No. 02-749

IN THE
Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does an employer's decision to exclude the job application of a former employee with a record of drug and alcohol addiction from the applicant pool for a job opening for which the former employee was otherwise qualified violate the Americans with Disabilities Act?

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Joel Hernandez struggled with alcoholism and drug addition for years before he voluntarily resigned from his position as a Calibration Service Technician at Hughes Missile Systems in Tucson, Arizona on July 15, 1991. The circumstances giving rise to Mr. Hernandez's resignation from Hughes were simple. After almost 25 years of employment with the company, Mr. Hernandez came to work smelling of alcohol on July 11, 1991, and his supervisor ordered him to undergo a drug test. When the test came back positive for cocaine, recognizing the gravity of his long-standing problem with substance abuse, Mr. Hernandez decided to quit Hughes in lieu of almost certain termination.

For almost a year after Mr. Hernandez quit Hughes, he continued to struggle with his addiction to drugs and alcohol without great success.

Finally, on Independence Day of 1992, Mr. Hernandez "hit rock bottom." Now fifty-two years old, Mr. Hernandez reflected on his past and the grim reality that drugs and alcohol had already destroyed much of his life and were threatening to destroy whatever remained of it. On that day, Mr. Hernandez promised himself to forswear drugs and alcohol.

With this promise, Mr. Hernandez also pledged to return to the "church of his childhood," the Latin Free Methodist Church in Tucson, Arizona. Mr. Hernandez became an active participant in the Church in August 1992, and he was baptized as a "faithful and active member" of the Church on October 11, 1992.

At the same time, Mr. Hernandez also began participating regularly in Alcoholics Anonymous. Mr. Hernandez attended A.A. meetings everyday from August through November 1992, and tapered off to attending one to two meetings a week into 1995.

With the support of his Church and A.A., Mr. Hernandez has been free from drugs and alcohol since July 4, 1992 to the present.

On January 27, 1994, about two-and-one-half-years after he quit Hughes in July 1991, Mr. Hernandez applied for one of seven openings for the position of "Products Tests Specialist" with his former employer, Hughes Missile Systems (now Raytheon). Mr. Hernandez had successfully performed in this position at Hughes during his previous tenure with the company, and he felt more than qualified for the job.

Mr. Hernandez attached two letters of recommendation to his job application, the first from his Pastor at Latin Free Methodist, Hector Siquieros, and the second from a sponsor at Alcoholics Anonymous, John Lyman. The letters respectively attested to Mr. Hernandez's regular church attendance and his ongoing recovery from alcoholism.

Instead of allowing Mr. Hernandez the simple dignity of *competing* against the other applicants for one of the open positions, Hughes *excluded* him from the applicant pool at the very threshold of the hiring process. Hughes thus denied Mr. Hernandez the opportunity to compete—and to succeed or fail thereby—based on his abilities *vis a vis* the abilities of the other applicants.

Contrary to Hughes' present contentions, Mr. Hernandez did not ask Hughes to "confer" any "preferential rehire rights" upon him. *See Brief for Petitioner*, i. Instead, he merely asked for the simple (but fundamentally American) right to compete for a job.

Believing that Hughes' refusal to allow him to compete for a job because of his history of addiction to drugs and alcohol violated his civil rights, Mr. Hernandez filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). In response to Mr. Hernandez's Charge of Discrimination, Hughes straightforwardly admitted that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.*" However, once the case proceeded to litigation, Hughes changed its story and asserted that it was somehow "unaware" that Mr. Hernandez ever suffered from drug and/or alcohol addiction and that it excluded his application from the applicant pool based upon an alleged "unwritten, but uniform" policy of prohibiting employees terminated for violating company rules from ever being rehired by the company. *See Brief for Petitioner*, p. 28.

The Americans with Disabilities Act (the "Act") expressly protects recovering alcoholics and drug addicts from discrimination based upon their history of drug and alcohol addiction. *See* 42 U.S.C § 12114(b)(1) (an individual who "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use" is entitled to protection under the Act). *See also Bragdon v. Abbott*, 524 U.S. 624, 633 (1998) (recognizing that "drug addiction and alcoholism"

can constitute "disabilities" protected under the Act), *EEOC Technical Assistance Manual,* VIII § 8.5 ("Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addition or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past addiction"), H.R. Rep. No. 101-485 (II) at 51 (1990) ("drug addiction and alcoholism" can constitute "physical or mental impairments" protected under the Act), 135 Cong. Rec. S10774-75 (1989) (Senator Kennedy) ("persons who are subjected to discriminatory actions because of a history of illegal drug use which they have successfully overcome are fully protected by the ADA").

The Act also expressly proscribes "exclusionary qualification standards" that act to prevent disabled individuals from "fully participating" in the workforce, like the unwritten rule that Hughes claims it used to exclude Mr. Hernandez's job application from the applicant pool. *See* 42 U.S.C. § 12112(b)(6).

Because Hughes barred Mr. Hernandez from competing for a job based on his history of addiction to drugs and alcohol, as the Court of Appeals correctly concluded in the proceedings below, Hughes' decision to exclude Mr. Hernandez's job application from the applicant pool violated his rights under the Americans with Disabilities Act.

Statutory Framework

Congress enacted the Americans with Disabilities Act on July 26, 1990. Reflecting the broad bipartisan support for the Act, President George H. W. Bush signed it into law on the same day.

Congress enacted the ADA "to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities," including the removal of "exclusionary qualification standards" that prevent qualified disabled individuals from "fully participating" in the workforce and undermine their efforts to achieve "economic self-sufficiency." 42 U.S.C. § 12101(a)(8)&(9).

Title I of the Act governs private employers (like Hughes) and became effective on July 26, 1992, two years after Congress passed the Act. *See* 42 U.S.C. § 12111 note.

The scope of Title I is undeniably broad. It prohibits employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

The Act expressly prohibits employers from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability. . . ." 42 U.S.C. § 12112(b)(6).

The Act protects persons who are currently "disabled" (*i.e.*, those who have a "physical or mental impairment that substantially limits one or more of the[ir] major life activities"), as well as those who have "a record of such an impairment," or who are "regarded as having . . . such an impairment." 42 U.S.C. § 12102(2). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment positions that such individual holds or desires." 42 U.S.C. § 12111(8).

The ADA expressly recognizes that alcoholism and drug addiction can constitute "disabilities" subject to protection under the Act. However, the Act creates a protective divide between disabled alcoholics and drug addicts who are *still engaging* in the use of alcohol and/or illegal drugs, and *recovering* alcoholics and drug addicts no longer disabled by the current use of drugs and/or alcohol.

Specifically, under Section 12114(a) of the Act, an employee or job applicant "*currently* engaging in the use of illegal drugs [or alcohol]" is *not* entitled to protection under the Act, even if the employee or job applicant would otherwise qualify as "disabled" under the Act as a result of such use, and the employer "acts on the basis of such use." 42 U.S.C. § 12114(a) (emphasis added).

Correspondingly, in keeping with the underlying principle that disabled alcoholics and drug addicts *currently* engaging in the use of alcohol and/or illegal drugs are *not* subject to protection under the Act, Section 12114(c) of the Act expressly provides that employers:

1. may prohibit the illegal use of drugs and the use of alcohol in the workplace;

2. may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs in the workplace;

3. 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; and
>
> 4. may test employees or applicants for illegal drugs and "make" employment decisions "based on such test results."

In contrast to its treatment of disabled drug addicts and alcoholics currently using drugs or alcohol, the Act "provides limited protection from discrimination for recovering drug addicts and for alcoholics." EEOC, *Technical Assistance Manual for the Americans with Disabilities Act*, VIII § 8.1. As the EEOC has recognized:

> Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addition or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past addiction.

Id. at VIII § 8.5. Specifically, under Section 12114(b) of the Act,

> *(b) Rules of construction*
>
> Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—
>
> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use.

42 U.S.C.A. § 12114(b).

The Act's express protection of recovering alcoholics and drug addicts is well-reflected in the legislative history of the Act. In the congressional debates proceeding the passage of the Act, Senator Edward Kennedy (Dem.) of Massachusetts stated that:

> Retaining these protections for persons who formerly used or were addicted to illegal drugs, but who have successfully been rehabilitated and no longer use illegal drugs, is an absolutely essential component of our national war against drugs. It also helps to carry out our national commitment to encourage all those who need it to come forward for treatment, and *to ensure that individuals who have successfully overcome drug problems will not face senseless or irrational barriers that work to impede their full reintegration into society.*

135 Cong. Rec. S10775 (emphasis added). Similarly, Senator Jesse Helms (Rep.) of North Carolina remarked that:

> Mr. President, let me finally address the issue of compassion for those who have fallen into the narcotic and alcohol trap. *Anyone who wants to help himself break the cycle of drug addiction*

> *should be given that chance. We should not hinder those who legitimately want to make their life better*, let me also emphasize that I have incorporated the same language for the Rehabilitation Act that Senators HARKIN and KENNEDY agreed to put in Title I of the Americans with Disabilities Act. That means current—and that is a very important word—current abusers of illegal drugs do not qualify as handicapped for the purposes of Federal programs.

Id. S10775 (emphasis added). Senator Tom Harkin (Dem.) of Indiana observed that:

> At the same time, the ADA retains employment protections for applicants and employees who have overcome drug or alcohol problems, including those who are participating successfully in treatment programs and are refraining from illegal drug use or alcohol abuse.

135 Cong. Rec. S10777. Senator Dan Coats (Rep.) of Illinois explained that:

> [S]ection 104 of Title I is intended to make clear that an individual job applicant or employee who currently uses alcohol or illegal drugs is not protected by the ADA's nondiscrimination provisions. At the same time, and consistent with the Rehabilitation Act of 1973, *it is intended that rehabilitated alcoholics and drug users will be protected under this law.*

135 Cong. Rec. S10792 (emphasis added). Senator Patrick Moynihan (Dem.) of New York stated that:

> *I believe it hugely valuable that we extend, as this legislation does, protections from discrimination for those who are rehabilitated or recovering from drug or alcohol addiction*. To turn away from individuals who have recognized their addiction to drugs and alcohol and who have sought, successfully, treatment would indeed be a cruel hoax. I salute these efforts.

135 Cong. Rec. S10801 (emphasis added). Finally, Representative Charles Rangel (Dem.) of New York stated that:

> Treatment can save the lives of individual abusers, and it can also return them to productive roles in society which strengthens our families, our communities, our economy, and our ability to meet the competitive challenges of the growing international marketplace. By providing protections against discrimination for recovered substance abusers and those in treatment or recovery who are no longer engaged in illegal drug use, the bill provides an incentive for treatment. *Under this bill, no one who seeks treatment and overcomes a drug abuse problem need fear discrimination because of past drug use.*

136 Cong. Rec. H2443-H2444 (emphasis added). The Act's express protection of recovering alcoholics and drug addicts is consistent with other federal civil rights laws protecting the disabled, for example, the Fair Housing Act, 42 U.S.C. § 3602(h), and the Rehabilitation Act, 29 U.S.C. § 705(20).

As demonstrated below, Hughes' proposed interpretation of the Act ignores its stated purpose, its express scope, and its legislative history. If adopted by this Court, Hughes's present contentions regarding the scope of the ADA would virtually negate the protections Congress intended to provide to recovering alcoholics and drug addicts under the Act.

Factual Background

Joel Hernandez was only twenty-six years old when he started working as a janitor for Hughes Missile Systems in Tucson, Arizona on July 21, 1966. Joint Appendix ("J.A.") at 12a. Almost twenty-five years later when Mr. Hernandez voluntarily resigned from Hughes on July 15, 1991, he had been promoted to the position of a Calibration Service Technician and was fifty-one years old.

When Mr. Hernandez resigned from Hughes in July of 1991, Hughes evaluated his work ability as "good," his work conduct as "fair," and his work productivity as "fair." In fact, Mr. Hernandez's lengthy tenure of employment with Hughes was unblemished by any significant disciplinary or performance issues, except for two problems relating to absenteeism caused by his addiction to drugs and alcohol in 1986 and 1991. J.A. at 17a.

Specifically, in August of 1986, Hughes was contemplating disciplining Mr. Hernandez for absenteeism. *Id*. When Mr. Hernandez informed Hughes that he was suffering from alcoholism, Hughes offered him the option of entering an alcoholic treatment program or being terminated. *Id.* Mr. Hernandez wisely elected to undergo treatment for his addiction. *Id*.

Mr. Hernandez subsequently admitted himself to a residential alcohol treatment center (Cottonwood de Tucson) in Tucson, Arizona on August 11, 1986. *Id*. Once in treatment, it was also determined that Mr. Hernandez was "alcohol dependent," "cannabis dependent" and a "cocaine abuser" and that his abuse of these substances was "continuous." *Id.* at 30a. After completing thirty days of intensive in-patient therapy at the center, Mr. Hernandez went back to work for Hughes. *Id.* at 17a.

About five years later, Mr. Hernandez's addiction to alcohol and drugs resurfaced. *Id.* at 18a. On July 11, 1991, Mr. Hernandez's supervisor suspected that he smelled alcohol on Mr. Hernandez's breath and instructed him to undergo a drug test. *Id.* After the drug test returned positive for cocaine, facing almost certain termination, Mr. Hernandez voluntarily resigned from his employment with Hughes on July 15, 1991. *Id*.

Mr. Hernandez's *only* "misconduct" on the job immediately prior to his resignation was testing positive for cocaine. Hughes did not discipline Mr. Hernandez for using drugs or alcohol at work or for being under the influence of drugs or alcohol at work. Nor had Mr. Hernandez engaged in any other misfeasance or nonfeasance in the workplace relating to his resignation. Mr. Hernandez's misconduct was based exclusively on his status, *i.e.*, he tested positive for trace amounts of cocaine in his urine.

Almost a year after Mr. Hernandez quit Hughes, on Independence Day of 1992, Mr. Hernandez "hit rock bottom." J.A. at 44a-45b. Having turned 52 years old in April, Mr. Hernandez reflected on his past and recognized that drugs and alcohol had destroyed what should have been the best years of his life. *Id.* Based on this realization, Mr. Hernandez promised himself to renounce drugs and alcohol forever. *Id*.

With this transformation, Mr. Hernandez also promised himself to return to the "church of his childhood," the Latin Free Methodist Church in Tucson, Arizona. *Id*. Mr. Hernandez began regularly attending Church in August 1992, and he was baptized as a "faithful and active" member of the Church on October 11, 1992. *Id*. at 13a.

During the same time period, Mr. Hernandez also became a "good and active" participant in the recovery program of Alcoholics Anonymous. J.A. at 14a.

From July 4, 1992 to the present, Mr. Hernandez "has been clean and sober and has used no alcohol or drugs or otherwise engaged in any conduct constituting substance abuse." *Id.* at 44a-45a.

With his faith renewed and his sobriety intact, on January 27, 1994, Mr. Hernandez applied for the position of Product Test Specialist with Hughes. Mr. Hernandez had successfully performed this position at Hughes in the past, and there were seven openings for the job. J.A. at 18a.

Mr. Hernandez attached two letters of recommendation to his job application that attested to his newfound faith and his ongoing recovery from addiction.

The first letter was written by Hector Siquieros, Mr. Hernandez's Pastor at the Latin Free Methodist Church in Tucson. In a letter dated April 2, 1993, Pastor Siquieros wrote that:

> Dear Personnel Management:
>
> With this letter I, Hector Siquieros, pastor of the Latin Free Methodist Church, would like to recommend Mr. Joel Hernandez to your facilities.
>
> Mr. Hernandez has assisted our church since August of 1992 and was baptized on October 11, 1992. He has been a faithful and active member of the church [and has established] good rapport with the other members.
>
> If you have any questions regarding Mr. Hernandez, do not hesitate to contact me at your earliest convenience.
>
> Very truly yours,
>
> Hector Siquieros
> Pastor

J.A. at 13a.

Mr. Hernandez's job application to Hughes also contained a letter written on his behalf by Mr. John L. Lyman, M.S. Mr. Lyman had worked with recovering alcoholics for many years, and he worked with Mr. Hernandez at Alcoholics Anonymous.

In his April 26, 1993 letter, Mr. Lyman wrote that:

> I have known Mr. Hernandez for almost a year. I have seen him occasionally at his place of employment and frequently at meetings of Alcoholics Anonymous.
>
> I have worked with recovering alcoholics for ten years and have screened people for the New Hampshire Department of Motor Vehicles and referrals from state and federal parol boards, among my other duties.
>
> I volunteered to write you on behalf of Joel Hernandez as I have seen steady and consistent progress in his recovery from this disease.
>
> Joel attends A.A. regularly, participates in discussion when appropriate, is maintaining his sobriety, and is in all a good and active member.
>
> Alcoholics Anonymous has clearly been demonstrated as the best recovery tool for alcoholics and Joel's commitment to the program demonstrates to me his willingness to accept responsibility for his recovery.

> In summary, I would heartily recommend Joel Hernandez for any position for which he is qualified. He is a diligent and caring individual who seems to merit a second chance. You may, if you wish, contact me at home for further information since I am not currently in formal practice due to health problems.
>
> Sincerely,
>
> John L. Lyman, M.S.

J.A. at 14a-15a.

Mr. Hernandez's application packet thus provided Hughes with notice that although he suffered from the "disease" of alcoholism, he was "maintaining his sobriety" and was "actively" participating in Alcoholics Anonymous.

A labor relations representative at Hughes, Ms. Joanne Bockmiller, subsequently pulled Mr. Hernandez's personnel file and reviewed his application package. Although Mr. Hernandez clearly disclosed that he was a recovering alcoholic in his application materials, Hughes did *not* inquire as to the history and status of Mr. Hernandez's recovery. Hughes also elected not to request that Mr. Hernandez undergo a drug or alcohol screen. Hughes also did *not* allow Mr. Hernandez to take any qualifications tests related to the position for which he applied, even though Mr. Hernandez had already passed these tests during his previous tenure of employment with Hughes.

Instead, Hughes pulled Mr. Hernandez's application from the applicant pool and refused to allow him to compete for any of the seven job openings. J.A. at 18a.

Mr. Hernandez's Charge of Discrimination

After Hughes refused to allow Mr. Hernandez to compete for one of the seven openings, Mr. Hernandez filed a Charge of Discrimination against Hughes with the EEOC in June 1994. J.A. at 16a.

In its response to Mr. Hernandez's Charge of Discrimination, on July 15, 1994, in a letter signed by George Medina, the Diversity Development Manager at Hughes, Hughes informed the EEOC that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.*" J.A. at 19a. Thus, in its first attempt to justify its refusal to even consider Mr. Hernandez's job application, Hughes admitted that it excluded Mr. Hernandez's job application from the applicant pool because of his record of previous "drug use" and an alleged lack of evidence demonstrating his "successful drug rehabilitation."

Based on these facts, in November of 1997, the EEOC issued a "Letter of Determination" finding reasonable cause to conclude that Hughes violated Mr. Hernandez's rights under the Americans with Disabilities Act.[1] J.A. at 93a-95a. The EEOC's Letter of Determination found that:

1. In one of its most recent opinions considering Title VII of the Civil Rights Act, this Court noted the EEOC issues Letters of Determination finding "reasonable cause" of discrimination in only approximately 11% of all charges of discrimination filed with the EEOC. *See Equal Employment Opportunity Commission v. Waffle House, Inc.*, 122 S. Ct. 754, 762 n.7 (2002). Hughes did *not* object to the introduction of the EEOC's Letter of Determination in favor (Cont'd)

> Examination of the evidence reveals [that Mr. Hernandez] was previously employed by [Hughes] for approximately 20 years. He held various positions in which he successfully performed the job functions required of a Product Test Specialist. On July 15, 1991, he resigned in lieu of discharge as a result of testing positive for alcohol and illegal drugs. In January 1994, [Hughes] had seven openings for Product Test Specialist. On January 27, 1994, [Mr. Hernandez] submitted his resume to [Hughes] for consideration for one of these positions. The evidence indicates that at the time of his application [Mr. Hernandez] submitted a statement to [Hughes] indicating he was recovered and no longer an illegal drug or alcohol user. The evidence shows [that Hughes] rejected [Mr. Hernandez's] application based on his record of past alcohol and drug use.
>
> The Americans with Disabilities Act states that an employer may not deny employment to a drug addict or alcoholic who is not currently using drugs or alcohol and has been rehabilitated, because of a history of drug addiction or alcoholism. In this instance, [Hughes] denied employment to [Mr. Hernandez] because of his history of drug and alcohol abuse. Accordingly, I find reasonable cause

(Cont'd)
of Mr. Hernandez in the proceedings before the District Court or the Court of Appeals. *See generally, Coleman v. Quaker Oats Company,* 232 F.3d 1271, 1283 (9th Cir. 2000) (O'Scannlain, J.) ("An EEOC letter [of determination] is a 'highly probative evaluation of an individual's discrimination complaint.' *Plummer v. Western Int'l Hotels Co., Inc.*, 656 F.2d 502, 505 (9th Cir. 1981). As required by our case law, the district court properly admitted the letter into evidence.").

> to believe that [Mr. Hernandez] was denied hire to the position of Product Test Specialist because of his disability.

After the EEOC's attempts to resolve this dispute by means of conciliation failed, Mr. Hernandez filed a civil action against Hughes in the United States District Court for the District of Arizona in Tucson, Arizona.

The Proceedings Before the Lower Courts

In response to Mr. Hernandez's lawsuit, after completing pretrial discovery, Hughes moved the district court for summary judgment. In its motion for summary judgment, Hughes claimed for the first time that it had rejected Mr. Hernandez's application based on an "unwritten," oral custom of prohibiting employees terminated for violating company rules from ever working for Hughes again. Of course, this belated assertion contradicted Hughes' earlier admission to the EEOC that "*Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.*" J.A. at 19a.

Significantly, Hughes could not identify the origin, history, or scope of its alleged unwritten custom of prohibiting the rehire of employees terminated for misconduct.

Moreover, in stark contrast to Hughes' alleged unwritten oral custom of prohibiting the re-employment of individuals previously terminated for misconduct, Hughes' *written* personnel policies provided that if a job applicant for employment tested positive for drugs or alcohol, the applicant is only rendered ineligible for employment with Hughes for the following twelve months. Hughes' written personnel policies also provided that an applicant who admitted to former drug or alcohol use could be considered for employment if the drug screen of the applicant returned negative.

Thus, the unwritten, oral custom that Hughes claimed served to bar Mr. Hernandez from competing for the job openings was at odds with Hughes written, formal personnel policies regarding drug abuse.

In any event, the district court granted Hughes' motion for summary judgment without explanation on January 30, 2001, and dismissed Mr. Hernandez's complaint.

Mr. Hernandez timely appealed from the district court's judgment.

The Court of Appeals reversed the district court's judgment for two reasons.

First, based on Hughes' express admission that "Hernandez's application was rejected based on [1] his demonstrated drug use while previously employed, and [2] the complete lack of evidence indicating successful drug rehabilitation," the Ninth Circuit concluded that a material factual dispute existed regarding the question of Hughes' intent in terminating Mr. Hernandez and hence summary judgment was precluded. *Hernandez v. Hughes Missile Systems Company*, 298 F.3d 1030, 1034 (9th Cir. 2002).

Second, the Court of Appeals also concluded that Hughes' alleged custom of automatically excluding former employees discharged for misconduct from the applicant pool violated the ADA as applied to Mr. Hernandez because (1) the misconduct that resulted in Mr. Hernandez's discharge consisted only of testing positive for illegal drugs, (2) that status was causally related to his drug addiction, and (3) Mr. Hernandez was now in recovery. *Id*. at 1036-1037.

This Court granted Hughes' Petition for a Writ of Certiorari on February 24, 2003, 123 S. Ct. 1255.

ARGUMENT

1. Hughes had direct, actual notice of Mr. Hernandez's disability.

Hughes claims that "it is undisputed that the decisionmaker [who excluded Mr. Hernandez's application from the applicant pool, a labor relations representative named Joanne Bockmiller] did not know that Hernandez was 'disabled' within the meaning of the ADA." *Brief for Petitioner*, p. 29.[2]

This assertion is belied by the record.

First, it is undisputed that Mr. Hernandez's application to Hughes contained a letter regarding his successful struggle against alcoholism written on his behalf by Mr. John L. Lyman, M.S. Joint Appendix 14a-15a. Mr. Lyman had extensive experience in working with recovering alcoholics, and he worked with Mr. Hernandez at Alcoholics Anonymous. *Id*. In his letter of April 26, 1993, Mr. Lyman wrote that:

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2. In its opinion, the Court of Appeals concluded that "it is not disputed that Hernandez was 'disabled' within the meaning of the ADA at the time he resigned in lieu of termination, and a record of that disability existed." *Hernandez v. Hughes*, 298 F.3d at 1034 n.9. In its Petition for a Writ of Certiorari, Hughes did not seek this Court's review of the Court of Appeal's conclusion that Mr. Hernandez's addiction to drugs and alcohol constituted a "disability" under the Act.

Nevertheless, in its Brief, at pages 28-29, Hughes faults the Court of Appeals for allegedly undertaking "no analysis of whether Hernandez's drug use ever amounted to an addiction or impaired his ability to engage in any major life activity." (Italics Omitted.) Because Hughes did not seek certiorari on the question of Mr. Hernandez's disability, that issue is not before this Court. *See* Sup. Ct. R. 14.1(a).

Gentlemen:

I have known Mr. Hernandez for almost a year. I have seen him occasionally at his place of employment and frequently at meetings of Alcoholics Anonymous.

I have worked with *recovering alcoholics* for ten years and have screened people for the New Hampshire Department of Motor Vehicles and referrals from state and federal parol boards, among my other duties.

I volunteered to write you on behalf of Joel Hernandez as I have seen steady and consistent progress in his recovery from this disease.

Joel attends A.A. regularly, participates in discussion when appropriate, is maintaining his sobriety, and is in all a good and active member.

Alcoholics Anonymous has clearly been demonstrated as the best recovery tool for alcoholics and Joel's commitment to the program demonstrates to me his willingness to accept responsibility for his recovery.

In summary, I would heartily recommend Joel Hernandez for any position for which he is qualified. He is a diligent and caring individual who seems to merit a *second chance.*

> You may, if you wish, contact me at home for further information since I am not currently in formal practice due to health problems.
>
> Sincerely,
>
> John L. Lyman, M.S.

Id. (emphasis added). Based on Mr. Lyman's letter, Hughes had direct notice that (1) Mr. Hernandez suffered from the "*disease of alcoholism*," (2) Mr. Hernandez was "maintaining his sobriety," and (3) Mr. Hernandez "regularly" attended AA meetings and was "in all a good and active member" of Alcoholics Anonymous.

Mr. Lyman's letter also recognized that Mr. Hernandez was seeking employment and that he merited "a second chance." Under the circumstances, the reference to a "second chance" suggested that Mr. Hernandez's previous separation from Hughes was related to his struggle with alcohol and drug addiction.

Finally, Mr. Hernandez's personnel files with Hughes disclosed that he suffered from "alcohol dependence continuous," "cannabis dependence continuous," and "cocaine abuse continuous." *See* J.A. at 30a. Indeed, Mr. Hernandez resigned from Hughes only after he had failed a drug test administered to him after his supervisor suspected that he smelled of alcohol, and Mr. Hernandez's "Employee Separation Form" at Hughes indicated that he had been "DISCHARGED FOR PERSONAL CONDUCT," indicating in parenthesis that he had "quit in lieu of discharge."

Indeed, the simple fact that Hughes knew that Mr. Hernandez was a recovering alcoholic was enough to put it on notice that Hernandez had "a record of an impairment" that might constitute a "disability" under the ADA. *See, e.g., EEOC Technical Assistance Manual*, VIII § 8.2 ("A person who is an alcoholic is an 'individual with a disability' under the ADA"), *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001) (alcoholism is a protected disability under ADA); *Mararri v. WCI Steel, Inc.*, 130 F.3d 1180, 1185 (6th Cir. 1997) ("There is no dispute that alcoholism is a disability within the protection of the ADA").

As the Court of Appeals concluded below,

> It is true that Bockmiller testified that she did not know of Hernandez's history of drug addiction or of the reason for his leaving the company in 1991. However, she also testified that at the time of her review she pulled Hernandez's entire personnel file, which would have included the 1991 drug test results. She also stated that, although she did not remember what Hernandez attached to his application, she would have seen any materials he submitted, which included the letter from his A.A. counselor [John Lyman]. It would be reasonable to infer from the presence of this letter that Bockmiller was aware of the fact that Hernandez was a recovering alcoholic and that, with that knowledge, she would have checked the personnel file to determine the reason for his earlier termination. In short, the Bockmiller evidence, which itself permits an inference that she was aware of Hernandez's positive drug

> test, does not eliminate the question of fact that arises as a result of Hughes's explicit statements to the EEOC that the application was rejected because of Hernandez's prior drug addiction. Thus, Hernandez raises a genuine issue of material fact as to whether he was denied re-employment because of his past record of drug addiction.

Hernandez v. Hughes Missile Company, 298 F.3d at 1034 (9th Cir. 2002). This conclusion is underscored by Ms. Bockmiller's admission that she discussed Mr. Hernandez's separation from Hughes with George Medina, the author of Hughes position statement to the EEOC. J.A. at 57a.

In *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2001), this Court recently noted that when considering a motion for summary judgment,

> the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

In this case, although Joanne Bockmiller claimed that she did not know that Mr. Hernandez had a history of drug and alcohol addiction, she was not a "disinterested witness," but an employee attempting to shield her employer from potential liability. Moreover, Ms. Bockmiller's testimony was impeached by (1) the letter written by John Lyman that was attached to Mr. Hernandez's job application, which Ms. Bockmiller admits was available for her review, (2) the position statement that Hughes provided to the EEOC signed by George Medina admitting that "Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation," J.A. at 19a, and (3) Ms. Bockmiller's admission that she discussed Mr. Hernandez's separation from Hughes with George Medina. *Id.* at 57a.

Under these circumstances, drawing all reasonable inferences in Mr. Hernandez's favor, the Court of Appeals was correct in remanding this dispute to the district court so that a finder of fact could resolve the question of Hughes' alleged discriminatory intent in excluding Mr. Hernandez's job application from the applicant pool.

2. Hughes' alleged unwritten policy of automatically rejecting the job applications of former employees terminated for violating company rules is a pretext for Hughes' discriminatory treatment of Mr. Hernandez.

It was only after the EEOC issued its Letter of Determination concluding that Hughes' treatment of Mr. Hernandez violated the ADA and after the case proceeded to litigation that Hughes claimed—for the first time—that it refused to consider Mr. Hernandez's application based on an alleged unwritten policy of never rehiring former employees terminated for

misconduct. In *Reeves v. Sanderson Plumbing*, 530 U.S. at 147, this Court acknowledged that "[p]roof that the defendant's explanation [of the conduct alleged to be discriminatory by the plaintiff] is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."

In this case substantial evidence proves that Hughes' alleged reason for excluding Mr. Hernandez's application from the applicant pool was merely a pretext to mask unlawful discrimination.

First, Hughes' assertions regarding its alleged unwritten policy of never rehiring former employees terminated for misconduct were impeached by its initial written submission to the EEOC. Specifically, in the position statement to the EEOC signed by George Medina regarding its treatment of Mr. Hernandez, Hughes admitted that:

> [Mr.] Hernandez's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.
>
> . . . .
>
> Section 1630.3(b) of the ADA provides that the term "disability" and "qualified individual with a disability" may not exclude an individual who: has successfully completed a supervised drug rehabilitation program and is no longer engaged in the illegal use of drugs; or an individual who is participating in a supervised rehabilitation

> program and is no longer engaging in such use. However, this provision is not applicable to this situation as [Mr. Hernandez] has provided no evidence to demonstrate he has either successfully completed or is currently undergoing drug rehabilitation.[3]

J.A. at 19a. It is important to emphasize that Hughes' *first* explanation for refusing to consider Mr. Hernandez's job application admitted that the refusal was based on Mr. Hernandez's history of drug abuse and that Hughes invoked its "unwritten policy" explanation only *after* it had been sued.

Based on the chronology of Hughes' explanations, a finder of fact could reasonably conclude that the more recent explanation was not factual. *See generally, E.E.O.C. v. Sears Roebuck and Co.*, 243 F.3d 846, 852 (4th Cir. 2001) ("a factfinder could infer from the late appearance of [the employer's] current justification that it is a post-hoc rationale, not a legitimate explanation for [its] decision not to hire [the employee]"), *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 813 (10th Cir. 2000) ("We are disquieted . . . by an employer who 'fully' articulates its reasons for the first time months after the decision was made").

Hughes' explanations for its refusal to consider the merits of Mr. Hernandez's application were also contradictory and unconvincing. As the First Circuit recently noted in *Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 432 (1st Cir. 2000):

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3. Of course, Mr. Lyman's letter of April 26, 1993 regarding Mr. Hernandez's participation in Alcoholics Anonymous constituted the very evidence of rehabilitation that Hughes claimed that Mr. Hernandez had failed to provide.

> When a company, at different times, gives different and arguably inconsistent explanations [regarding its reasons for terminating an employee], a jury may infer that the articulated reasons are pretextual.

See also Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1167 (6th Cir. 1996) ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext"), *Kobrin v. University of Minnesota*, 34 F.3d 698, 703 (8th Cir. 1994) ("Substantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext"), *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1422 (7th Cir. 1992) ("A jury's conclusion that an employer's reasons were pretextual can be supported by inconsistencies in or the unconvincing nature of the decisionmaker's testimony").

It is also significant that Hughes' alleged policy is oral and not written. As the court observed in *Dunning v. National Industries, Inc.*, 720 F. Supp. 924, 931 (D. Ala. 1989):

> [T]his court cannot overlook that unwritten policies, as opposed to written policies, can be easily turned into tools of discrimination. . . . These circumstances allow for more discretionary, and therefore potentially more discriminatory, enforcement of the policy.

This conclusion is especially applicable in this case given the fact that no one at Hughes could identify the origin, history, or scope of the alleged unwritten policy.

The alleged unwritten policy was also at odds with Hughes' written personnel policies regarding employee drug abuse. Specifically, Hughes' written personnel policies regarding drug abuse provided that if an applicant for employment tested positive for drugs or alcohol, the applicant was merely rendered ineligible for employment with Hughes for the following twelve months, not forever. Similarly, Hughes' written personnel policies provided that an applicant who admitted to former drug or alcohol use could nevertheless be considered for immediate employment if the drug screen of the applicant returned negative. Finally, Hughes' written personnel policies did not require that employees testing positive for illegal drugs (like Mr. Hernandez) be terminated or not be rehired.

Simply stated, Hughes' alleged unwritten policy could not be rationally squared with its written policies regarding drug use. As the Court of Appeals observed in this regard:

> It is interesting to note that Hughes puts a long time employee who is fired for drug use and has since been rehabilitated in a less favorable position than a new applicant who is a current drug user. Hughes does not exclude from employment a new applicant who may be a drug user. A new applicant must take a drug test in order to qualify for employment. If he tests positive for drug use, he is not automatically excluded from working for Hughes; rather, he is ineligible for 12 months but may re-apply after that time period has passed. In contrast, a long time employee who slips is barred forever.

Hernandez v. Hughes Missile Systems, 298 F.3d at 1036 n.16. These facts rendered the very existence of Hughes' alleged unwritten policy suspect.

Under these circumstances, in accordance with the standards set forth by this Court in *Reeves*, the Ninth Circuit was correct in remanding the dispute for resolution by a finder of fact.

3. Hughes' alleged unwritten rule of never rehiring former employees terminated for violating company policy violates the ADA as applied to Mr. Hernandez.

Even assuming for purposes of argument that Hughes' alleged unwritten rule of never rehiring former employees terminated for violating company policy actually exists, and that the rule was not misused as a pretext for Hughes's discriminatory treatment of Mr. Hernandez, the rule would nevertheless violate the ADA as applied to Mr. Hernandez.

Hughes describes its unwritten "rule" as "uniform," "blanket," "flat," and permitting of no "exceptions." *See Brief of Petitioner*, p. 3. However, the ADA expressly applies to hiring rules (like the unwritten rule in this case), *see* 42 U.S.C. § 12112(a), and prohibits "exclusionary qualification standards" that prevent the disabled from "fully participating" in the workforce. *See* 42 U.S.C. § 12101(a)(8).

Specifically, under the Act, an employer "discriminates" against an otherwise qualified individual with a disability if the employer uses

> qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability . . . unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related

> for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6).

In this case, Hughes makes no attempt to demonstrate that its rule regarding the rehiring of former employees terminated for violating company rules is "job-related" as to the position for which Mr. Hernandez applied, a "Product Test Specialist." In fact, based on the fact that Hughes claims that its unwritten rule applies to all "positions" at Hughes, it would be impossible for Hughes to establish that the rule was somehow related to the particular position for which Mr. Hernandez applied.

Nor has Hughes made any showing that its alleged rule is consistent with "business necessity." Indeed, Hughes would be precluded from even attempting to make such a showing at this late juncture, because it failed to do so in *both* the district court and the Court of Appeals. *See Hernandez v. Hughes Missile Systems*, 298 F.3d at 1037 n.19 ("We note that Hughes has not raised a business necessity defense, *see* 42 U.S.C. § 2113(a), and we do not consider when, if ever, such a defense might be available with respect to the hiring of a rehabilitated drug addict").

This conclusion is especially applicable in this case based on the alleged "uniform" and "blanket" nature of Hughes' unwritten rule. As this Court recognized in *PGA Tour v. Martin*, 532 U.S. 661, 688 (2001), an entity covered by the Act must make an "individualized inquiry" *before* refusing to modify its "policies, practices, or procedures" in order to accommodate a "particular person's disability."

Because Hughes failed to even attempt to make such an "individualized inquiry" before (or after) it decided to exclude Mr. Hernandez's job application from the applicant pool, Hughes violated Mr. Hernandez's rights under the ADA.

Although Hughes asserts that "regarded as" and "record of" ADA plaintiffs are not entitled to reasonable accommodations, Petitioner's Brief at p. 18, this assertion is refuted by the specific language of the statute. Specifically, the Act provides that:

> It may be a defense to a charge of discrimination under this Act that an alleged application of qualifications standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job related and consistent with business necessity, and such performance cannot be accomplished by *reasonable accommodation*, as required under this title.

(Emphasis added.) Accordingly, the express language of the Act requires that an employer's qualification standards must be modified in order to accommodate an otherwise qualified disabled individual, unless the employer can show that the accommodation is inconsistent with "business necessity." The Court's opinion in *PGA Tour v. Martin*, 532 U.S. 661, 688 (2001), reflects this principle.

Finally, Hughes claims that the "second chance" that Mr. Hernandez allegedly seeks from Hughes is not a "reasonable" accommodation in any event, *see Brief of Petitioner* at p. 23. In fact, Mr. Hernandez is *not* asking for a

second chance. Mr. Hernandez resigned from Hughes in lieu of termination as a result of testing positive for cocaine. Mr. Hernandez has suffered the consequences of that mistake, being forced to leave the job that he had held for twenty-five years and losing his salary and attendant benefits.

When Mr. Hernandez applied to Hughes in January of 1994, he did not ask for a "second chance" by trying to get his old job back. Instead, he sought only the opportunity to *compete* for a new job at Hughes. The ADA requires nothing less.

CONCLUSION

For the reasons set forth above, this Court should AFFIRM the judgment of the Court of Appeals.

Respectfully submitted,

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