

H.R. ALERT*

DECEMBER 2003

Supreme Court Rules on Whether Company's No Rehire Policy is Valid

This month, the United States Supreme held that an employer's no-rehire policy was a legitimate, nondiscriminatory reason for refusing to rehire a former employee who was a recovered drug addict. In *Raytheon Co. v. Hernandez*, the plaintiff, Hernandez, was forced to resign after he tested positive for cocaine in a workplace drug test. Two years later, Hernandez reapplied for work with the company. Raytheon rejected Hernandez's application because it had a policy against rehiring employees who were terminated for misconduct. Hernandez sued, claiming the failure to rehire him violated the Americans with Disabilities Act because he had a record of drug addiction and/or because the company regarded him as being a drug addict. The lower court dismissed Hernandez's claim, but the Ninth Circuit Court of Appeals reversed holding that the no-rehire policy was unlawful as applied to former drug addicts, whose only work-related offense was testing positive because of their addiction. The Supreme Court reversed the Ninth Circuit's decision, holding that the Court of Appeal erroneously combined the disparate impact analysis with the disparate treatment analysis. In this case, Hernandez's discrimination claim was based on

being treated differently because of his disability or perceived disability (a disparate treatment claim). In evaluating this type of claim, a court must determine whether the plaintiff has made a prima facie case of discrimination, and, if so, whether the defendant presented a legitimate, nondiscriminatory reason for the adverse employment action. The Supreme Court held that Raytheon's no-rehire policy was a legitimate, nondiscriminatory reason for refusing to rehire Hernandez and that the only remaining question was whether Hernandez had produced sufficient evidence from which a jury could conclude that this reason was pretextual. The Supreme Court further held that the Ninth Circuit erred by evaluating the impact of the no-rehire policy on recovering drug addicts and remanded the case for a determination of whether there was sufficient evidence of pretext to permit the case to go to a jury.

Employer Practice Tip: The Equal Employment Opportunity Commission supported Mr. Hernandez when he took his complaint to the Commission. This case should serve as a reminder that the EEOC's position is not always adopted by the courts.

Changes to Fair Credit Reporting Act

This month, President Bush signed legislation "reauthorizing" the Fair Credit Reporting Act (FCRA) to include a provision to exempt third-party investigations of employee wrongdoing from the reporting and disclosure provisions of the FCRA. The Act's definition of "consumer report" has been amended to exclude communications made by a third party to an employer in connection with the investigation of suspected misconduct relating to employment or compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization, or any pre-existing written policies of the employer. The communication must not be made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity and the communication can only be made to certain entities such as the employer,

federal, state or local officers or agencies, or a self-regulatory organization with authority over the employer or employee. After taking an adverse action based on such a communication, the employer must disclose to the consumer a summary containing the nature and substance of the communication; however, the employer is not required to disclose the sources of that communication.

Employer Practice Tip: The new provisions of the FCRA were designed to reverse a Federal Trade Commission opinion letter which employers argued impeded the use of third-party investigations of harassment and other workplace misconduct. (The FCRA's opinion was contained in a letter to Judi Vail, and is often referred to as the "Vail Letter.")

* H.R. ALERT is intended to provide late-breaking news in the employment arena.

Immigration Reform Possible Next Year

President Bush announced this month that he plans to kick off his reelection year by proposing a program that would make it easier for immigrants to work legally in the United States. The proposal, if adopted as law, would constitute the most significant changes to immigration law in 18 years. The plan would allow immigrants to cross the border legally if jobs are waiting for them. Bush wants an immigration policy that “helps match any willing employer with any willing employee.” Bush will present his proposal in the second week of January, shortly before traveling to Monterrey, Mexico, for a two-day summit of leaders from throughout the Americas.

Employer Practice Tip: The beginning of a calendar year is always a good time for employers to conduct a self-audit and make sure that all hired employees have completed a Employment Eligibility Verification form (Form I-9). U.S. Citizenship and Immigration Services has a “Frequently Asked Question” section to address employment eligibility questions which you can find on the Internet at this url:

<http://uscis.gov/graphics/howdoi/EEV.htm>

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ANNOUNCEMENTS

The New Orleans Employment Law practice group is pleased to announce that Patricia Adams has joined the group as an associate attorney. Patricia is a 1995 graduate of Syracuse University College of Law. She received a Bachelor of Arts degree, *cum laude*, in Political Science from Tulane University in 1984. Patricia was a field attorney with the National Labor Relations Board from 1996-2001 and has practiced law in the areas of employment, management counseling, agency and general labor litigation.

HAPPY NEW YEAR

On behalf of all of the attorneys and staff at Phelps Dunbar, we wish our clients and their families a safe and happy New Year.