

1-1-2005

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### Recommended Citation

Kendra Horger, *Raytheon v. Hernandez: The Americans with Disabilities Act and its Effect on Neutral, Non-Discriminatory (NON) Hiring Policies of Employers*, 8 RICH. J.L. & PUB. INT. 78 (2004).

Available at: <http://scholarship.richmond.edu/pilr/vol8/iss2/5>

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***Raytheon v. Hernandez:***  
**The Americans with Disabilities Act and its Effect on Neutral,  
 Non-Discriminatory (NON) Hiring Policies of Employers**

By Kendra Horger \*

The purpose of the Americans with Disabilities Act Of 1990 (the “ADA”) is

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in [the Act] on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority...in order to address the major areas of discrimination faced day-to-day by people with disabilities.<sup>1</sup>

Although the Act provides technical definitions of disabilities and their applications and exemptions, courts have interpreted the ADA over the last fourteen years to determine to what extent a condition can be considered a disability, which arenas the ADA governs,<sup>2</sup> how far—in light of proportionality—the ADA can be applied, and how much evidence is sufficient in terms of meeting the burden of persuasion in discrimination cases.<sup>3</sup>

Recently, the United States Supreme Court considered whether the ADA conferred preferential treatment on “disabled” employees lawfully terminated or forced to resign only for a non-specific violation of workplace conduct rules. In *Raytheon v. Hernandez*,<sup>4</sup> a former drug addict applied for rehire with petitioner. The respondent, Joel Hernandez, had been forced to resign after failing a drug test—an absolute violation of company workplace conduct rules.<sup>5</sup> He was terminated under a blanket policy which called for the firing of all who violated workplace conduct rules.<sup>6</sup> Two years later, Hernandez reapplied for employment with Raytheon.<sup>7</sup> Hernandez submitted references with his new application, which he believed led the employer to reject him because the employer regarded him as a drug addict.<sup>8</sup> The *Raytheon* Court did not address whether

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<sup>1</sup> 42 U.S.C. § 12101(b) (2000).

<sup>2</sup> See, e.g., *PGA Tour. v. Martin*, 532 U.S. 661, 677 (2001) (holding that golf courses are specifically identified as public accommodations pursuant to 42 U.S.C. § 1218 (7)(L)).

<sup>3</sup> See, e.g., *Pugh v. City of Attica*, 259 F.3d 619, 628-29 (7th Cir. 2001) (holding that in light of evidence of claimant’s mishandling of funds, suspicious timing of employee discharge alone was insufficient to support a claim of pretextual discrimination).

<sup>4</sup> 124 S. Ct. 513 (2003).

<sup>5</sup> *Id.* at 516.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 517.

the *status* as a former drug addict (or rather, the status of being regarded as a drug addict) was in fact a disability. Rather, the Court examined the applicability of the ADA to workplace rehiring policies for employers and the extent to which rebuttal evidence proffered to be non-discriminatory could be considered pretextual.<sup>9</sup>

This casenote will examine the legislative history and background of the ADA, the case law following its passage, the procedural and substantive background of *Raytheon*, the Supreme Court's holding in *Raytheon*, and the impact thereof.

### I. Americans with Disabilities Act—Background and Legislative History

Congress passed the ADA intending to eliminate discrimination against those with disabilities, to provide enforceable standards for those discriminating against the disabled, and to ensure the central role of the federal government in the program.<sup>10</sup> In order to understand how the ADA was applied in *Raytheon*, a general understanding of both the legal history and congressional intent for the ADA is helpful.

The goal of the ADA is to protect over 43 million Americans with physical or mental disabilities.<sup>11</sup> A survey commissioned in 1986<sup>12</sup> provided the impetus for congressional intervention in the protection of the disabled. First, the survey found that the most accurate definition of “disabled” was “not working.”<sup>13</sup> The Harris Study found that the disabled were poorer<sup>14</sup> and less educated than their non-disabled counterparts,<sup>15</sup> and had a higher rate of unemployment.<sup>16</sup> In short, the study concluded that the major barriers to employment for the disabled were the refusal by employers to recognize their capabilities, a “lack of available jobs,” a “lack of marketable skills,” and a “lack of accessible or affordable transportation” to jobs.<sup>17</sup>

The predecessor to the ADA was the Rehabilitation Act, in which Congress afforded protection to the handicapped by prohibiting discrimination against them by any federal or federally-funded program or activity.<sup>18</sup> The Rehabilitation Act defined a person as handicapped if he or she had a physical or mental impairment substantially limiting one or more of the person's life activities, had a record of such impairment, or was regarded as having such impairment.<sup>19</sup> The Rehabilitation Act, however, left a gap in protection afforded to the disabled as compared with any other minority. Unlike those discriminated against on the basis of race or sex, for example, the disabled had no legal

<sup>9</sup> *Id.* at 519-20.

<sup>10</sup> 42 U.S.C. § 12101(b).

<sup>11</sup> *Id.* at § 12101(a).

<sup>12</sup> International Center for the Disabled and National Council on the Handicapped, *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (Louis Harris and Associates, Inc., Study No. 854009, 1986).

<sup>13</sup> *Id.* at 4, 47.

<sup>14</sup> *Id.* at 33.

<sup>15</sup> *Id.* at 22-24.

<sup>16</sup> *Id.* at 52.

<sup>17</sup> *Id.* at 70.

<sup>18</sup> 29 U.S.C. § 701 (2003).

<sup>19</sup> 29 U.S.C. § 706(8)(A) (2003).

recourse to redress discrimination.<sup>20</sup> Discrimination on disability tended to isolate disabled persons; despite measures (i.e. the Rehabilitation Act) taken to protect disabled persons, discrimination continued to be a pervasive problem in areas such as housing, employment, and education. Therefore, Congress enacted the Americans with Disabilities Act of 1990 to “invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”<sup>21</sup> The ADA afforded more protection while closing the gap between all disabled people and those covered by the Rehabilitation Act, in that it specifically required that nothing in the ADA be construed to allow for a lesser standard than applied under Title V of the Rehabilitation Act for federal regulations *related to* the Rehabilitation Act.<sup>22</sup>

## II. Scope of the Americans with Disabilities Act

The ADA protects the disabled in employment (Title I), public entities and services (Title II), public accommodation providers and services (Title III) and other miscellaneous matters (Title IV). While the sectors covered by the subchapters differ, a disability under all types of claims is defined as “(A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such impairment; or (C) being regarded as having such an impairment.”<sup>23</sup> “Major life activity” has been defined by the Supreme Court as an activity that is an important part of most people’s daily lives.<sup>24</sup> The definition of disability as a physical or mental impairment substantially limiting one’s major life activities has been broadened most notably by the third prong of the definition under the ADA, which is being *regarded* as having such impairment.<sup>25</sup> The wording is effectively identical to the language of the Rehabilitation Act, yet the meaning seems to present the greatest possibility for abuse.

## III. Applicability and Case Law: The Americans With Disabilities Act of 1990

Since the enactment of the ADA in 1990, courts have addressed a number of issues as to what exactly constitutes a “disability” as defined in the Act. In *Murphy v. United Parcel Services*,<sup>26</sup> the Court held that the petitioner, fired by the respondent

<sup>20</sup> 42 U.S.C. § 12101(a)(4) (2003).

<sup>21</sup> 42 U.S.C. § 12101(b)(4) (2003).

<sup>22</sup> See, e.g., *Bragdon v. Abbott*, 524 U.S. 624 (1998). The case turned on whether an individual’s condition (in this case, HIV) constituted a “disability” under the ADA. *Id.* at 628. The Supreme Court noted the identical language in the definitions of a “handicap” and “disability” in the Rehabilitation and the Americans with Disabilities Acts. *Id.* at 631. The Court noted that respondent would have been eligible as having a “handicap” under the Rehabilitation Act. *Id.* at 642. Thus, his HIV indeed constituted a disability under the ADA. *Id.* at 655. *But see* *Aiken v. Nixon*, 236 F.Supp. 2d 211, 225-26 (N.D.N.Y. 2002) (noting that grounds for establishing a claim under the Rehabilitation Act and the ADA were essentially the same, but plaintiff failed to assert a viable cause for either Act, so both claims were dropped).

<sup>23</sup> 42 U.S.C. § 12102(2) (2003).

<sup>24</sup> See, e.g., *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (holding that an inability to do repetitive work was not sufficient proof of being substantially limited in a major life activity—it was not an integral part of most peoples’ lives, thus the ADA did not apply).

<sup>25</sup> 42 U.S.C. § 12102(2)(C) (2003).

<sup>26</sup> 527 U.S. 516 (1999).

because of his hypertension, had failed to establish that his hypertension substantially limited a major life activity because major life activity would mean preclusion from more than one job.<sup>27</sup> The Court seemed to take a preemptive strike against widespread abuse under the ADA by upholding adherence to federal regulations for health and safety reasons, such as federally-prescribed visual acuity standards for truck drivers.<sup>28</sup> The Court has also established a pattern of case-by-case analysis of claims. For example, in *Olmstead v. L.C. by Zimring*,<sup>29</sup> the Court held that upon plaintiff's establishing qualification for a community-based treatment program, the Court must consider the state's available resources.<sup>30</sup> Further in line with a case-by-case analysis system, the Supreme Court rejected the argument proffered by the Equal Employment Opportunity Commission that a disability should be determined in its "uncorrected" state in *Sutton v. United Airlines*.<sup>31</sup> The Court noted that the Congressional intent of the ADA was *not* to extend protection to those whose *uncorrected* conditions amounted to disability, although a person who took corrective measure would not *per se* be excluded from protection.<sup>32</sup> The Court in *Sutton* again noted that *substantially limiting an activity*, as a disability, should imply preclusion from more than one particular job.<sup>33</sup>

#### IV. *Raytheon v. Hernandez*: Background and Procedural Posture

After more than a decade of ADA cases establishing who would be afforded protection, the Supreme Court was asked to determine the extent of protection afforded under the ADA in a potentially *indirect* discriminatory claim and the degree to which evidence must prove a discrimination defense pretextual.<sup>34</sup>

Respondent Hernandez worked for Raytheon for 25 years.<sup>35</sup> On July 11, 1991, after suspicions arose regarding his appearance and behavior at work, Hernandez submitted to a company drug test, per company policy.<sup>36</sup> The test came back positive for cocaine and Hernandez admitted he "had been up late drinking beer and using cocaine the night before the test."<sup>37</sup> In lieu of discharge, Hernandez was forced to resign.<sup>38</sup> His

<sup>27</sup> *Id.* at 525. Writing for the majority, Justice O'Connor noted that "the undisputed record evidence demonstrates that [complainant] is, at most, regarded as unable to perform only a particular job," which, as a matter of law was insufficient to prove that claimant was substantially limited in a major life activity. *Id.* But see *id.* at 525 (Stevens, J., dissenting) (noting that petitioner had a disability within the meaning of the ADA because his condition in its unmedicated state did in fact *severely* limit his ability to perform major life activities).

<sup>28</sup> *Albertson's, Inc., v. Kirkinburg*, 527 U.S. 555 (1999). Federal regulations mandated a minimum visual acuity for truck drivers. *Id.* at 558-59. Respondent employee, a truck driver, failed his visual acuity test but was eligible for waiver based on an eye condition. *Id.* at 559-60. Petitioner employer terminated respondent without waiting for waiver. *Id.* at 560. Ultimately, the Supreme Court held that employer was *not* required to justify its adherence to the federal regulation policy regarding visual acuity. *Id.* at 577.

<sup>29</sup> 527 U.S. 581 (1999).

<sup>30</sup> *Id.* at 587.

<sup>31</sup> 527 U.S. 471 (1999). But see *Murphy*, 527 U.S. at 525. (Stevens, J., dissenting).

<sup>32</sup> *Id.* at 487.

<sup>33</sup> *Id.* at 491.

<sup>34</sup> 124 S. Ct. 513 (2003).

<sup>35</sup> *Id.* at 516.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

resignation was recorded by petitioner company's report as "discharge for personal conduct (quit in lieu of discharge)." <sup>39</sup>

Over two years later, Hernandez reapplied for employment at Raytheon. <sup>40</sup> He indicated on his new application that he was previously employed by the company. <sup>41</sup> Respondent attached two reference letters: one from an Alcoholics Anonymous counselor certifying that Hernandez regularly attended meetings and was in recovery, the other from a pastor asserting he was an active member of the church. <sup>42</sup> Upon review of his application, Hernandez was rejected due to petitioner company's policy that it did not rehire former employees who had resigned because of workplace conduct violations. <sup>43</sup> Although Hernandez received no indication that his application and attached reference letters had led to discriminatory treatment based on his status as a former drug addict, he believed he had been discriminated against for having a "disability" as such. <sup>44</sup>

Joanne Bockmiller was employed by Raytheon and was responsible for reviewing Hernandez' reapplication for employment. <sup>45</sup> She testified through deposition that upon reading that Hernandez had previously worked at the Company, she pulled his personnel file to review his separation summary. <sup>46</sup> Pursuant to company policy, she rejected the application for rehire, as Hernandez had been terminated for workplace misconduct. <sup>47</sup> Bockmiller testified that she did not know that Hernandez was a former drug addict, nor had she seen anything in the record indicative of that fact. <sup>48</sup>

Hernandez filed a charge with the EEOC indicating that while Raytheon had not given him any reason as to his rejection under the policy, he believed that he had indeed been discriminated against in violation of the ADA under a disparate treatment theory. <sup>49</sup> Petitioner responded with a letter to the EEOC indicating its understanding of the ADA's exemption of those *currently* participating in the illegal use of drugs, and further, contrary to Hernandez' complaint, the non-hire was not based on any legitimate disability. <sup>50</sup> Raytheon maintained its right to reject workplace conduct violators as an absolute policy. <sup>51</sup> Further, it asserted that Hernandez had produced no evidence to change the company's position that his conditional resignation rendered him ineligible for hiring. <sup>52</sup> The EEOC concluded from petitioner's response letter that Hernandez' reference letters may have alerted Bockmiller as to the nature of his forced resignation,

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 517.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

and that the petitioner company thus “rejected [respondent’s] application based on his record of past alcohol and drug abuse.”<sup>53</sup> With reasonable cause indicating that Hernandez had been denied rehire because of his “disability,”<sup>54</sup> the EEOC issued a right-to-sue letter.<sup>55</sup>

Petitioner company moved for summary judgment, to which Hernandez, for the first time, argued that even if petitioner had applied a neutral no-rehire policy, the policy would nevertheless violate the ADA on a disparate impact theory.<sup>56</sup> The District Court granted petitioner’s motion for summary judgment only as to the disparate treatment theory claim.<sup>57</sup> The Court refused to look at respondent’s latter claim, as Hernandez had not timely raised the issue of the disparate impact theory.<sup>58</sup>

On appeal, the Court agreed with the District Court that respondent had failed to raise a disparate impact theory claim in a timely manner. The Court of Appeals applied the evidentiary framework analysis to the disparate treatment claim developed in *McDonnell-Douglas Corp. v. Green*.<sup>59</sup> The Court found a genuine issue of fact after applying the *prima facie* analysis from *McDonnell-Douglas*. Thus, the respondent had offered enough evidence to bar summary judgment.<sup>60</sup> Per *McDonnell-Douglas*, the burden then shifted to the company to present a non-discriminatory explanation for its non-hire policy.<sup>61</sup> The company argued that it had applied a legitimate and non-discriminatory reason for declining to hire Hernandez: all previously terminated employees had been eliminated from the possibility of rehire.<sup>62</sup> The Court held that although the policy was on its face non-discriminatory, it was indirectly discriminatory “as applied to former drug addicts whose only work-related offense was testing positive because of their addiction.”<sup>63</sup> The Supreme Court granted certiorari to determine whether in this particular case the ADA could confer preferential rights on disabled employees lawfully terminated for violating workplace conduct rules.<sup>64</sup>

<sup>53</sup> *Id.*

<sup>54</sup> “Disability” under the ADA is not only a physical or mental impairment substantially limiting one or more major life activities or a record of such an impairment, but also the status of *being regarded as having such an impairment*. 42 U.S.C. § 12102(2).

<sup>55</sup> *Raytheon*, 124 S. Ct. at 517.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (citing *Hernandez v. Hughes Missile Systems Co.*, 298 F.3d 1030, 1037 n.20) (9th Cir. 2002)).

<sup>59</sup> 411 U.S. 792 (1973). Plaintiff brought claim against defendant employer for non-rehire as discrimination violation of the Civil Rights Act of 1964. *Id.* at 796. The Court established a framework for the evidentiary burden in discrimination cases, holding that the complainant must bear the *initial burden* of establishing a *prima facie* case of discrimination. *Id.* at 802. After the initial burden is satisfied, the burden then shifts to the employer to offer a legitimate, non-discriminatory reason for the employer’s action. *Id.* at 802.

<sup>60</sup> *Raytheon*, 124 S. Ct. at 518; *see, e.g., Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 149 (2000).

<sup>61</sup> 124 S. Ct. at 518 (citing *McDonnell-Douglas*, 411 U.S. at 802).

<sup>62</sup> 124 S. Ct. at 518.

<sup>63</sup> *Id.* (quoting *Hughes Missile Systems*, 298 F.3d at 1036).

<sup>64</sup> 124 S. Ct. at 516.

## V. Raytheon Opinion

Justice Thomas delivered the unanimous opinion of the seven member Court. (Justices Souter and Breyer recused themselves from the case). The Court considered the Court of Appeals' *McDonnell Douglas* procedural approach, such that the burden shifted from respondent to petitioner as soon as Hernandez provided evidence to suggest discrimination.<sup>65</sup> Hernandez contended that though the Company's proffered neutral, non-discriminatory policy was lawful on its face, it was indirectly discriminatory, and, therefore, unlawful under the ADA.<sup>66</sup> Although the policy would theoretically be rendered "blind" as to applicants, the Court of Appeals determined that the policy served to bar reemployment of a former drug addict, regardless of evidence of rehabilitation, and, therefore, violated the ADA.<sup>67</sup> In short, the Court of Appeals determined that a blanket policy could *never* suffice as neutral and non-discriminatory because it had a disparate impact on recovering drug addicts.<sup>68</sup> Justice Thomas noted that in so holding, the Court of Appeals erred by "conflating the analytical framework for disparate-impact and disparate-treatment claims."<sup>69</sup> In other words, the Court of Appeals merged the disparate treatment and impact theories, allowing for the stricter criteria of the impact theory to suffice for treatment qualification. Under a correct application of the disparate treatment framework, the Court of Appeals, as a matter of law, should have determined that a neutral no-hire policy is *per se* a non-discriminatory reason under the ADA.<sup>70</sup> The Court reasoned that had the Court of Appeals correctly applied the disparate-treatment requirements, the only residual issue, after another shift of the burden of persuasion, would be whether Hernandez could produce significant evidence that the company's stated reason for rehire rejection was, in fact, pretextual.<sup>71</sup>

Justice Thomas summarized the Court's conventional recognition of the difference between disparate impact and disparate treatment theories as applied to discrimination claims.<sup>72</sup> The Supreme Court had previously stated, "[D]isparate 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, sex or [other protected characteristic]."<sup>73</sup> Noting the importance of addressing the difference

<sup>65</sup> *Id.* at 518.

<sup>66</sup> *Id.* at 517.

<sup>67</sup> *Id.* at 518; *Hughes Missile Systems*, 298 F.3d at 1036-37.

<sup>68</sup> *Raytheon*, 124 S. Ct. at 518-19.

<sup>69</sup> *Id.* at 519.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977)) (alteration in original). The *Teamsters* Court noted that proof of intentional discrimination was critical, although it could, in some cases, be inferred from the "mere fact of differences in treatment." *Id.* Disparate impact theories, on the other hand, "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and *cannot be justified by business necessity.*" *Id.* (emphasis added). See also *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (affirming *Teamster's* differentiation between disparate treatment and impact theories and both theories' amenability to discrimination claims.)

between disparate impact and disparate treatment, as well as the remedies available to particular claims, the Court states that Hernandez failed to make a timely disparate impact claim.<sup>74</sup> His claim was thus limited to the disparate treatment theory. Hernandez would have to prove the company “refused to rehire respondent because it *regarded* [him] as being disabled and/or because of respondent’s record of a disability.”<sup>75</sup>

The Court further explained that the only true issue before the Court of Appeals should have been whether, upon Raytheon’s explanation of the no-hire policy as reason for rejection of Hernandez’ application, there was evidence sufficient for a jury to conclude that the company indeed made its decision on a pretextual reason (i.e. disability).<sup>76</sup> The error of the Court of Appeals, noted the Supreme Court, was an utter lack of attempt to treat the claim as a disparate treatment claim.<sup>77</sup> The Court of Appeals noted a reference to the company’s failure to raise a business necessity defense,<sup>78</sup> a factor relevant only in a disparate impact claim.<sup>79</sup> The Supreme Court noted that by erroneously conflating the theories, the Appeals Court overlooked the fact that Raytheon’s no-rehire policy was “a quintessential legitimate, non-discriminatory reason for refusing to rehire [Hernandez].”<sup>80</sup> As such, the decision not to rehire Hernandez for a previous infraction of workplace conduct rules could in no way have been motivated by his disability.<sup>81</sup>

The Court concluded that once Hernandez had proffered a *prima facie* discrimination claim, the legal issue before the Court should have been whether the company had offered a legitimate reason for its employment action.<sup>82</sup> Because the Court of Appeals erred in applying an impact analysis and considering intent, the claim was vacated and remanded for proceedings consistent with that holding.<sup>83</sup>

## VI. The Impact of *Raytheon*

The unanimous decision in *Raytheon* means that an employer’s use of a blanket no-rehire policy meets the burden placed on employer to produce a non-discriminatory reason under the ADA. However, in order for the policy to be legal, the policy has to be applied in the same way to any and all former employees previously fired or forced to resign for breaking workplace conduct rules. The Court’s decision in *Raytheon* means

<sup>74</sup> See *Texas Dep’t. of Comty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981). The Court noted that it had long “recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral policy has a discriminatory impact on protected classes.” *Id.* at 252 n. 5.

<sup>75</sup> *Raytheon*, 124 S.Ct. at 520 (emphasis added) (citing *Hughes Missile Systems*, 298 F.3d at 1037 n. 20.)

<sup>76</sup> *Raytheon*, 124 S.Ct. at 520.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (citing *Hughes Missiles Systems*, 298 F.3d at 1037 n.19).

<sup>79</sup> 124 S. Ct. at 520; see, e.g., *Grano v. Dep’t of City of Columbus*, 637 F.2d 1073, 1081 (6th Cir. 1980) (holding that in the case of a disparate impact claim, the issue turns on whether the employer’s screening process filters out a disproportionate number of a protected class).

<sup>80</sup> 124 S.Ct. at 520.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 521.

<sup>83</sup> *Id.*

that employers using a neutral, non-pretextual rehire policy will not be amenable to claims of disparate treatment under the ADA. While addressing the substantive protection afforded the disabled under the ADA, the decision fell short in that it did not address whether a policy such as that used by Raytheon would be violative of the ADA under the disparate impact theory.<sup>84</sup> This failure leaves a wide gap for employers trying to align human resources rehiring policies with the ADA's criteria.

Another potential problem arising from *Raytheon* is the explicit reference by the Court to the ADA's recognition of both disparate impact and disparate treatment claims.<sup>85</sup> While serving to separate the two claims and the level of evidence needed for burden of persuasion of each level, the Supreme Court effectively puts plaintiffs on notice to pursue not only disparate treatment but also disparate impact claims. Furthermore, because Hernandez raised his impact claim in an untimely manner, the ever-looming question of "whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules"<sup>86</sup> remains unresolved.

Overall, the Americans With Disabilities Act of 1990, in succeeding and complementing the Rehabilitation Act, allows for greater protection of those with disabilities. Although case law has given interpretation to much of the statutory language, the minutiae of indirect discrimination remains to be conclusively addressed by the Supreme Court. *Raytheon v. Hernandez* meant a clear decision in terms of neutral, non-discriminatory no-rehire policies regarding disparate treatment claims. The issue of disparate impact claims remains open to statutory interpretation by the Supreme Court.

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<sup>84</sup> See *id.* at 516.

<sup>85</sup> *Id.* at 520.

<sup>86</sup> *Id.* at 516.