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Supreme Court Weighs Rehabilitating Against Rule-Breaking Under the ADA

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NEWS

scription drugs from foreign countries, 16% of which were Canadian. While many packages appeared to contain FDA-approved drugs, 88% violated some FDA provision. For instance, the drugs were different than those approved in the United States, had inadequate labeling, had been removed from the market, or were inadequately packaged.⁷

The Illinois Policy Institute has raised concerns that terrorists might take advantage of weaknesses in the supply chain to taint the drug supply. As the import blitz illustrated, U.S. Customs and the FDA do not have the manpower to examine all the drugs coming into the country; the burden of ensuring a safe drug supply would be enormous.⁸ Moreover, free-market experts predict that pharmaceutical companies may stop selling large quantities overseas, limiting the amount of drugs that could be reimported, and that reduced revenue from American consumers could stunt research and development.

Emanuel disagrees, claiming that the passage of the bill would create the kind of competition that would balance out prices worldwide. Additionally, the bill would actually improve the safety of imported drugs through the use of inexpensive counterfeit-resistant technology. Finally, because the pharmaceutical industry receives so many tax breaks, taxpayers already generate sufficient revenue to maintain research and development, he said.

While reimportation is generally seen only as a short-term solution to rising drug costs, Emanuel believes that even if a prescription-drug benefit is passed this year, seniors will still be left with significant out-of-pocket costs. The cost-savings of reimported drugs could help, and the support from seniors is evident.

"We have received calls and letters from seniors around this coun-

try thanking us for fighting for this issue," Emanuel said.

1. Alex Markels, *A Prescription for Controversy*, U.S. News & World Report, Oct. 6, 2003, at 50.
2. Rx Depot franchises are located in Alabama, Arkansas, California, Colorado, Connecticut, Florida, Iowa, Illinois, Indiana, Kansas, Massachusetts, Missouri, Montana, North Carolina, Nebraska, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Texas and Wisconsin, available at <http://www.rxdepot.com/liststore.php> (last accessed Oct. 15, 2003).
3. H.R. 2427, 108th Cong. (2003), available at <http://thomas.loc.gov>.
4. Edward H. Crane & Roger Pilon, *Conservative Drug Split: Reimportation is right and good*, National Review Online, July 29, 2003, at [http://www.nationalreview.com/script/print-](http://www.nationalreview.com/script/print-page.asp?ref=/comment/comment-crane-pilon072903.asp)

- page.asp?ref=/comment/comment-crane-pilon072903.asp
5. Press Release, Office of the Governor, *Governor Directs Special Advocates to Report on Possible Cost Savings of Allowing State Health Plans to Reimburse Patients for Reimported Rx Drugs* (Sept. 15, 2003), available at <http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?SubjectID=3&RecNum=2272>
6. Petition, available at <http://www.affordable-drugs.il.gov/>
7. Press Release, *FDA, FDA/U.S. Customs Import Blitz Exams Reveal Hundreds of Potentially Dangerous Imported Drug Shipments* (Sept. 29, 2003), available at <http://www.fda.gov/bbs/topics/NEWS/2003/NEW00948.html>.
8. Policy Brief 03-04, Illinois Policy Institute, *Does the Blagojevich Prescription Drug Reimportation Proposal Threaten Public Safety, Fund Terrorism?* (Sept. 30, 2003), available at <http://www.illinoispolicyinstitute.org/PB%2003%20-%2004%20Reimportation.htm>.

Supreme Court Weighs Rehabilitating Against Rule-Breaking Under the ADA

Mary E. O'Malley

The Supreme Court is balancing the rights of employers to create company policy against an individual's right to work. On October 8, 2003, the Court heard oral arguments in *Raytheon v. Hernandez* to resolve whether a record of past drug abuse qualifies for protection under the American with Disabilities Act ("ADA").¹ Raytheon seeks to protect the integrity of its company policy while Joel Hernandez claims Raytheon's policy discriminated against him as a prior drug abuser.

In 1991, Hernandez was given a drug test at his place of employment and tested positive for cocaine.² At the time of the test, he worked on government defense missiles as a Calibration Service Technician for Hughes Missile Systems Company ("Hughes"), a government defense contractor and

subsidiary of Raytheon Company. Hernandez also had prior alcohol problems coupled with excessive absenteeism. In light of the positive cocaine test, Hernandez exercised an option to resign in lieu of termination.

Over two years later in January 1994, Hernandez applied for rehire by Hughes as a Product Test Specialist, a position in which Hernandez had prior experience. Hernandez supplied Hughes with two letters of recommendation: one from his pastor and the other from his sponsor in Alcoholics Anonymous, which stated Hernandez's progress in substance recovery. Hughes rejected the application after its Labor Relations Department found that his Employee Separation Summary reflected that Hernandez resigned in lieu of termination due to prior

misconduct. Hernandez brought suit against Hughes under the ADA alleging that Hughes' re-hiring practices discriminated against him. Hernandez argued to qualify as disabled due to his record of drug abuse, or alternatively, due to falsely being regarded as a drug abuser. The district court found in favor of Hughes, but the Ninth Circuit reversed.³

The Ninth Circuit acknowledged that Hernandez was not disabled at the time of his resignation because the ADA expressly excludes current drug users from ADA coverage. The court held, however, that even though Hughes is entitled to reject rehiring on the basis of prior misconduct, the ADA confers preferential and exceptional rehire rights in the form of a second chance when the misconduct is related to illegal drugs. Raytheon appealed, and the Supreme Court granted certiorari.

Raytheon contends that ADA protection does not extend to any former employees who broke an employment rule. Paul Grossman, who argued on behalf of Raytheon before the Supreme Court, maintained that the only thing the ADA prohibits in this context is discrimination, which is not implicated in this case. "This case stands for the ability of employers to maintain their 'no re-hire' rules," said Grossman. "Creating an exception to the ADA opens a Pandora's Box, which creates a proliferation of rule-breaking. For example, employers may have to re-hire employees who were discharged for beating up their supervisors because the employees claim their former drug abuse caused them to do it."⁴

Hernandez rejects Hughes' claim that Hughes did not re-hire him due to past rule-breaking, but

rather his past record of drug abuse. Although the Labor Relations Department claimed Hernandez was not re-hired due to past misconduct, Hernandez asserts that his letters of recommendation put Hughes on notice that he was rehabilitated from drug and alcohol abuse. If the failure to reconsider him was due to a past record of drug abuse, it is discriminatory and violates the ADA.

Ann Reesman, amicus curiae for the Equal Employment Advisory Council, emphasized the importance of understanding the ADA. "This is an extremely important case because the ADA does not provide a blanket provision for everyone in recovery for drug abuse," stated Reesman. "Just because the ADA excludes current drug users, does not automatically mean that 42 USCS § 12114 (b) protects and includes those recovering drug addicts who broke employment rules."⁵ The ADA also states that

"While rehabilitated drug addicts may have individual rights in becoming productive members of society, employers also have the right to establish uniform employment policies that provides employees with clear guidelines and expectations."

employees engaging in illegal drugs are held to the same standards as other employees, even if unsatisfactory performance is related to drug use.⁶

Reesman also focused on the implications of the case. "On one level, this is a trust issue, and it is definitely a safety issue. This man used to calibrate defense missiles. At the time he calibrated those missiles, he broke the rule when drugs were found in his system," asserted Reesman. "The rule goes right up there with 'You will not steal.' 'You will wear a uniform.' or 'You will keep up with safety precautions.' It is quite common for employers to discharge people who use drugs, and just as they have a right to do so, they also have a right to not re-hire former employees who break the rules." Two conflicting policy interests are implicated in this case. While rehabilitated drug addicts may have individual rights in becoming productive members of society, employers also have the right to establish uniform employment policies that provides employees with clear guidelines and expectations. Whether Hernandez is characterized as a rule-breaker or a man who rehabilitated his way into ADA protection, the Supreme Court has a weighty decision to make.

1. *Raytheon v. Hernandez*, 123 S.Ct. 1255 (2003)

2. *Hernandez v. Hughes Missile Systems Co.*, 298 F.3d 1030 (9th Cir. 2002).

3. *Hernandez*, 298 F.3d at 1033.

4. Telephone interview with Paul Grossman, Partner, Paul, Hastings, Janofsky & Walker LLP (Oct. 1, 2003).

5. Telephone interview with Ann Elizabeth Reesman, Member, McGuinness, Norris & Williams LLP (September 22, 2003).

6. 42 USCS § 12114 (c)(4) ("a covered entity 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.")