IN THE SUPREME COURT OF THE UNITED STATES

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RAYTHEON COMPANY, :

Petitioner :

v. : No. 02-749

JOEL HERNANDEZ. :

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Washington, D.C.

Wednesday, October 8, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:57 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C., on behalf of the Petitioner.

PAUL D. CLEMENT, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

STEPHEN G. MONTOYA, ESQ., Phoenix, Arizona; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:57 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-749, the Raytheon Company v. Joel Hernandez.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

Petitioner, like thousands of other employers throughout this country, has a policy that if an employee is discharged for violating a workplace rule -- usually that involves serious misconduct in the -- in the workplace -- then he becomes permanently ineligible to be rehired by that particular employer.

The court of appeals in this case correctly held at Fed.App. 12a, note 17, that there is no question that petitioner applied this policy in rejecting respondent's application. And the court of appeals also held that there's no question that this policy on its face is not unlawful.

Nonetheless, the Ninth Circuit declared that even in a case alleging only disparate treatment, the, quote, policy violates the ADA as applied to former drug

addicts whose only work-related offense was testing positive because of their addiction.

QUESTION: Mr. Phillips, it -- the Ninth Circuit in its opinion on about page 8a in the appendix said, Hernandez raises a genuine issue of material fact as to whether he was denied reemployment because of his past record of drug addiction. And I'm concerned that the court may have said there is a genuine issue of fact here, that it wasn't clear whether there was a no-hire policy that was either adopted or if it was used in this case, that there's something else at stake due to the different responses of the man who wrote the letter versus the woman who actually made the decision, and that there's some issue of fact here.

Now, if that's the case, maybe the rest of the opinion is just dicta. I don't know.

MR. PHILLIPS: It's pretty clear that the rest of the opinion is not dicta, Justice O'Connor. The -- that portion of the analysis is -- is directed solely at the question of whether or not the plaintiff had made out a prima facie case, and what the court said was, you know, is there any evidence from which anyone could draw the inference that there was discrimination because of a disability. And it recognized frankly that that was a very close question, that if you read even the -- the

statement made to the EEOC, you can read that in different ways. Maybe you should look at Bockmiller.

But the truth is in making the prima facie showing, all that you really needed to look at was the policy statement -- or the -- the response to the EEOC, and that would be enough, I think, to get you past the prima facie showing.

It -- it is at page 10a where the court then turns its complete attention, and it says, you know, so in sum we hold that -- that Hernandez's prima facie case of discrimination has been made out, and now we turn to the next stage in the process, which is to look and see whether or not there is a -- a non-pretextual justification.

QUESTION: I might agree with you that a no-hire policy, if that's what was used, is certainly not unlawful. But if there is a genuine issue of fact here, what -- what do we do?

MR. PHILLIPS: Well, if there were a genuine issue of fact, you -- you would -- you know, you'd remand to allow the case to go forward. There's clearly not a genuine issue of fact because if you -- once you get past just looking at the EEOC statement that was made by the employer and -- and you're in the district court and you're looking at summary judgment and the question is

whether or not the action of the employer is pretextual, we only have the burden to come forward and say we had a -- a perfectly lawful reason for doing what we did.

QUESTION: Well, aren't the two questions really severable, whether the Ninth Circuit's treatment of the no-rehire policy was correct under ADA law, and second, whether the employer was entitled to summary judgment? I -- I think those are two different questions.

MR. PHILLIPS: Well, I -- yes, they are two different questions, Mr. Chief Justice. I think the answer is that I think we probably would have been entitled to summary judgment even on the prima facie showing.

The only way the court of appeals got to its analysis -- the only way it could have gotten there under Hazen Paper -- is to say that the pretextual basis -- the pretextual argument that was put forward by the employer -- we have to take that off the table because if that -- if that policy is in this case, there is not a shred of evidence that that policy was not applied in this particular case. And that's exactly what the court of appeals said in -- in the footnote in its opinion. It said that's unquestioned.

QUESTION: Mr. Phillips, I'm having the same problem that Justice O'Connor and the Chief expressed.

One thing is if we take this case, there's a no-hire rule. Can an employer have such a rule and apply it with even hand? That's a question of law.

But this case seems to be underneath messier. For example, this no-hire policy was unwritten. This is a company that had a lot of written rules. That's an important rule. Why was it unwritten? Why does Medina testify we had a right, not that we'd apply it every case, but we had a right not to rehire someone who was discharged for cause?

The -- the record is suspicious on, one, whether there was a policy; two, whether it was applied with an even hand. That one can't tell. So why should a judge take this as given that there was indeed such a policy and that it -- it was applied with an even hand? Don't those questions remain in the case? Even if you prevail on if they had such a policy and if they applied it with an even hand, they would not be offending --

MR. PHILLIPS: I mean, there's no question that respondent has asserted arguments that the -- that -- that there's a question as to whether the policy exists. The Ninth Circuit expressly held that the policy exists and was applied in this particular case --

QUESTION: Well, they held it in a footnote, and I'm --

MR. PHILLIPS: I don't take footnotes seriously in all court's opinions, Your Honor.

(Laughter.)

MR. PHILLIPS: Well, but I mean, it could not have been more explicit in terms of dealing with this particular issue. Was the policy presented and was it -- was -- did the policy exist and was it applied in this particular case? There's no question about that.

And there's no testimony that raises any doubt. It may be that it's an unwritten policy, but the testimony in the joint appendix at 22a, 57a, 59a, 71a, 72a, and 73a, which is the affidavit and deposition testimony of Bockmiller who was the decision maker in this case and Medina who signed the -- the statement, is consistent, that -- that there is an absolute policy and practice that this employer uniformly uses.

QUESTION: We don't know from this record, for example, whether someone who had sexually harassed a fellow worker and for that reason was fired, whether such a policy would apply -- has, in fact, been applied to such a person, whether someone who assaulted a co-worker would also be barred permanently from re-hire. If there is the firm policy, then it's unquestionably legal, but -- but there isn't in this anything except two employees who gave testimony, no other examples, other than this very case,

to show that this has been applied across the board.

MR. PHILLIPS: But Justice Ginsburg, the respondent had a full opportunity for discovery in this case. He was an employee for 25 years. If he had known of any instances in which this rule hadn't been applied, he could presumably have brought that forward. If he could have discovered any instance in which this rule had not been applied consistently --

QUESTION: I thought he said that he didn't even know the rule existed.

MR. PHILLIPS: Actually he's not specific in -- in regard to that. I mean, he's made that argument at this stage in the proceedings, but there's nothing in the record, certainly nothing during the deposition testimony, in which he says -- there's nothing in his affidavit.

But -- but, Justice O'Connor, it's worth reading the joint appendix -- I'm sorry, Justice Ginsburg. I apologize.

(Laughter.)

MR. PHILLIPS: But, Justice Ginsburg, it's worth reading on joint appendix 70a. You know, this -- his application would have been rejected had he been fired for stealing or fighting or anything like that. It's unequivocal, absolutely uncontradicted testimony in this record. There is no question --

QUESTION: Mr. Phillips, can I ask you a question that makes the assumption that you want to make for the whole case, that the policy was just applied in this case? Suppose a person, aware of the policy, right -- and has the history of this person, and say you would admit he's qualified. I know there's some doubt about that in this case. A qualified applicant, who has a history of drug or alcohol use and was fired for that years ago, writes a letter to the company and says I'm totally aware of your policy of not hiring -- rehiring people who were previously discharged for cause, but I want you to know I am a rehabilitated person and therefore I'm handicapped and I come within the statute. And I think the -- the rule against discriminating against handicaps requires you to make a special accommodation for me. Please do so.

Now, why could you turn him down?

MR. PHILLIPS: Well, you could -- you could continue to assert that the -- that our policy is our policy and we're entitled to assert that policy.

Now, you know, there are alternative theories that could be brought forward. One -- one could be that the policy has a disparate impact, which wasn't litigated in this case --

QUESTION: And if --

MR. PHILLIPS: -- and also --

QUESTION: -- a whole bunch of people. He says -- he admits he's the only person who fits. So he can't make a disparate impact argument. He just says you have a duty to accommodate under this statute and your failure to accommodate is discrimination when you know that the reason for the policy doesn't apply --

MR. PHILLIPS: Well, there are sort of three answers to that in terms of the reasonable accommodation rationale. First of all, remember that this is not an employee any longer who is in fact disabled. This is one who's merely regarded as or has a record of. And the statute specifically talks about accommodating the limitations of the employee. So there -- there are no limitations here. So I think (b)(5) by its terms doesn't apply.

QUESTION: Is it your view there's no duty to accommodate for applicants? I'm just trying to -- is it your view that the statute does not require any accommodation for applicants as opposed to actually employed persons?

MR. PHILLIPS: No, I don't -- I don't know that that doesn't require any -- anything with respect to applicants or any accommodation with respect to

applicants. I don't -- I -- I think what it doesn't do is

allow you to look beyond whether there are limitations that need to be accommodated. And I don't think it -- and I don't think it is a reasonable accommodation within the meaning of (b)(5) to say that you're entitled to a second bite of the apple. If you have violated a misconduct rule and been discharged for that reason, whether it's drug-related or not, it seems to me clear under the statute -- certainly it's clear under -- under 114(c)(4) -- that that is precisely the situation in which the employer is allowed to discharge you and to impose on you a permanent ban.

QUESTION: Well, the discharge isn't in question. The question is whether a person who is now handicapped within the meaning of the statute and who was previously discharged for a reason that clearly does not justify rehiring now, other than the fact you want to have a rule with no exceptions to it. I don't really -- I'm a little unclear as to if you don't say the duty to accommodate has no application to applicants as opposed to employees, I'm a little unclear as to why this isn't like a rule in the gender discrimination cases, you can't lift over 100 pounds or something like that.

MR. PHILLIPS: Well, because I think the reason

is is that in order to allow this employee to come back under these circumstances, you have to -- you have to

discriminate in his favor because if -- if this were a person who --

QUESTION: That's right, and that's always the case of -- of accommodation.

MR. PHILLIPS: Right.

QUESTION: It's always a discrimination in favor of the applicant.

MR. PHILLIPS: Right, but that's why you have to look at 114(c)(4), which says specifically that you are entitled to treat former drug addicts precisely the way you would treat any other employee. So then the question I think is if this employee had been discharged originally because he was a sex offender or a sexual harasser and -- and had a psychological reason for it, and he came back in and he said, I'm -- I'm cured, I'm fixed, I want to come back to work now, the answer there might be one thing. I don't know the -- you know, there may be a reasonable accommodation issue there.

But with respect to 114(c)(4), which very specifically says that you're allowed to impose qualification standards that are the same where you're not going to allow that other employee to come in -- that's

the way your policy operates -- applying that rule fairly to this situation means that this employee is not entitled to come in.

I don't think it's a flat rule against applicants versus non-applicants. I think it's a (c)(4) -- 114(c)(4) rule that says that you are always entitled to treat the rehabilitated drug addict exactly the same way you would treat anyone else who engaged in misconduct.

QUESTION: Mr. Phillips, I guess the Ninth Circuit did not address at all the reasonable accommodation question, did it?

MR. PHILLIPS: I don't think it did address the reasonable accommodation issue.

QUESTION: No. So I guess we'd have a hard time in getting into it, but it --

MR. PHILLIPS: Any more than it --

QUESTION: -- may be a serious question.

MR. PHILLIPS: Well, it might be and -- and I don't think it would be in this case. As I say, I think 114(c)(4) is a complete answer to the reasonable accommodation argument, and I think frankly 114(c)(4) is a complete answer to the disparate impact argument, which the court of appeals also not only didn't get into, but found had been expressly waived.

That's why I think, Justice O'Connor, at the end of the day, what this case is about is Hazen Paper. We have a rule here that was unquestionably applied. There is not a shred of evidence that it wasn't applied.

QUESTION: Well, Mr. Phillips, one of the things is -- doesn't quite fit is in the case of this very employee. He was given a test despite this firm no-hire -- no-rehire rule. They did give him a test in 1999, and it turned out he flunked it badly. But everyone recognizes that flunking in 1999, when you're a little rusty, doesn't mean you would have flunked in 1994, which is the critical time here. But why did the company, if it has this firm -- firm, no-exception policy, no rehires, why did it give him the test to see if he was qualified?

MR. PHILLIPS: Well, because any employers who's in the middle of litigation would be irrational not to try to find some kind of a non-litigated solution to the problem. And so we were looking for a non-litigated solution to the problem. Since he wasn't qualified in 1999, it wasn't available to us to bring him back or to try to come up with some other kind of a settlement. I think it completely inappropriate to hold it against us to try to come up with a solution to this case that wouldn't have required us to take the time of the court at that

point.

QUESTION: Mr. Phillips, looking at 114(c)(4), I think that speaks to the -- what the company may do to employees, not -- it doesn't speak to former employees --

MR. PHILLIPS: Right.

QUESTION: -- or applicants for employment.

MR. PHILLIPS: But -- but, of course, Mr. Hernandez was an employee in 1991.

QUESTION: Right.

MR. PHILLIPS: And we discharged him and then we imposed on him the same qualification standards that we would impose to anyone that we discharged under those exact same circumstances. He is dismissed.

QUESTION: I understand.

MR. PHILLIPS: And he is permanently barred on -- on a going-forward basis.

QUESTION: But I don't think (c) --

MR. PHILLIPS: That language clearly covers this.

QUESTION: I don't think (c)(4) explains why you didn't have a duty to accommodate him when he -- when he sought re-employment.

MR. PHILLIPS: Well, I think the answer to that is (c)(4) would -- would trump the reasonable

accommodation argument, if -- if it had been properly raised and it were before the court. I think at the end of the day, we'd win that, but Justice O'Connor -- I got the name right there -- is clearly right that that issue wasn't resolved by the Ninth Circuit, and therefore remains open. I mean, it is not an issue for this Court

at this point.

I just want to make it absolutely clear that the rule was applied -- I don't think there is any way that you can question that there is an issue of fact to be resolved as to how this rule was applied in this circumstance. In order to discount the applicability of the rule as the basis for Mr. Hernandez's rejection, you have to declare that Ms. Bockmiller flat-out lied, and she didn't. Everything in the record in this case is consistent with the idea that she looked at the summary separation, she concluded that there was no basis to go forward with this case, and she acted accordingly. An employee -- obviously, employers are allowed to use their own employee's testimony. It cannot be that that's an interested witness whose testimony is not entitled to credit when it is absolutely uncontradicted.

So we are not only entitled to have this rule set aside, we're also entitled to judgment at the end of

the day.

Thank you, Your Honors. I'd reserve the balance of my time.

QUESTION: Thank you, Mr. Phillips.

Mr. Clement, we'll hear from you.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

A policy -- a mutual policy of refusing to rehire individuals previously terminated for serious misconduct does not constitute disparate treatment for purposes of the Americans with Disabilities Act even as applied to an individual previously discharged for drug-related misconduct. The policy does not single out people who are addicted or those who test positive for drugs for disfavorable treatment. The policy treats all serious misconduct, whether drug-related or not, the same.

As a result, an individual who is refused re-employment pursuant to that policy is simply not subject to disparate treatment because of their disability.

QUESTION: Mr. Clement, does the Government take a position on whether there's an issue of fact hidden in

this case about whether there is a neutral no-hire policy?

MR. CLEMENT: Justice O'Connor, in our brief we suggested that it would be possible to grant summary judgment for the employer here on this record. I have to confess, though, that that issue is of considerable less importance to the Government than the broader validity of this rule. One thing I -- I'll address why we think summary judgment might be appropriate, but I want to

emphasize, though, that even if the Court thinks that summary judgment is not appropriate here, the proper disposition would be to vacate and remand.

But it's very important to vacate the opinion because the theory of the Ninth Circuit, if you can divine one here, is that, all right, there's a pretextual case for discrimination and the employer comes in and says, we didn't discriminate on the basis of disability. We applied a neutral, across-the-board rule. And as I read the Ninth Circuit opinion, what they say is that neutral rule is not a legitimate, nondiscriminatory basis for your employment action. And they -- they do that as a matter of law, and that is a profoundly wrong decision as a matter of law, especially in a disparate treatment case because Justice Stevens suggested that maybe you could have a reasonable accommodation theory but that's not in

this case. It is possible that the language of 42 U.S.C. 12112(b)(6), which embodies the Americans with Disabilities Act disparate impact principles, could be used to challenge the neutral policy. But whatever else is true, when an employer applies a neutral policy, it has not engaged in disparate treatment on the basis of disability.

Now, if I can get back to the summary judgment question. I think there's two reasons why we thought

summary judgment was -- would be appropriate for the employer.

One is as suggested by Mr. Phillips. In footnote 17, after the court of appeals finishes with its pretext analysis, it seems to suggest that there's really no dispute that both sides agree that this policy was invoked. And I think in -- in looking through the lower court record, it doesn't seem like the gravamen of the respondent's case was that the policy doesn't exist. It was more a -- a suggestion that whether or not you have a policy, as to me in particular that's not the reason for the discharge, and the best evidence of that, of course, is the letter that George Medina sent to the EEOC.

QUESTION: You mean the best evidence supporting the plaintiff.

MR. CLEMENT: Yes, the best evidence that the plaintiff has is that letter to the EEOC from Mr. Medina. And, of course, that letter suggests that it was more complicated than simply application of a neutral policy, and it's for that reason that the EEOC issued a -- a cause to sue letter.

Unfortunately, though, Mr. -- Mr. Medina was not the ultimate decision maker in this case. That was Joanne Bockmiller. And the record is clear -- and this is at joint appendix 51a and then 64a. It's clear that Ms.

Bockmiller did not participate in the preparation of that Medina letter.

QUESTION: Then why did the company --

QUESTION: I don't know that -- I don't know that that's enough, though, to defeat summary judgment. A jury is entitled to disbelieve any witness I believe, even though perhaps the -- you don't show any bias on the part of the witness.

MR. CLEMENT: Well, Mr. Chief Justice, that's not the way I read this Court's decision in Anderson against Liberty Lobby, which seems to suggest that simply the possibility that the jury will not disbelieve testimony even if there's no other evidence that draws that testimony into question --

QUESTION: But there is.

MR. CLEMENT: -- it's not enough.

QUESTION: You mentioned Medina, Medina's letter, which says, look, we -- we refused to hire this person because he didn't show -- he didn't show that he was no longer an addict.

MR. CLEMENT: And I think that if the Medina -- certainly if Medina were the decision maker or even one of the decision makers in this case --

QUESTION: But didn't the company designate him to put in the response to EEOC?

MR. CLEMENT: They certainly did, but the -- the facts of this case are that Bockmiller was the ultimate decision maker. And in Hazen Paper, this Court suggested that in these kind of disparate treatment cases, what you're looking for is if --

QUESTION: What is the relative position in the company? I had the impression that Medina was a higher level employee than Bockmiller.

MR. CLEMENT: I think that's correct, Justice Ginsburg, but at the end of the day, he just wasn't the decision maker.

I think, though, I -- I've made our position clear, which is when you have a case where there's an

ultimate decision maker who suggests a neutral policy was involved, our position would be a -- a straight statement by somebody who was not involved in -- directly in the decision making process shouldn't preclude summary judgment.

I do want to be clear, though, that that really is the less important issue for the -- from the Government's perspective because the Ninth Circuit's decision in this case does embody the position that this kind of neutral policy, assuming it exists for a moment, is somehow per se unlawful as applied to drug addicts. And I think, again as Justice Stevens suggested, there may

be ways that a plaintiff could try to go after such a neutral policy. They could suggest that it -- that under a reasonable accommodation theory, a reasonable accommodation must be given. But if that were brought forward, I think an employer would have an opportunity to say, no, that reasonable accommodation imposes an undue hardship.

In similar fashion -- and I would say this. I think if you look at the statute as a whole, the provision of the statute that most specifically speaks to a neutral qualification criteria that is alleged to have a disparate impact on individuals with a disability is -- is 42 U.S.C.

12112(b)(6).

QUESTION: Well, there's no disparate impact case here. That was not raised, was it?

MR. CLEMENT: No, that was not raised.

QUESTION: I don't know what about the reasonable accommodation theory. The Ninth Circuit didn't address that.

MR. CLEMENT: They --

QUESTION: Was that a claim?

MR. CLEMENT: No, that was never addressed in the lower courts.

QUESTION: No. That's what I thought. So we don't have to get into that.

MR. CLEMENT: You don't have to get in, and we would suggest that you not definitively resolve the reasonable accommodation issue or the disparate impact theory.

But that doesn't mean that it's sort of harmless error if the Ninth Circuit opinion stays on the book because the Ninth Circuit assumes that the answer to the question on reasonable accommodation is that you could never justify such a policy. You'd always have to grant a reasonable accommodation.

The Ninth Circuit opinion assumes that there

would be a disparate impact even when there's not or even if the employer could justify the policy as job-related and consistent with business necessity.

I wanted to be responsive to Justice Stevens' question, though, even though I think this Court should ultimately not reach it. With respect to reasonable accommodation, there's no question that reasonable accommodation applies in the application process. And so if you have -- for example, if you're going -- an employer wants to give a application test for the job, and puts it in a facility that's not wheelchair accessible, that reasonable accommodation would have to be given, and that would be a reasonable accommodation in the hiring process.

I do think, though, that subsection (b)(6)

addresses very directly a neutral qualification standard that's alleged to screen out an individual with a disability or to tend to screen out an individual with a disability. And with respect to that claim, that would trigger the employer's burden to come forward and show that the requirement was job-related and consistent with business necessity.

One of the real sort of ironies, if you will, of the Ninth Circuit's opinion is on the same page of the opinion and in consecutive footnotes, after they -- they

clearly hold that the disparate impact theory is not in this case, they also fault the employer for not justifying the neutral rule as consistent with business necessity. But the business necessity defense, as its status as a defense, suggests is not some sort of free-floating obligation on the employer, especially in a disparate treatment case where the employer has already pointed to a neutral and legitimate, nondiscriminatory reason for their actions. The business necessity defense comes into a case when a plaintiff has properly preserved a claim under subsection (b)(6) and triggers the obligation of the employer to come through.

I would like to also point out, though, that we largely agree with Mr. Phillips that there is -- there is much in 42 U.S.C. 12114(c)(4) that suggests that there may

be a basis for an employer to maintain this kind of neutral policy, and I think an employer may be able to use that section as a defense.

I would agree with Justice Stevens that it doesn't speak directly to this situation because all it does is allow -- with respect to current drug users who aren't entitled to any protection under the act, it clarifies that an employer can apply a neutral qualification standard, and it doesn't matter whether the

underlying misconduct has its roots in -- in drug use or drug addiction. And I think it doesn't directly say it, but implicit in that provision is the idea that an employer can use uniform and neutral sanctions for violations of those uniform conduct rules.

The difficult question becomes whether or not there's something special about a bar on re-employment, when you say that if you violate our conduct rules not only are you terminated, but you need never darken our door again. And I think with respect to that kind of policy, there are two -- the act, in a sense, points in two different directions. On the one hand, the act draws a clear distinction between current drug users who are -- who are not protected by the act and draws a distinction between recovered addicts who are protected by the act. In --in any event, the Court can reconcile those competing

policies in a subsequent case.

QUESTION: Thank you very much, Mr. Clement.

Mr. Montoya, we'll hear from you.

ORAL ARGUMENT OF STEPHEN G. MONTOYA

ON BEHALF OF THE RESPONDENT

MR. MONTOYA: Mr. Chief Justice, and may it please the Court:

In the Ninth Circuit's opinion, the court made

it emphatically clear that there were two predicates for its decision. One was a traditional discriminatory impact analysis, what Raytheon's intent was upon dismissal. And this is all very clear, reprinted at page 12a and 13a of the appendix. The court says that Mr. Hernandez has, quote, presented sufficient evidence from which a jury can conclude -- could conclude that he was qualified for the position he sought in 1994 and that is application was rejected because of his record of drug -- drug addiction. Period. Additionally -- and then it goes to the question of whether or not this alleged uniform practice is, in fact, valid under the Americans with Disability Act. So there are two grounds for the decision.

And moreover, because this could be a mixed motive case, even if this Court concludes that the alleged oral practice is valid, the case would still have to be remanded because you -- even if the employer had a valid

reason to terminate Mr. Hernandez, if it also had a mixed motive and the other motive was invalid, it was -- he was also terminated and based upon his history of drug and alcohol addiction, the case has to be resolved by a jury. And the question --

QUESTION: Mr. Montoya, I'd like to go back to the opening statement you made because you -- you said

this was a legitimate disparate impact case, but looking on that same page in the footnote, the Ninth Circuit is agreeing with the district court that because Hernandez failed to timely raise disparate impact, this has got to be a disparate treatment case.

MR. MONTOYA: Your Honor, I misspoke. If I said disparate impact, I meant to say discriminatory intent. The question of Raytheon's intent. Did it apply this alleged uniform practice or did it discriminatorily intend to terminate Mr. Hernandez because he has this record of drug and alcohol addiction? They're distinct bases.

QUESTION: You don't mean terminate. You mean refuse to hire.

MR. MONTOYA: Refuse to hire, yes. I -- I -- and -- and both --

QUESTION: I mean, that makes good sense, but how do you reconcile that with footnote -- footnote 17? It says, there is no question, the court says, that Hughes

applied its automatic policy, this policy, in rejecting Hernandez's application. I mean, I -- it boggles the mind.

MR. MONTOYA: Your Honor, that is a -- I -- I can't resolve that.

QUESTION: You want us to give text more weight

than footnotes.

MR. MONTOYA: I do, Your Honor --

QUESTION: That's not unreasonable.

MR. MONTOYA: -- because that footnote is directly contrary to the record. In fact, in the district --

QUESTION: Maybe the law clerks wrote the footnotes and the judges wrote the text.

(Laughter.)

MR. MONTOYA: I won't speculate on that, Your Honor.

But I -- I will say that I disagree with my learned friends representing Raytheon that we admitted that this oral practice was applied to Mr. Hernandez in this case because we don't even think that the practice exists. The reason why we don't think the practice exists is because in Raytheon's first official written statement in this very case, Raytheon doesn't mention it. It doesn't mention a practice. It doesn't mention a rule.

It doesn't represent -- or it doesn't indicate that there's a policy. It just says there's a right, which is very different.

QUESTION: But the Ninth -- the Ninth Circuit again, Mr. Montoya, in footnote 17 simply says there's no

question that Hughes applied this policy in rejecting Hernandez's application.

MR. MONTOYA: I know it says that Justice -- Chief Justice Rehnquist. I think what the Ninth Circuit meant in that footnote is that there's no question that Raytheon claims that it applied that. And I think what the Ninth Circuit was trying to get at was that even if Raytheon's story is true, Raytheon still doesn't necessarily win because Raytheon's alleged practice could be violative of the ADA as applied to Mr. Hernandez in this particular case. But the question of discriminatory intent remains.

Moreover and just as importantly, the question of whether or not this alleged practice exists remains. This is an oral -- this is a right that Raytheon alleged. There's no -- no evidence that this rule was ever applied to anyone else.

QUESTION: We -- we didn't take the case to -- to determine whether -- you know, to determine that. I mean, I -- the court of appeals proceeded on the

assumption that it did exist, and -- and the reason we have the case is that it is a very important proposition of law, which the Ninth Circuit adopted, that where you have such a policy, it will not be applicable to someone

who's a rehabilitated drug addict.

MR. MONTOYA: Yes, that's --

QUESTION: That's the reason we took the case, and you're telling us we can't get to it because -- because in fact the Ninth Circuit was just wrong that there was the policy at all.

MR. MONTOYA: That is correct, Your Honor, and I believe that that is a question of disputed material fact.

QUESTION: Did -- did you raise this in your -- in your brief in opposition to certiorari?

MR. MONTOYA: Yes, we did, Your Honor.

QUESTION: That particular question?

MR. MONTOYA: Yes, we did. We believe that the question presented in the petitioner's cert petition is hypothetical because it's contingent upon at least two dispositive material factual disputes, the question of discriminatory intent and the question of whether or not this uniform practice actually exists.

QUESTION: Well, but the Ninth Circuit, I take it, was entitled to proceed on the assumption that the factual determination might turn out as -- as Hughes says

it is, and it then went on and gave instructions as to how the case ought to be resolved. And we certainly can reach that if we think it's in error.

MR. MONTOYA: Yes, you can. However, I think that in order to reach that, you have to make a factual assumption that might be incorrect, and I think that it would be premature for the Court to render that assumption or to make that assumption at this juncture because it could be that if this case were remanded to the trial court, jury instructions would render that aspect of this Court's opinion moot. For example, a jury could answer affirmatively whether or not --

QUESTION: Did the court of appeals exceed its authority under Article III in making the statements it -- it did with respect to the lawfulness of the termination policy?

MR. MONTOYA: Your Honor, I think that it -- it certainly reached the borders of Article III. Maybe a declaratory judgment action could have been filed --

QUESTION: So you think that in some later case the Ninth Circuit would -- would say that this is not binding on other panels?

MR. MONTOYA: Well, it would depend upon the facts. If the assumed facts were identical, then perhaps it would be binding. However, those facts are clearly

assumptions in this particular case.

QUESTION: Well, if -- if facts might be proven

from the record, courts of appeals routinely give directions to the trial courts as to how the law is to be applied, don't they?

MR. MONTOYA: That's true, Your Honor. However, that makes this case much less worthy of this Court's consideration at this juncture because even though the Ninth Circuit is perhaps closer to the district court and has more judicial resources to resolve those types of declaratory questions, those questions might, once again, be rendered moot in this particular case if the jury concludes that there was no oral practice and that in fact it was made up, or if the jury concludes that notwithstanding any oral practice --

QUESTION: Well, that's all right, but we would still have achieved what we set out to achieve, and that is to determine whether the statement of law that the Ninth Circuit opinion sets forth is correct or not --

MR. MONTOYA: That -- that --

QUESTION: -- that if there -- if there is a firing solely by reason of policy, it is nonetheless invalid as applied to a rehabilitated drug addict. That's an important proposition. We would resolve that one way or other, even though your case might continue on. So

what? We don't care whether your case continues on.

MR. MONTOYA: Well, in -- in that -- in that event, Justice Scalia, the answer --

QUESTION: I mean, you care a lot. I know that, but that's -- that's not what's important to us.

MR. MONTOYA: I understand.

And -- and the answer to Raytheon's petition in that event would be a resounding yes. The ADA does grant preferential rehiring rights to an employee who was terminated for misconduct if four conditions are met. The misconduct was related to a disability as defined by the ADA. The disabled individual in question is rehabilitated from the disabling addiction that this case concerns. And Raytheon is unable to establish undue hardship as an affirmative defense. Raytheon is unable to establish business necessity as an -- as a affirmative defense.

QUESTION: Undue hardship being under the accommodation requirement?

MR. MONTOYA: Yes.

QUESTION: But now, the -- the court of appeals never got to that.

MR. MONTOYA: Well, they -- they didn't get to it using that terminology. However, they did get to it in saying that this uniform rule violated the ADA as applied to Mr. Hernandez in this particular case.

QUESTION: Well, but surely, if they had meant the -- the part of the -- the part of the act that requires accommodation, they would have said so.

MR. MONTOYA: Well --

QUESTION: I mean, you're really kind of rewriting the court of appeals' opinion, it seems to me.

MR. MONTOYA: Well, Your Honor, I don't know whether you'd call it a reasonable accommodation or a relaxation of the qualification requirement because the -- the ADA, under 12112(b)(6), does apply to qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals. And that's what the Ninth Circuit, by any other words, was talking about in this case. There's a -- an alleged, a highly disputed qualification standard that screens out this particular individual, Mr. Joel Hernandez.

QUESTION: What disability would you be accommodating?

MR. MONTOYA: You would be accommodating the disability of disabling addiction to drugs and alcohol.

QUESTION: He doesn't have that disability.

MR. MONTOYA: Well, but the ADA --

QUESTION: He used to have it but he doesn't have it --

MR. MONTOYA: But the ADA -- under the definition of disability set forth by the ADA, Justice Scalia, someone with a record of a disability is in fact disabled under the statute.

QUESTION: He is in fact disabled, but -- but what -- what disability of his are you accommodating?

MR. MONTOYA: His former -- you're relaxing a qualification standard that would -- that would hinder the entrance of a reformed alcoholic who was disabled under the statute into the job market, which is the purpose of the ADA, not to segregate disabled individuals who can work from the job market.

QUESTION: But when he comes back years later, he's not disabled. I mean, I just don't see how it fits.

MR. MONTOYA: Well, it -- it -- Justice O'Connor --

QUESTION: It doesn't fit.

MR. MONTOYA: -- it doesn't fit in --

QUESTION: No.

MR. MONTOYA: -- to the traditional reasonable accommodation analysis.

QUESTION: No.

MR. MONTOYA: However, it does fit into the statute, to the language of the statute, 12(b)(6), those qualification standards that screen out. Under the ADA,

those have to be relaxed. Whether you call the relaxation of those standards reasonable accommodation or whether you call it something else, substantively it's the same thing. It is an accommodation of a qualification standard or a relaxation of a qualification standard based upon a particularized inquiry regarding an individual applicant. That's what the ADA expressly demands in the language of the statute itself, and that's what the Ninth Circuit was talking about in this case when it said Raytheon's alleged uniform practice violated the ADA.

QUESTION: And that's what the Solicitor General says is not really presented in this case, though.

MR. MONTOYA: Well, it's hard to say that it's not presented in this case, Justice Stevens, because the Ninth Circuit addressed that very issue.

QUESTION: Well, they didn't address section 112, though.

MR. MONTOYA: Well, it didn't cite 112, but it -- it --

QUESTION: They didn't cite it, and they said it's not a disparate impact case, too.

MR. MONTOYA: And I -- I think what the Ninth Circuit meant by that, Justice Stevens, is that we're not talking about a class of individuals treated disparately. We're talking about one individual who was treated

discriminatorily. And the ADA also --

QUESTION: He's only discriminatorily treated because he's a member of a -- of a specially defined class, namely, reformed alcoholics and -- and drug-addicted persons. That for that record makes him a disabled person. He's kind of in a unique class.

The -- the court of appeals really did not focus on this part of the case.

MR. MONTOYA: Well, Your Honor, even though there's that language regarding disparate impact, it nevertheless ruled the way it did and said that this -- and -- and in fact, the -- the Ninth Circuit --

QUESTION: But the ruling that it adopted, as I understand the statute, really deprived the employer of an opportunity to -- to set forth any of the affirmative defenses that would be available, business necessity, and so forth.

MR. MONTOYA: Well, Your Honor, the employer had the ability to assert those affirmative defenses in its complaint in the district court, which is part of the record in this case, and it did not. Undue hardship, business necessity, direct threat, all of those --

QUESTION: They don't need to assert those defenses if someone was claiming a failure to accommodate, and if that was not what was before the house, they'd have

no incentive to do that.

MR. MONTOYA: Well, clearly, Justice Scalia, Mr. Hernandez was challenging this rule that screened him out, and if in fact --

QUESTION: But why do we even get to that? This is -- this case is so puzzling on -- for many reasons, but one thing is Medina or Medina said he didn't come up with one shred of proof that he's no longer an addict, and we are permitted -- being an addict is not a disability within the ADA, being an addict. Being a reformed addict is. So said this employer, look, he sent a letter -- he sent a letter from his church pastor. He sent a letter from Alcohol Anonymous. Maybe that shows that he's no longer an alcoholic, but there's not one thing here that says he's no longer addicted to cocaine. And there -- and I don't -- I didn't find anything either that said that.

MR. MONTOYA: Well -- well, Your Honor, I think that if you construe the facts and the inferences in Mr. Hernandez's favor, as you must, Mr. John Lyman's letter, who is the AA sponsor, says that he is in recovery from addiction. And if you construe the inferences in Mr. Hernandez's favor on a motion for summary judgment, I think that that would also include his addiction from other substances as well.

QUESTION: Even though this is -- this is solely

from someone who knows him from the alcohol program. Isn't the most logical assumption if he's got a letter from an AA counselor, that what they're talking about is alcohol addiction?

MR. MONTOYA: Yes, Your Honor. However, because AA offers a rehabilitation program for any type of alcohol or substance abuse, I don't think it would really matter in this case if you construe the facts and the inferences in favor of Mr. Hernandez, as you must, because he was the non-moving party in the context of a motion for summary judgment.

QUESTION: The inference you want us to construe in his favor is that alcohol means things other than alcohol. Is that --

MR. MONTOYA: Well -- well --

QUESTION: Is that a favorable inference, or is it a wild leap into the -- into the dark?

MR. MONTOYA: I -- I don't think it's a wild leap into the dark, and I think it's supported by the text of Mr. John Lyman's letter.

QUESTION: Where is that letter so we can look --

MR. MONTOYA: It is appendix 14a, Justice Ginsburg, and it says, Joel attends AA regularly, participates in discussion when appropriate, and is

maintaining his sobriety, and is in all a good and active member. Mr. Hernandez is maintaining his sobriety.

QUESTION: Sobriety.

MR. MONTOYA: That is a general statement. And there are many --

QUESTION: Really? I -- I -- you -- you refer to somebody who's a recovered drug addict as he's now sober?

MR. MONTOYA: Yes, clean and sober.

QUESTION: Gee, I don't think so. I think sober is -- refers to drunkenness.

MR. MONTOYA: I -- I think it can refer to any --

QUESTION: You say a drug addict is stoned. You don't say he's --

(Laughter.)

MR. MONTOYA: Well, I -- I think -- I think that if someone is not on drugs, someone can be described as clean and sober. Sober means --

QUESTION: But in the next paragraph, it says, Alcohol Anonymous has been demonstrated the best recovery tool for alcoholics.

MR. MONTOYA: That is true, Justice Ginsburg.

QUESTION: And it says he's -- he's committed to this program, demonstrates his willingness to accept

responsibility for his recovery.

MR. MONTOYA: But this letter -- this letter is unequivocal that he was in recovery. This letter is unequivocal that he was maintaining his sobriety, and I -- and I contend that it is reasonable to believe that there's more than -- alcohol is just one form of drug, and alcohol is a drug that impacts sobriety. There are other drugs that impact sobriety, and cocaine impacts sobriety. I think that the clear import of this letter is that he is clean and sober in all respects and is taking responsibility for his recovery in all respects.

And the point that Justice Ginsburg brings up is not a point that the trial court gave any credence to. It's not a point that the court of appeals gave any credence to. And that is really the type of argument that I would contend should be presented to the jury. And -- and that's especially true in this case because Raytheon claims --

QUESTION: Whether or not summary judgment should be granted is a question of law, not -- not a question of fact. And so the same arguments can be made in -- in every court that's considering it I think.

MR. MONTOYA: That is -- that is correct. However, depending upon the weight of the evidence, some --

QUESTION: The weight of the evidence has nothing to do with summary judgment.

MR. MONTOYA: Well -- well, if -- if there's a factual dispute, Justice Rehnquist, then the summary judgment is no longer -- then summary judgment is no longer appropriate.

What I perhaps should have stated is that this -- this letter renders summary judgment inappropriate in reference to the question of whether or not Mr. Hernandez is maintaining his recovery.

QUESTION: I thought you were going to say that the -- what the plaintiff claimed is a witness. The plaintiff says, I've had this whatever the -- the moment was. I reached rock bottom or whatever you called it, and I woke up one day and said no more and ever since then I've been clean. So the -- so the -- the plaintiff did -- that was the only proof. That might not be very convincing, but it was a statement --

MR. MONTOYA: That -- that is true. That is part of the record. And moreover and more importantly, that is unrebutted below. At no time in this proceedings did Raytheon ever question Mr. Hernandez's rehabilitation. On July 4th of 1992 in his affidavit, Mr. Hernandez said that he embraced Jesus Christ as his Lord and Savior and foreswear drugs and alcohol. That is in his affidavit.

That is unrefuted.

And more important -- and just as importantly, Raytheon didn't subject him to an IME. Under rule 35, hey, you say you're -- you're rehabilitated? Prove it. Let's send you to a physician to let him ascertain that. The question of rehabilitation is in fact a question of fact that was not contested in the proceedings below, and in fact --

QUESTION: Well, all that adds up to the fact that he was not disabled when he reapplied. He wasn't.

MR. MONTOYA: That is correct.

QUESTION: And -- and nobody is arguing that he was. He wasn't disabled. So he doesn't fit under the statute --

MR. MONTOYA: Well --

QUESTION: -- as a disabled person. He wasn't regarded as because he wasn't asked to take a test or anything. I mean, he just doesn't fit under the definition of disability in the statute. So --

QUESTION: But he had a record of disability, which makes him disabled within the meaning of the statute.

MR. MONTOYA: Yes, that is true, Justice Stevens. And Justice O'Connor, in fact, in George Medina's letter, he says that there's a complete lack of

evidence indicating successful drug rehabilitation, indicating that Raytheon believed that he was still addicted. And not only does Raytheon say that once in a footnote in its position statement, it also says it again. Mr. --

QUESTION: Of course, if he's still addicted, then he's not protected by the act.

MR. MONTOYA: Well, they -- it's a false belief that they believe he's addicted. And -- and if he's regarded as taking drugs and alcohol and is -- and is disabled as a result of that addiction, then he is regarded as disabled under the act, which is exactly what Raytheon said in writing in its first official statement regarding this case.

QUESTION: Mr. Montoya, in your -- you say now that you question the existence of such a rule, and yet you've had an opportunity for discovery in the district court and you didn't try to pursue any kind of disparate impact. I -- I don't see that you ever asked any questions about, well, let's look at this rule. Do you apply it to people who were let go for stealing or whatever other reasons? You never, never tested the rule.

MR. MONTOYA: Your Honor, the rule was tested in the context of the deposition examination of the only two witnesses that Raytheon produced who testified about the

rule: Bockmiller and Medina.

And, first of all, no one knew the genesis of the rule where -- or -- or not -- they didn't even describe it as a rule. In the depositions, they described it as a practice, and they didn't know the origin of the practice. They didn't know how often it had been applied. They didn't know why it hadn't been written down.

And moreover and -- and very importantly, this oral practice contradicted Raytheon's written practices. For example, under Raytheon's written rules, a temporary employee who tests positive for drugs and alcohol, quote, will have their assignment terminated and will not be eligible for assignment or for regular employment for the succeeding 12 months. So Raytheon has a written rule that is actually contrary to its alleged oral practice, which impeaches the testimony regarding the existence of the written rule. If a temporary employee tests positive for drugs and alcohol, the temporary employee is terminated, but can reapply even for permanent employment -- temporary or permanent employment within 12 months. That impeaches the very existence of the alleged oral practice. In fact --

QUESTION: I still don't understand why you didn't follow up those two depositions with interrogatories, saying what is the origin of this

practice. How long have you had it? To whom have you applied it? The company certainly would have records of the people that they've discharged for cause, how many of them had applied to be re-hired.

MR. MONTOYA: That's true, Justice Ginsburg. However, that's a two-edged sword. Raytheon also didn't adduce any evidence of its application to any other individual and that would actually be Raytheon's burden. If we, as the Ninth Circuit concluded, established a prima facie case, then it's Raytheon's duty to rebut that prima facie case with some form of evidence. The only evidence that Raytheon produced in reference to this oral practice was the testimony of Bockmiller and Medina, and they didn't adduce any applications of this rule either. So if you look at the totality of evidence, actually that deficit in the record cuts against Raytheon and in favor of Mr. Hernandez.

QUESTION: Mr. Montoya, I -- I hope -- you don't have much time left. I hope you will -- just give me an answer to the only question in this case that I care about. And I don't care about all these factual controversies. They can be sorted out later.

What is your response to the question of whether -- assuming that this company fired your client -- or refused to rehire your client because he had been fired

for misconduct. Okay? It has a right to do that, and -- and it is not a -- an instance of disparate treatment. What is your response?

MR. MONTOYA: Your --

QUESTION: Is it anything other than the -- the need for accommodating a disability? Is -- is that the only reason why it is unlawful?

MR. MONTOYA: No, that's not the only reason. If -- if I understand your question, Justice Scalia, it's not only a question of reasonable accommodation, it's also a question of whether or not he's the most qualified. It's also a question of whether or not he constitutes a direct threat or his rehiring would give rise to an undue hardship or was justified by a business necessity.

QUESTION: But that's -- that's all -- those are all categories under the need to accommodate. Right?

MR. MONTOYA: Yes, Justice Scalia.

QUESTION: Apart -- apart -- assuming that -- assuming that I don't think that issue was raised in the case, is there any other reason why it would have been unlawful, assuming that they were simply implementing a policy?

MR. MONTOYA: Yes, Your Honor. Based upon 12(b)(6), the screen out or tend to screen out, this screened out this particular individual, and in that

respect, Justice Scalia, I believe that this case is very analogous to the Court's opinion in PGA v. Martin where you have a uniform rule that someone claims is not subject to any exception. I think that this rule violates the ADA, as the Ninth Circuit concluded because this rule is the antithesis of a particularized inquiry that the case law demands a disabled applicant or a disabled employee receive under the Americans with Disability Act.

If Your Honors have no further questions, I'll thank you.

QUESTION: Thank you, Mr. Montoya.

Mr. Phillips, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice.

It seems to me that there are two ways to look at this case. One is you can simply take the court of appeals at its word, which is to say we think there's a question for -- that -- that defeats summary judgment on a prima facie case, but when we get to the question of what the policy is of the -- of the employer in this case, there's no dispute about that, the employer's policy was applied, and then address the question of whether or not that policy is valid under the ADA.

I have not heard Mr. Montoya yet attempt to

defend that -- that holding in the face of a disparate treatment theory in this case. He puts in disparate impact under 12(b)(6). He puts in reasonable accommodation, 112(b)(6) and 112(b)(5). Those are not issues that were decided below. They were not the theory of the court of appeals.

This is a decision that has extraordinary implications because thousands of employers have precisely this rule. It is important for this Court to declare that that rule is valid.

On the secondary question -- and that is, can the Court get to that question? I think there's no doubt that the Court ought to just follow the court of appeals' logic on that. But if the Court wanted to look at whether or not there is a question of fact as to whether or not this person was discriminated against because of his disability, I submit to you that the record does not permit a jury to make that finding under this Court's decision in Reeves.

Bockmiller was the decision maker. She testified, without contradiction, that she never looked past the summary sheet that said he was discharged because of conduct, and that was it. And she didn't have to look beyond that.

Medina testified, without contradiction, that

that is the policy that applies. She applied it in the right way. We do it consistently. It would have made no difference whether he was a thief or whether he was somebody who used drugs. We applied it that way.

Mr. Montoya and his client had 2 years to discover whether that policy existed, whether it had exceptions, whether it was applied in any other particular way, and there is not one shred of evidence -- he didn't even ask those witnesses if there were flaws in the way they applied it. That is absolutely across the board.

The only -- and -- and then, you know, this is a policy that exists. Thousands of employers use precisely this policy, which is why frankly it probably isn't written down.

And so at the end of the day, there is nothing on the other side of this except the one statement that was sufficient to justify getting beyond the prima facie stage of this case, but that is not sufficient to justify taking this to a conclusion or to raise an issue of fact as to whether or not he was discriminated against because of his disability. He was acted against because he violated the company policy. That policy is valid under the ADA, at least as it's been litigated at this point, and for that reason the Court should reverse and enter judgment in our favor.

If there are no other questions, thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Phillips.

The case is submitted.

(Whereupon, at 11:54 a.m., the case in the above-entitled matter was submitted.)