case that it did), as someone then "currently engaging in the illegal use of drugs" Hernandez was, in 1991, in a group that Congress expressly excluded from ADA coverage. 42 U.S.C. § 12114(a).

The court of appeals concluded, however, that Hernandez fell within one of the other two categories of disabled individuals — those with a "record of" an impairment or who are "regarded as" disabled. But "regarded as" and "record of" plaintiffs are not entitled to reasonable accommodation. The reasonable accommodation obligation flows from 42 U.S.C. § 12112(b), the statutory definition of the term "discriminate." Under that section of the Act, an employer "discriminates" against a disabled applicant or employee, *inter alia*, if the employer fails to "mak[e] reasonable accommodations *to the known physical or mental limitations* of an [individual who is] otherwise qualified," *id*. § 12112(b)(5)(A) (emphasis added), or "den[ies] employment opportunities to a job applicant or employee [where the] denial is based on the [unwillingness of the employer] to make reasonable accommodation *to the physical or mental impairment* of the employee or applicant," *id.* § 12112(b)(5)(B) (emphasis added). In both instances, the employer's obligation is to accommodate someone who possesses — present tense — "known physical or mental limitations" (subsection A) or "physical or mental impairments" (subsection B).

When Hernandez reapplied to Hughes, he had no "physical or mental limitations" or "impairments" that Hughes might have accommodated. He claims (concedes,

really) that by the time he reapplied, he was "recovered" from his alleged addiction, and that he was fully capable of performing either of the jobs for which he applied. *See*, *e.g.*, Opp. to Pet. at 3 ("Since early 1992 to the present, Mr. Hernandez 'has been clean and sober and has used no alcohol or drugs'"). He alleges no substantial, ongoing "physical or mental" impairment; he complains only about the alleged stigma persisting from his prior drug use. That stigma, however, is not a "known physical or mental *limitation*" or "physical or mental *impairment*[]" — the prerequisites to imposing the statutory obligation to make a reasonable accommodation. Thus, under the plain language of the statute, "regarded as" and "record of" plaintiffs are not entitled to reasonable accommodation.

Similarly, the EEOC's regulations make clear that Hughes owed no duty to accommodate Hernandez. According to the EEOC, "[t]here are three categories of 'reasonable accommodations'":

> (i) *Modifications or adjustments to a job application process* that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) *Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed*, that enable a qualified individual with a disability to perform the essential functions of that position; or
>
> (iii) *Modifications or adjustments that enable a covered entity's employee with a disability to enjoy*

> *equal benefits and privileges* of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. §§ 1630.2(o)(1)(i-iii) (emphasis added).

None of these categories fits this case. Hernandez did not ask Hughes to modify its "job application process"; he seeks to have Hughes lower its substantive job qualification standards to permit him special access to a job. He did not seek a change "to the work environment" or to the way in which a job "is customarily performed." Nor did he need such a change to enable him "to perform the essential functions of [any] position." Finally, Hernandez did not want "to enjoy equal benefits and privileges of employment as are enjoyed by . . . similarly situated" but non-disabled applicants; he seeks exceptional treatment, in the form of a second chance, that no other applicant would have received.

The reasonable accommodation obligation — essential as it is to the effective operation of the ADA — is not unbounded. Congress understood that reasonable accommodations, though necessary for those with statutory impairments, are strong medicine, to be administered judiciously. Those accommodations might be needed, Congress determined, to open the doors of opportunity for those who currently are experiencing physical or mental limitations. But that rationale does not extend to "regarded as" and "record of" plaintiffs. They are entitled to be free from disparate treatment, but they are not entitled to reasonable accommodation because, by definition, they do not then have a current physical or mental limitation requiring accommodation.

Several courts of appeals have noted the nonsensical results that would follow from accommodating those who suffer from no current impairment. If the Act were so interpreted,

> impaired employees would be better off under the statute if their employers treated them as disabled even if they are not. . . . [This] would do nothing to encourage those employees to educate employers to see their employees' talents clearly; instead it would improvidently provide those employees a windfall if they perpetuated their employer's misperception of a disability.

*Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 2002 U.S. App. LEXIS 6221, at *18-*19 (9th Cir. April 1, 2003); *accord Weber v. Strippit*, *Inc.*, 186 F.3d 907, 916-917 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078 (2000); *Workman v. Frito-Lay*, *Inc.*, 165 F.3d 460, 467 (6th Cir. 1999); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998); *Deanne v. Pocono Med. Ctr.*, 142 F.3d 138, 148 n.12 (3d Cir. 1998) (en banc) (dictum); *but cf. Katz v. City Metal Co.*, 87 F.3d 26, 31 (1st Cir. 1996) (discussing, without statutory analysis, accommodating a "regarded as" ADA plaintiff).

In sum, Hernandez's claim fails because "regarded as" and "record of" plaintiffs are not owed reasonable accommodation.

### B. A "Second Chance" Is Not A Reasonable Accommodation In Any Event

Even if "regarded as" and "record of" plaintiffs are entitled to accommodations under the statute, the accommodation sought here — a second chance — would not be reasonable. An employer's obligation under the Act is to consider those accommodations necessary to "enable a qualified individual with a disability to enjoy *equal* employment opportunities." EEOC COMPL. MAN. No. 274, 0560:00002 (2001), Order No. 560 (emphasis added). Here, however, Hernandez does not seek "equal employment opportunities," but rather preferential treatment.

Moreover, the statutory obligation to provide a reasonable accommodation is forward-looking. As the EEOC has explained, because a "reasonable accommodation is always prospective, an employer is not required to excuse past misconduct, even if it is the result of the individual's disability." EEOC Compl. Man. (BNA) N:2465, N:2480; EEOC, Psychiatric Disabilities and the ADA ¶ 31, *reprinted in* 8 Fair Empl. Prac. Man. (BNA) 405:7477 (1997) (reasonable accommodation is prospective, and does not require employer to excuse past misconduct even if the misconduct is caused by a disability).

The courts of appeals consistently have rejected the proposition that the duty to accommodate requires employers to offer a "second chance" to those who fail to meet performance or conduct standards. *E.g.*, *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666-67 (7th Cir. 1995) ("Siefken is not asking for an accommodation; . . . [h]e is asking for another chance. . . . But the ADA does not require this."); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 320 (5th Cir.

1997) (the employer need not grant a second chance to a person guilty of alcohol-related misconduct, even though the misconduct may have been attributable to alcoholism), *cert. denied*, 522 U.S. 1084 (1998); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (the plaintiff was discharged for sleeping on the job, which she said was brought on by medication for her disability; the ADA does not require giving the employee a "second chance" to conform to the employer's rules), *cert. denied*, 528 U.S. 1137 (2000); *Burroughs v. City of Springfield*, 163 F.3d 505, 507 (8th Cir. 1998) (plaintiff became dysfunctional due to seizures that resulted from his failure to take his medication; "Burroughs failed to meet th[e] [employer's] legitimate expectation . . . , and the ADA does not require the City to provide him another chance. . . .").

Even if there were doubt about the manner in which these principles are to be applied in *other* cases, *i.e.*, to the vast run of disabilities, there can be no such doubt about Congress's views regarding the use of illegal drugs. Congress took special pains to ensure that the Act conferred no special rights on drug users. Specifically, the Act: (a) defines the term "qualified individual with a disability" to exclude those currently using illegal drugs; (b) authorizes employers to prohibit the use of illegal drugs on the job, and to prohibit employees from arriving at work with drugs in their systems; and (c) permits employers to apply uniform "qualification standards for employment" and uniform standards for "job performance and behavior [to those who engage in the use of illegal drugs] even if [the] unsatisfactory performance or behavior is related to . . . drug use. . . ." 42 U.S.C. §§ 12114(c)(1), (2) & (4). Thus, when an employer takes action against "any employee or applicant" because of behavior "related to . . . drug use," it unquestionably acts lawfully. *Id.* § 12114(a).

When Hernandez was discharged for coming to work with cocaine in his system, Hughes held him "to the same standards [of] . . . behavior that [it uniformly applied] to other employees [even though the specific kind of] behavior [in which he engaged was] related to . . . drug use." 42 U.S.C. § 12114(c)(1). And, when it subsequently rejected Hernandez's application for prior, terminable misbehavior, it merely enforced its no-rehire rule, a "qualification standard[] for employment . . . that [it applies] to other" employees who seek to be rehired,[3] regardless of the nature of the prior misbehavior. *Id.* § 12114(c)(4).

The no-second-chance rule has been uniformly applied (until the Ninth Circuit's decision in this case) in the context of applications for rehire. In *Harris v. Polk County*, 103 F.3d 696 (8th Cir. 1996), for example, the plaintiff alleged that she had a mental illness that proximately caused the shoplifting incident for which she had been terminated. *Id.* When she applied for reemployment, the employer summarily rejected the application because, as a matter of "office policy," it refused to hire individuals known to have been guilty of unlawful conduct. *Id.* Rejecting the plaintiff's argument that the ADA sheltered her from the consequences of her disability-related misconduct, the Eighth Circuit observed that "an employer [must be able to] hold disabled employees to the same standard of law-abiding conduct as all other employees." *Id.* at 697.

3. The court of appeals thought it "interesting" that, at Hughes, incumbent employees who are discharged for drug use are barred forever from rehire, but that applicants who are rejected for testing positive for drugs are barred from reapplication only for 12 months. Pet. App. 11a n.16. There is no mystery. The incumbent Hughes employee who commits a drug violation had notice of, was subject to, and violated a Company conduct rule by choosing to come to work with drugs in his system; the applicant is not similarly situated.

Similarly, in *Johnson v. New York Hospital*, No. 99-7165, 1999 U.S. App. LEXIS 20151 (2d Cir. Aug. 20, 1999), the plaintiff had been terminated from his job for assaulting other employees while he was off duty. The plaintiff attributed his misconduct to a disability. When he reapplied for a job, the employer rejected him, citing its "policy of not rehiring any employee who has been discharged." *Id.* at *2. The Second Circuit rejected the notion that the ADA immunized the plaintiff from the consequences of his misconduct or mandated special exceptions for conduct merely because it may have a nexus to a disability.

In *Flynn v. Raytheon Co.*, No. 96-1019, 1996 U.S. App. LEXIS 20837 (1st Cir. Aug. 9, 1996) (unpublished opinion), *aff'g* 868 F. Supp. 383 (D. Mass. 1994), the plaintiff was fired for reporting to work under the influence of alcohol. The plaintiff did not dispute that the discharge was lawful; rather, he sued over Raytheon's decision not to consider him for reinstatement or rehire. In stark contrast to the decision below, the First Circuit affirmed summary judgment, noting that

> [t]he ADA does not require an employer to rehire a former employee who was lawfully discharged for repeated disability-related failures to meet its legitimate job requirements, *viz*., punctuality and sobriety. . . . Flynn cites no authority for his claim that the ADA entitles him to a "second chance" to meet Raytheon's legitimate work requirements. . . .

*Id.* at *4-*5.

All of these cases were correctly decided, and their holdings are supported by compelling practical considerations (along with the Act's statutory text).[4] Countless U.S. employers now have policies, formal or informal, barring the reemployment of those earlier terminated for misconduct. These rules preserve an employer's institutional memory. The managers involved in a termination decision may be gone when the fired employee reapplies. A no-rehire rule keeps new managers — who know little or nothing about the original offense — from repeating the company's earlier hiring mistakes. Moreover, the relationship between a former employee and the employer that previously fired him (and the managers who were involved in the decision) will often, if not inevitably, be freighted with substantial baggage; a no-rehire rule eliminates those sorts of unnecessary complications from the workplace. Thus, when such an individual reapplies, and the employer sees "not eligible for rehire" (or equivalent language) on a personnel form, that legitimately should be the end of the matter. Nothing in the text of the ADA or in the policies that have informed this Court's ADA decisions requires that an employer do more.

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4. In fact, the panel opinion in this case departs from prior (though unpublished) Ninth Circuit precedent. In *Caniano v. Johnson Controls Inc.*, No. 98-35159, 1999 U.S. App. LEXIS 20648 (9th Cir. Aug. 26, 1999), the plaintiff was terminated following a long string of absences. After the termination, he attributed his absences to a disability (dysthemia), and asked to be reinstated or rehired. The Ninth Circuit declined to read the ADA to require an employer "to rehire a legitimately terminated employee upon the employee's demonstration that he [now] could perform the job" satisfactorily. *Id.* at *4.

### C. Because The Decisionmaker Knew Nothing Of Hernandez's Alleged Disability, She Could Not Have Violated The ADA By Rejecting His Application

The court of appeals clearly erred in holding that Hughes either discriminated against, or was obligated to accommodate, Hernandez. What makes the Ninth Circuit's reasoning in this case particularly curious is its attempt to take facts which clearly demonstrate that no discrimination occurred and twist them in a way that the court at least believed could create a basis for liability.

First, if anyone erroneously "regarded [Hernandez] as" a person with a disability, it was the Ninth Circuit itself, which assumed that all drug use is inevitably tied to an addiction and that drug addictions are inevitably ADA-qualifying disabilities. This reasoning violates the rule in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).[5] *Williams* teaches that whether someone has a statutory disability turns, not on labels, but on a detailed, person-specific analysis of whether an individual is substantially limited in a major life activity. *Id.* at 196-199. The Ninth Circuit here ignored the lesson of *Williams*.

5. "Recreational" drug *use* is not a covered disability, and a record of having used drugs does not necessarily reflect an addiction. Here, for example, Hernandez testified that he was able to stop using cocaine on his own, without treatment. J.A. 43a-46a. Nothing in Hughes's records revealed an addiction. When Hernandez was released from the alcohol treatment center in 1986, the center reported his *alcohol dependence*, but there was no diagnosis of *drug addiction*; the center simply noted that he was a "cocaine user/abuser." J.A. 30a. That letter was stamped "Company Private" and kept in a medical folder or special counseling file, not Hernandez's personnel file. J.A. 88a-89a. Bockmiller never saw it. J.A. 55a.

The court assumed that all addicts are "substantially limited in one or more major life activities," and thus that a record of an addiction is, necessarily, a record of a statutory impairment. The court undertook no analysis of whether *Hernandez's* drug use *ever* amounted to an addiction or impaired his ability to engage in any major life activity.

The court of appeals evidently believed that this analysis was unnecessary because of its holding that the Company "regarded [Hernandez] as" having a disability. Pet. App. 6a n.8. But the court made two analytical errors. First, Hughes did not "regard [Hernandez] as" anything other than what he was: a person ineligible for rehire because of a record of misconduct. Second, even if it were true that the Company "regarded [Hernandez] as" a former *drug addict*, that would not end the inquiry. The court of appeals made no determination that Hughes regarded Hernandez as having been limited in one or more major life activities on account of that addiction. *Sutton*, 527 U.S. at 476, 478 (the "regarded as" aspect of the ADA is limited to claims that the employer wrongly regarded plaintiff as suffering from a substantial limitation in one or more specified life activities); *see also Burch*, 119 F.3d at 315-16 & 318 n.16 (plaintiff's status as an alcoholic is not sufficient to warrant a finding of disability, which requires an individualized inquiry into the impact on the plaintiff's major life functions); 29 C.F.R. App. § 1630.2(k) (a "record of an impairment" violation exists only if "the record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities.")

In addition, it is undisputed that the decisionmaker (Bockmiller) did not know that Hernandez was "disabled" within the meaning of the ADA. Proof of decisionmaker

knowledge is the first essential step in showing disparate treatment — *i.e.*, that "the protected trait . . . actually motivated the employer's decision." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (internal quotation marks and citation omitted). Obviously, if Bockmiller was unaware of Hernandez's allegedly protected status when she rejected his application, she could not have taken that status into account. Similarly, "[e]mployers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability *that [are] known to the employer*." 29 C.F.R. App. § 1630.9 (emphasis added); *see also* 42 U.S.C. § 12112(b)(5)(A) (any limitation must be "known").

Bockmiller knew nothing of Hernandez's checkered past — his alleged "record of" an impairment — and she did not "regard" him as disabled. She testified that she only knew what the Employee Separation Form told her: that Hernandez had been terminated for a violation of Hughes's rules of personal conduct. This testimony was unrebutted. Because Bockmiller did not know about Hernandez's alleged "record of" a disability, she could not have engaged in disparate treatment or unlawfully denied him an accommodation.[6]

6. Hernandez and the court of appeals both pointed to the Company's EEOC position statement, quoted *supra* at 8-9, as evidence that "the Company" knew about and relied upon Hernandez's drug use when it rejected his application. It is obvious, however, that the position statement, was merely pointing out the lack of evidence that Hernandez had ever suffered from a disabling impairment, much less that he had, in fact, been rehabilitated. *See* 29 C.F.R. §§ 1630.3(b)(1) & (2) (providing for ADA coverage of individuals, *inter alia*, who have completed or are undergoing a course of supervised drug rehabilitation). Hernandez also claims that the last sentence of the first paragraph quoted from Hughes's letter to the EEOC calls into question the existence of an absolute

(Cont'd)

Instead of concluding that this evidence put an end to Hernandez's claim, the court of appeals determined that because Bockmiller had *access* to more complete information about Hernandez's misconduct — she could have investigated further — a jury might conclude that Bockmiller was lying when she said she knew of no such information. This Court, however, has previously held that a plaintiff may not avoid summary judgment "by merely asserting that the jury might . . . disbelieve the defendant's" testimony. *Anderson v. Liberty Lobby*, *Inc*., 477 U.S. 242, 256 (1986).

In the alternative, the court of appeals held that Hughes had an obligation to broadcast information about Hernandez widely enough to ensure that no one could have made a decision about him ignorant of his past. The court declared that the decisionmaker's ignorance of the facts underlying

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(Cont'd)

no-rehire rule at Hughes. But the last sentence of the second quoted paragraph puts that contention to rest: "Complainant's conduct while employed by [Hughes] makes him ineligible for rehire." J.A. 20a. More importantly, whatever others at "the Company" might have known at some point in time, *Bockmiller* was the individual who rejected Hernandez's application, and it is undisputed that she had no role whatsoever in the preparation or review of the position statement. J.A. 64a. The position statement was written by a temporary, contract employee who was uninvolved in the decision to reject Hernandez's application. J.A. 68a. Thus, Bockmiller's testimony — that she did not know anything about Hernandez's alleged drug use at the time she rejected the application, but only that he had previously been terminated for misconduct by Hughes — was and is undisputed. There is no evidence in the record that Bockmiller would have reached a different decision if she had seen proof of rehabilitation; to the contrary, she applied Hughes's no-rehire rule without regard to (and without knowing anything about) the facts that led to Hernandez's original discharge.

Hernandez's termination itself constituted a violation of the ADA:

> If Bockmiller in fact did not know the reasons for Hernandez's "termination," *her lack of knowledge would have been due solely to Hughes's unlawful policy which shields its employees from the knowledge that an employment decision may be illegal.* Maintaining a blanket policy against rehire of *all* former employees who violated company policy . . . may well result, as Hughes contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is committing an unlawful act. *Having willfully induced ignorance on the part of its employees who make hiring decisions*, *an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge.*

Pet. App. 12a (first and third emphasis added).

This is a preposterous suggestion. Until now, no court has ever suggested that an employer should (let alone must) inform decisionmakers about an employee's (or former employee's) sensitive personal information — and thereby supply the decisionmaker with knowledge that could be used to discriminate.

The Ninth Circuit's analysis cannot be squared with the statute. First, the ADA places on the employee, not the employer, the obligation to identify a disability and ask for help. 29 C.F.R. App. § 1630.9 ("Employers are obligated to

make reasonable accommodation only to the physical or mental limitations resulting from the disability . . . that is [sic] known to the employer. . . . In general . . . *it is the responsibility of the individual with a disability to inform the employer* that an accommodation is needed.") (emphasis added); *see also Wallin v. Minn. Dep't of Corr.*, 153 F.3d 681, 689 (8th Cir. 1998) (same), *cert. denied*, 526 U.S. 1004 (1999); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir.) (same), *cert. denied*, 519 U.S. 1029 (1996); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) (same). The court of appeals' decision effectively shifts that burden to the *employer*; under the Ninth Circuit's approach, the employee may remain mum about his past and force the employer to ferret out the existence of a disability (or here, a "record of" a disability).

Second, the ADA elsewhere teaches that employers generally should *limit* access to information about the disabilities of employees to the greatest degree possible. *See*, *e.g.*, 42 U.S.C. § 12112(d)(3) (obligating employers to segregate, in a separate file, "information obtained regarding the medical condition" of an applicant, and severely limit the access of management employees to the information in those medical files). There is no basis in the text of the Act (or in the regulations and cases that interpret it) for imposing on employers any kind of dissemination requirement. Such a requirement would undermine the confidentiality that employees have a right to expect — a right the ADA was intended to foster.

* * * *

The Ninth Circuit decision is an invitation to every employee terminated for misconduct to make the "my disability made me do it" claim. Terminated for absenteeism? *It was caused by alcoholism*. Terminated for incompetence? *I couldn't concentrate because of my drug use*. Terminated for fighting? *It was my bipolar disorder*. Extending preferences for rehire in such a context would have profound consequences for American employers. No longer would companies be able to protect themselves with commonplace, common-sense and non-discriminatory no-rehire rules. Those rules violate neither the text nor the policies of the ADA, and the court of appeals erred in holding otherwise.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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## APPENDIX — STATUTORY PROVISIONS INVOLVED

### § 12102. Definitions

As used in this chapter:

* * *

**(2) Disability**

The term "disability" means, with respect to an individual —

**(A)** a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

**(B)** a record of such an impairment; or

**(C)** being regarded as having such an impairment.

* * * *

### § 12111. Definitions

As used in this subchapter:

* * *

**(6) Illegal use of drugs**

**(A) In general**

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which

is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

**(B) Drugs**

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

* * * *

**§ 12112. Discrimination**

**(b) Construction.** — As used in subsection (a), the term "discrimination" includes —

* * *

**(5)(A)** not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

**(B)** denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant[.]

* * * *

**§ 12114. Illegal use of drugs and alcohol**

**(a) Qualified individual with a disability**

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

**(b) Rules of construction**

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who —

**(1)** has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of

drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

**(2)** is participating in a supervised rehabilitation program and is no longer engaging in such use; or

**(3)** is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

**(c) Authority of covered entity**

A covered entity —

**(1)** may prohibit the illegal use of drugs and 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 require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

**(4)** may hold an employee 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 . . . .

**(d) Drug testing**

**(1) In general**

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

**(2) Construction**

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

* * * *