No. 02-749

In the Supreme Court of the United States

RAYTHEON COMPANY, PETITIONER

v.

JOEL HERNANDEZ

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an employer's general policy against rehiring former employees who were discharged for misconduct, when applied to a former drug user who was lawfully discharged for using illegal drugs, constitutes "disparate treatment" prohibited by Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111-12117.

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INTEREST OF THE UNITED STATES

This case concerns whether an employer's general policy against rehiring former employees who were discharged for misconduct, when applied to a former drug user who was lawfully discharged for using illegal drugs, constitutes "disparate treatment" prohibited by Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111-12117. Congress delegated to the Equal Employment Opportunity Commission (EEOC) and Department of Justice authority to promulgate regulations and enforce the provisions of the ADA. Both agencies have promulgated regulations and interpretive guidance concerning the obligations of employers with respect to their current and former

employees who use (or have used) illegal drugs. Moreover, because the Rehabilitation Act makes the standards of Title I of the ADA applicable to the federal government, see 29 U.S.C. 791(g), the United States, as the Nation's largest employer, has a significant interest in the protections afforded to current and former employees who use or have used illegal drugs. See also 29 U.S.C. 793(d) (ADA standards applicable to government contractors); 41 C.F.R. Pt. 60-741.

STATEMENT

1. Title I of the ADA prohibits an employer 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 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 * * * an impairment" that substantially limits a major life activity. 42 U.S.C. 12102(2).

"Discrimination" can take several forms under the ADA. Most fundamentally, the term encompasses the disparate treatment of individuals with disabilities "because of the disability." 42 U.S.C. 12112(a). Second, it includes so-called "disparate impact" claims, *i.e.*, claims that an employer is "using 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 with disabilities unless the standard, test or other selection criteria * * * is

shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6). An employer also may discriminate by failing to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" or by denying employment opportunities to an otherwise-qualified job applicant or employee because of "the need * * * to make reasonable accommodation to [that person's] physical or mental impairment." 42 U.S.C. 12112(b)(5).

The term "qualified individual with a disability" means "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). Congress specifically provided that the term does not encompass "any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. 12114(a). In addition, the ADA expressly provides that employers

> may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
>
> may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace; [and]
>
> * * * * *
>
> 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.

42 U.S.C. 12114(c)(1)-(2) and (4) (subsection numbering omitted). The ADA does not prohibit employers from testing employees or applicants for illegal drugs "or making employment decisions based on such test results." 42 U.S.C. 12114(d)(2).

The ADA does, however, "provide[] limited protection from discrimination for recovering drug addicts and for alcoholics." EEOC, *Technical Assistance Manual for the Americans With Disabilities Act* VIII-1 (1992). An individual who is no longer engaging in illegal drug use may be a "qualified individual with a disability" if he or she has been successfully rehabilitated or is participating in a supervised rehabilitation program. 42 U.S.C. 12114(b)(1) and (2). An individual also may be considered a "qualified individual with a disability" if he or she "is erroneously regarded as engaging in [illegal drug use], but is not engaging in such use" (42 U.S.C. 12114(b)(3)) and "the employer actually perceives the [drug use] to substantially limit a major life activity of the employee." *Parry* v. *Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 311 (6th Cir. 2000) (collecting authorities), cert. denied, 533 U.S. 951 (2001).

Neither the EEOC nor the Justice Department has issued guidance that specifically addresses the validity under the ADA of applying blanket policies against rehiring employees separated for misconduct to an individual lawfully discharged for drug use.

2. Respondent Joel Hernandez is a former employee of Hughes Missile Systems Company.[1] Pet. App. 2a.

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[1] Petitioner Raytheon Company acquired Hughes in 1997. For simplicity, both Hughes and Raytheon will be referred to as "petitioner."

Petitioner came close to terminating respondent in 1986 because of excessive absenteeism. Br. in Opp. 2. When respondent indicated that his absenteeism was caused by his alcoholism, petitioner allowed him to avoid discharge by enrolling in an in-patient alcohol rehabilitation program. *Ibid.*; J.A. 17a.

In July 1991, respondent reported for work displaying signs of substance abuse. J.A. 18a. Petitioner administered a drug test to respondent, who tested positive for cocaine. Pet. App. 2a. Respondent was given a choice between being discharged or resigning in lieu of termination. *Ibid.* Respondent chose to resign. The "Employee Separation Summary" petitioner prepared at the time of respondent's resignation stated that he had "quit in lieu of discharge" and that the reason for his departure was "discharge for personal conduct." *Ibid.*

In January 1994, respondent applied to be rehired by petitioner either in his former position as a Calibration Service Technician or as a Product Test Specialist, a position for which the company had openings. Pet. App. 2a-3a. Respondent noted on his application that he had been employed by petitioner previously. *Id.* at 3a. Respondent also attached to his application a letter from a counselor stating that he regularly attends Alcoholics Anonymous meetings, that he maintains his sobriety, and that he has accepted responsibility for his recovery. J.A. 14a-15a.

Respondent's application was forwarded to petitioner's Labor Relations Department, where it was reviewed by Joanne Bockmiller. Pet. App. 3a. Bockmiller testified in her deposition that she pulled respondent's personnel file and reviewed the employee separation summary. *Ibid.* Bockmiller testified that she concluded respondent was ineligible for rehire based on the com-

pany's unwritten policy against rehiring former employees who were discharged for misconduct or who had resigned in lieu of termination. Pet. App. 4a; J.A. 57a-58a. Bockmiller stated that, at the time, she was unaware that respondent had any history of drug or alcohol abuse and testified that "the personnel file would not indicate that information," which would instead be kept in a separate confidential file. J.A. 55a, 56a-57a, 60a; Pet. App. 4a. Petitioner rejected respondent's application. Pet. App. 3a.

3. In June 1994, respondent filed a charge with the EEOC, claiming that petitioner's refusal to rehire him violated the ADA. In response to respondent's charge, petitioner submitted to the EEOC a statement prepared and signed by a contract employee on behalf of George Medina, petitioner's Manager of Diversity. J.A. 67a-68a; Pet. App. 4a. Bockmiller testified that she did not participate in preparing the statement. J.A. 51a, 64a.

The Medina statement "denied that [petitioner] was discriminated against" and said that respondent'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. 19a. The statement noted that "[t]he Company maintains it[]s right to deny re-employment to employees terminated for violation of Company rules and regulations" (J.A. 20a), and that respondent was ineligible for hire because he had tested positive for illegal drugs at work and accordingly "was discharged for violation of Company Rule and Regulation No. 7."[2]

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[2] Rule and Regulation 7 prohibits:

> Unauthorized or unlawful manufacture, distribution, dispensing, sale, possession, consumption, use or being under the

Ibid. In November 1997, the EEOC District Director issued respondent a determination finding "reasonable cause to believe that [respondent] was denied hire to the position of Product Test Specialist because of his disability." J.A. 95a. The EEOC issued a right to sue letter in June 1998. Pet. App. 4a n.5.

4. Respondent filed suit against petitioner under the ADA in July 1998 (Pet. App. 5a), alleging that petitioner discriminated against him "because of his record of drug addiction or because he was perceived as being a drug addict." *Id.* at 6a. Petitioner moved for summary judgment, arguing that Bockmiller had declined to rehire respondent based solely on petitioner's unwritten policy of not rehiring persons who were discharged for misconduct or who resigned in lieu of termination, and that Bockmiller had acted without knowing of respondent's drug use. *Id.* at 5a. Petitioner also argued that respondent had failed to present evidence that petitioner's reliance on the no-rehire policy was pretextual. *Ibid.*

Respondent argued that petitioner had refused to rehire him because of his record of drug use, and asserted that its reliance on the no-rehire policy was pretextual. C.A. E.R. Tab 7, at 10-12. Respondent also argued that petitioner's unwritten policy of not rehiring employees terminated for misconduct, although "facially neutral," had a "disparate impact" on employees with a history of drug or alcohol abuse. *Id.* at 13-14. Respondent raised no reasonable accommodation claim. See *id.* at 13.

> influence of alcohol, a controlled substance or illegal drug during working time, while performing work for the Company or at any time on Company premises; or testing positive for alcohol or drugs on a test requested by the Company.

J.A. 20a (emphasis omitted).

After a hearing, the district court granted petitioner summary judgment without a written opinion. Pet. App. 16a. The district court declined to consider respondent's "disparate impact" claim, finding that respondent had "fail[ed] to plead or raise the theory in a manner consistent with" circuit precedent. *Id.* at 16a n.1.

5. The court of appeals reversed the grant of summary judgment on respondent's disparate treatment claim and remanded, holding that there were genuine issues of material fact about whether petitioner refused to rehire respondent because of his perceived disability or record of disability. Pet. App. 1a-13a. The court first held that respondent had made a prima facie case of disability discrimination, based on petitioner's statement to the EEOC that it had rejected respondent's application "based on his demonstrated drug use." *Id.* at 7a. Although noting that "Bockmiller testified that she did not know of [respondent's] history of drug addiction or of the reason for his leaving the company" (*ibid.*), the court observed that Bockmiller had available respondent's "entire personnel file," which, the court believed, "would have included the 1991 drug test results." *Id.* at 8a. The court also concluded "[i]t would be reasonable to infer from the presence of th[e] letter" respondent appended to his application from his A.A. counselor "that Bockmiller was aware of the fact that [respondent] was a recovering alcoholic." *Ibid.* Accordingly, the court of appeals concluded, "the burden switched to Hughes to offer a legitimate nondiscriminatory reason for its actions." *Id.* at 10a.

The court next rejected petitioner's claim that its "unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules" was a legitimate non-discriminatory reason for

failing to rehire respondent. Pet. App. 11a. The court concluded that the policy, "although not unlawful on its face, violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." *Ibid.* Even if Bockmiller were unaware of respondent's past drug use and simply denied his application because of petitioner's general no-rehire policy, "her lack of knowledge would have been due solely to Hughes's unlawful policy which shields its employees from the knowledge that an employment decision may be illegal." *Id.* at 12a. The court concluded (*ibid.*):

> Maintaining a blanket policy against rehire of *all* former employees who violated company policy * * * may well result, as Hughes contends it did here, in the staff member who makes the employment decision remaining unaware of the 'disability' and thus of the fact that she is committing an unlawful act. Having willfully induced ignorance on the part of its employees who make hiring decisions, an employer may not avoid responsibility for its violation of the ADA by seeking to rely on that lack of knowledge.

The court of appeals affirmed the district court's ruling that respondent had failed to properly raise a claim of disparate impact. Pet. App. 13a n.20.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that a company's facially neutral policy against rehiring former employees who have been discharged for violating company conduct rules "violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." Pet. App. 11a. Such a policy does not constitute "disparate treatment" on the basis of disability, because it applies equally to all former employees discharged for misconduct, regardless of the type of misconduct that was the basis for the discharge, and regardless of whether the former employee suffered a disability. Indeed, the ADA explicitly permits employers to hold drug users and alcoholics to the same standards of conduct as other employees. See 42 U.S.C. 12114(c)(4). Accordingly, the ADA's prohibition on disparate treatment neither forbids discharge for drug use nor forbids adoption of a facially neutral policy against rehiring individuals discharged for misconduct, including drug-related misconduct.

The court of appeals' decision undercuts the effectiveness of workplace conduct rules, which represent a legitimate effort by employers to promote workplace safety and productivity. By preventing firms from adopting blanket rules imposing permanent consequences for serious misconduct, including drug-related misconduct, the court of appeals' decision "indirectly but unmistakably undermine[s] the [rules] that regulate dangerous behavior." *Despears* v. *Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995).

Not only must the decision below be reversed, but petitioner is entitled to summary judgment. The evidence in the record, taken in the light most favorable to

respondent, does not demonstrate that petitioner refused to rehire him because of a record of disability or perceived disability, but did so because of its neutral no-rehire policy. Respondent has presented insufficient evidence to support a finding that application of that policy was a pretext for discrimination on the basis of disability.

ARGUMENT

A. Application Of A Facially Neutral Policy Prohibiting The Rehiring Of Former Employees Discharged For Misconduct Does Not Constitute "Disparate Treatment" Prohibited By The ADA

The court of appeals erred in holding that a company's "blanket policy against rehir[ing] of *all* former employees" (Pet. App. 12a) discharged for violating neutral company conduct rules "violates the ADA as applied to former drug addicts whose only work-related offense was testing positive because of their addiction" (*id.* at 11a)—even if "the staff member who makes the employment decision [is] unaware of the 'disability.'" *Id.* at 12a. That holding conflicts with the text of the ADA, and with broader principles of anti-discrimination law.

1. The most basic feature of the ADA, and the only one at issue here, see p. 17, *infra*, is the Act's prohibition on the "[u]njustified disparate treatment" of otherwise similarly situated individuals because of their disability. *Olmstead* v. *L.C.*, 527 U.S. 581, 607 (1999) (Stevens, J., concurring in part and concurring in the judgment); cf. *Traynor* v. *Turnage*, 485 U.S. 535, 548 (1988) ("the central purpose of § 504 [of the Rehabilitation Act] * * * is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals"). An employer's neutral

policy against rehiring former employees who were discharged for violating conduct rules (or who resigned in lieu of discharge) does not facially conflict with the ADA's prohibition on disparate treatment of the disabled.[3]

To begin with, such a policy does not involve "treat[ing] some people less favorably than others" because of a protected characteristic. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 609 (1993) (quoting *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 n.16 (1977)); accord 2 EEOC Compl. Man. (BNA) 604:0001 (2002). Rather, as the court of appeals itself recognized, such facially neutral policies involve a "blanket [prohibition] against rehir[ing] of *all* former employees" terminated for misconduct. Pet. App. 12a. Such a policy applies on an equal basis to all employees regardless of the type of misconduct that was the basis for their discharge—whether it was for fighting, sexual harassment, theft, or (as here) testing positive for illegal drugs during work hours. Similarly, rules against testing positive for illegal drugs or being drunk in the workplace apply regardless of whether the employee is addicted or is merely a casual user, an alcoholic or a social drinker.

Moreover, the ADA textually permits employers to hold drug addicts and alcoholics to the same standards

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[3] The court of appeals proceeded on the understanding that petitioner's no-rehire policy extended both to employees discharged for misconduct and those who resigned in lieu of discharge for misconduct. See, *e.g.*, Pet. App. 4a n.4 ("for the purposes here—the rehiring of former employees—there appears to be no difference in Hughes's treatment of employees who were terminated as opposed to those who resigned under threat of termination"); *id.* at 12a n.17 ("There is no question that Hughes applied this [no-rehire] policy in rejecting Hernandez's application.").

as other employees: employers "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 [it] holds other employees, even if the unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." 42 U.S.C. 12114(c)(4); see 29 C.F.R. 1630.16(b)(4). Thus, if a company ordinarily fires employees for excessive absenteeism or coming to work under the influence of drugs or alcohol, it may do the same when the employee is an alcoholic or addicted to drugs. "It is well-established that an employee can be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred under the influence of a disability. This rule is particularly applicable to employees who violate rules relating to drug or alcohol abuse." *Pernice* v. *City of Chicago*, 237 F.3d 783, 785 (7th Cir. 2001) (citation omitted). "The refusal to excuse, or even alleviate the punishment of, the disabled person who commits [misconduct] under the influence as it were of his disability * * * is not 'discrimination' against the disabled; it is a refusal to discriminate in their favor." *Despears* v. *Milwaukee County*, 63 F.3d 635, 637 (7th Cir. 1995).[4]

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[4] Accord, *e.g.*, *Technical Assistance Manual for the Americans With Disabilities Act* VIII-5 (1992) ("[u]nsatisfactory behavior such as absenteeism, tardiness, poor job performance, or accidents caused by alcohol or illegal drug use need not be accepted or accommodated"); 2 EEOC Compl. Man. (BNA) 902:0006 n.11 (employer "does not have to excuse [employee] misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees"); 1 EEOC Compl. Man. (BNA) 0:3806 (same); *Salley* v. *Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998) ("drug-related misconduct is a legitimate, non-discriminatory rea-

By the same token, if the company ordinarily bars former employees terminated under such circumstances from being rehired, it may apply the same standard to former employees who are recovering alcoholics or drug addicts. See, *e.g.*, *Harris* v. *Polk County*, 103 F.3d 696, 697 (8th Cir. 1996) (concluding that ADA permits employer's refusal to rehire former employee discharged because of criminal conviction allegedly related to mental illness, because "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees"). Employment actions taken pursuant to such a facially neutral policy do not represent action taken "because of the disability of [an] individual." 42 U.S.C. 12112(a).

In a disparate treatment case, "liability depends on whether the protected trait * * * *actually motivated* the employer's decision * * * and had a *determinative influence* on the outcome." *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper*, 507 U.S. at 610) (emphasis added); see

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son for termination" of a drug addict); *Mararri* v. *WCI Steel, Inc.*, 130 F.3d 1180, 1182 (6th Cir. 1997) (discharge for testing positive for alcohol at work in violation of agreement with employer was lawful under the ADA because employee was "discharged * * * for violating the agreement, not for being an alcoholic"). The Rehabilitation Act—which Congress used as a model in drafting the ADA, see *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998)—also permits employers to make employment decisions based on alcohol- and drug-related misconduct. See *Newland* v. *Dalton*, 81 F.3d 904, 906 (9th Cir. 1996); *Leary* v. *Dalton*, 58 F.3d 748, 753 (1st Cir. 1995); *Little* v. *FBI*, 1 F.3d 255, 259 (4th Cir. 1993); 43 Op. Att'y Gen. 75, 86 (1977) ("we do not believe that section 504 [of the Rehabilitation Act] would prevent [an alcoholic or drug-addicted employee] from being subject to reasonable, generally applicable rules of conduct that are related to this condition, such as proscriptions against the possession or use of drugs or alcohol").

Personnel Adm'r v. *Feeney*, 442 U.S. 256, 279 (1979) (action must be taken "*because of* * * * its adverse effects upon an identifiable [protected] group") (emphasis added). Accordingly, this Court has held that it does not constitute discrimination to make an employment decision based on a factor that is "correlated with" a protected characteristic, so long as there is an analytical distinction between the two.

In *Hazen Paper*, for example, the Court held that terminating an employee because his pension was about to vest, although prohibited under ERISA, did not violate the Age Discrimination in Employment Act of 1967. The Court noted that while entitlement to pension benefits is "correlated with age" (507 U.S. at 611) because "older employees * * * are more likely to be 'close to vesting' than younger employees" (*id.* at 612), an employee's age was nonetheless "analytically distinct from his years of service." *Id.* at 611. Accordingly, the Court concluded, "it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Ibid.*; cf. *Feeney*, 442 U.S. at 271, 279-280 (holding that facially neutral hiring preference for veterans did not constitute unconstitutional intentional sex discrimination, although a "substantially greater proportion" of beneficiaries were men).

While addiction to illegal drugs, use of illegal drugs, and drug-related misconduct are correlated, they nonetheless are analytically distinct. Many people who test positive for illegal drugs in the workplace are casual drug users rather than addicts, and many recovering addicts refrain from illegal drug use. Thus, termination for a positive drug test—and refusal to rehire a person terminated for drug-related misconduct—do not represent prohibited discrimination "because of the disability of [an] individual." 42 U.S.C. 12112(a). The courts of

appeals have recognized that fact by consistently drawing a "distinction between discharging someone for unacceptable [drug- or alcohol-related] misconduct and discharging someone because of" drug addiction or alcoholism. *Maddox* v. *University of Tenn.*, 62 F.3d 843, 847 (6th Cir. 1995) (collecting authorities); accord *Renaud* v. *Wyoming Dep't of Family Servs.*, 203 F.3d 723, 730 (10th Cir. 2000) (noting that "where the disability at issue is alcoholism, * * * the ADA recognize[s] a dichotomy between the disability and disability-caused misconduct" such as being intoxicated at work); *Nielsen* v. *Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998) (the ADA "clearly contemplate[s]" this distinction).

Furthermore, when the decision not to rehire a person reflects the application of a blanket policy against rehiring former employees who were discharged for misconduct—even when the reason for discharge was drug use, and the person was an addict at the time—it does not implicate the "primary purpose" of the ADA, which is to "eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in * * * the workplace." *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002); cf. *Olmstead*, 527 U.S. at 600. See generally 42 U.S.C. 12101(a)(7). Rather, it results from the person's individual merit, as demonstrated by his or her conformance with company rules of conduct. Accordingly, policies against rehiring former employees who were discharged for misconduct (or who resigned in lieu of termination) are not inconsistent with the ADA's prohibition on disparate treatment of the disabled.

2. This is not to say that a policy that prohibited the rehiring of employees discharged for misconduct could

not give rise to liability under the ADA. However, such a policy would be properly analyzed as a disparate impact claim under 42 U.S.C. 12112(b)(6), rather than as a disparate treatment claim. For example, a policy that barred *only* persons discharged for drug use from consideration for rehiring might be challenged as having a disparate impact on individuals with the disability of addiction. Such a disparate impact challenge must account for the ADA's express provision that employers "may hold an employee who engages in the illegal use of drugs * * * to the same qualification standards for employment or job performance and behavior that [it] holds other employees, even if the unsatisfactory performance or behavior is related to drug use." 42 U.S.C. 12114(c)(4). Accordingly, a disparate impact challenge to a neutral policy, like the one at issue here that precludes the rehiring of any employee who was discharged for any form of serious misconduct, would be more difficult to sustain.

Respondent has not preserved a disparate impact claim here.[5] Accordingly, this case presents a situation analogous to the one this Court confronted in *Hazen Paper*. There, the Court carefully distinguished beween disparate treatment and disparate impact claims, 507 U.S. at 609, noted that the employee brought only the former, *id.* at 610, and concluded that a decision that is based on a factor other than age, even if correlated with age, does not constitute forbidden disparate treat-

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[5] Both the district court (Pet. App. 16a n.1) and court of appeals concluded that respondent had "failed to timely raise [a] claim of disparate impact" (*id.* at 13a n.20), and respondent did not cross-petition to seek review of that holding. Accordingly, the claim is not before the Court. *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 92 n.2 (1978) (per curiam); *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 279 n.2 (1976).

ment. *Id.* at 611. In the same way, to the extent reliance on the no-rehiring policy was not pretextual, see pp. 23-25, *infra*, a decision based on that policy does not constitute disparate treatment forbidden by the ADA.

B. The Court Of Appeals' Holding Will Disrupt Legitimate Workplace Rules Designed To Promote Safety And Productivity

Workplace conduct policies advance three important interests: they help fulfill the employer's duty, imposed under the common law and the law of many states, to "exercise reasonable care in providing a safe workplace" (*International Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851, 859 (1987); Ralph G. Wellington & Vance G. Camisa, *Trade Association and Product Safety Standards: of Good Samaritans and Liability*, 35 Wayne L. Rev. 37, 51 & n.84 (1988)); they promote company productivity, by helping to control a variety of inappropriate workplace conduct, such as insubordination, sexual harassment, absenteeism, theft, drug or alcohol abuse, and violence; and they help to limit a company's legal liability by establishing standards for employee behavior and disciplining or discharging those who do not comply. Workplace conduct policies that include prohibitions on reporting for work under the influence of alcohol or drugs may further all three interests.[6] It is no surprise, then, that most companies'

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[6] See, *e.g.*, M.L. Holcom et al., *Employee Accidents: Influences of Personal Characteristics, Job Characteristics, and Substance Use in Jobs Differing in Accident Potential*, 24 J. of Safety Res. 205 (1993) (drug and alcohol use correlated with increased accident rate for high-risk jobs); Tyler D. Hartwell et al., *Workplace alcohol-testing programs: prevalence and trends*, Monthly Labor Rev., June 1998, at 27 n.6 (*available at* http://www.bls.gov/opub/mlr/1998/06/art4full.pdf) (drug use associated with industrial

workplace conduct rules contain provisions addressing drug and alcohol use.

For maximum effectiveness, workplace rules must be tailored to the particular needs and culture of a particular company. Cf. United States Dep't of Labor, *What Works: Workplaces Without Alcohol and Other Drugs* v (1994) (*What Works*) (*available at* http://said.dol.gov/SAID_Attachments/553said1.pdf). Although the government encourages employers to create employee assistance programs to deal with a range of workplace problems and specifically to help rehabilitate employees who abuse drugs or alcohol, the federal government specifically has recognized that businesses may legitimately decide to terminate employees who test positive for drug use. See EEOC, *Technical Assistance Manual for the Americans With Disabilities Act* VIII-5 (1992); see also 14A Employ. Coordinator (RIA) ¶ PM-16,104 (2003) ("reporting to work under the influence of alcohol, narcotics, or other [illegal] drugs" is "almost always viewed as grounds for automatic discharge" and "virtually all employers consider [it] to be serious enough to merit immediate dismissal").

Similarly, companies may legitimately conclude that misconduct that warrants discharge—whether related to illegal drug use or not—should bar employees from subsequent employment with the company. Cf. *What*

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accidents); Office of Applied Studies, Dep't of Health & Human Servs., *Worker Drug Use and Workplace Policies and Programs: Results from the 1994 and 1997 National Household Survey on Drug Abuse*, Ch. 3 (2002) (*available at* http://www.samhsa.gov/oas/nhsda/A-11/WrkplcPlcy2-22.htm) (drug use correlated with absenteeism and excessive turnover); Jacques Normand et al., *An Evaluation of Preemployment Drug Testing*, 75 J. Applied Psychol. 629, 636-637 (1990) (reducing drug use by employees could save millions of dollars through increased productivity).

Works 23 (*available at* http://said.dol.gov/SAID_Attachments/553said5.pdf) (setting forth model corporate drug policy featuring bar on rehiring of employees terminated for drug use). Such a policy has definite advantages. First, it gives employees clear notice that some misconduct is so serious that it will not be tolerated. Cf. 14A Employ. Coordinator (RIA) ¶ PM-16,103 (2003) (discussing automatic discharge policies). Second, and relatedly, it operates as a strong deterrent to covered misconduct, which is a particularly important consideration for employees in sensitive or high-risk positions. Third, the clarity of the rule makes it simple to administer and prevents accidental rehiring when persons making hiring decisions lack access to former employees' full records. Finally, it furthers former employees' privacy interests, because there is no need for the employer to keep detailed records of the nature of employee misconduct.

The court of appeals' rule undermines the effectiveness of workplace conduct rules and limits on the rehiring of discharged employees. By creating an exemption to blanket policies prohibiting the rehiring of employees discharged for serious misconduct for "former drug addicts whose only work-related offense was testing positive because of their addiction" (Pet. App. 11a), the court below undermined the certainty and evenhandedness of such policies. By reading the ADA's prohibition on disparate treatment of the disabled to exempt recovering drug addicts and alcoholics from otherwise generally applicable workplace rules prescribing the consequences for misconduct, the court of appeals' rule conflicts with Congress's judgment that the ADA should not provide special preferences to those who use drugs or alcohol in the workplace. See, *e.g.*, 42 U.S.C. 12114(c). Equally important, such a rule

"indirectly but unmistakably undermine[s] the [rules] that regulate dangerous behavior." *Despears*, 63 F.3d at 637.

C. Petitioner Is Entitled To Summary Judgment

For these reasons, the court of appeals clearly applied an erroneous legal standard and the judgment below should be reversed. It also appears that under the proper legal standard, summary judgment for petitioner is appropriate.

Summary judgment is proper if "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). Petitioner is entitled to summary judgment here because the evidence in the record, taken in the light most favorable to respondent, does not demonstrate that petitioner refused to rehire respondent because of his record of disability or perceived disability, but rather did so based on the neutral application of its no-rehire policy.[7]

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[7] Although this Court has never addressed the issue, the courts of appeals have applied the familiar burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), to analyze disparate treatment claims under the ADA. See, *e.g.*, *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999); *Helfter* v. *United Parcel Serv., Inc.*, 115 F.3d 613, 616 (8th Cir. 1997); cf. *Reeves*, 530 U.S. at 142 ("assum[ing], *arguendo*, that the *McDonnell Douglas* framework" applies to ADEA actions). Under the *McDonnell Douglas* framework, once a plaintiff has established a prima facie case of discrimination, the burden of going forward with evidence shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. 411 U.S. at 802. If the employer presents evidence of a nondiscriminatory reason for its action, the plaintiff may then show that the employer's proffered explanation is not the

Petitioner presented the testimony of Joanne Bockmiller, who testified that she reviewed respondent's application and made the determination not to rehire him. Pet. App. 3a. Bockmiller testified that she pulled respondent's personnel file and reviewed the employee separation summary from his prior employment, and concluded respondent was ineligible for rehire because petitioner has an unwritten policy against rehiring its former employees who were discharged for misconduct or who resigned in lieu of termination. Pet. App. 4a; J.A. 57a-62a. Bockmiller stated that, at the time, she was "not aware" that respondent had any history of drug or alcohol abuse and—contrary to the court of appeals' assumption (Pet. App. 8a)—"the personnel file would not indicate that information." J.A. 55a; accord J.A. 56a, 60a; see also 88a-91a (information would be in medical file). Bockmiller stated that she did not "determine the specific reason as to why Mr. Hernandez was terminated" (J.A. 56a), but that respondent was treated "the same as we would anyone else who had been terminated or quit in lieu of discharge and was not eligible for rehire." J.A. 59a.

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true reason for the employment decision, but was "in fact a coverup for a * * * discriminatory decision." *Id.* at 805. The burden of persuasion remains with the plaintiff at all times. *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993). This Court need not determine whether respondent has presented a prima facie case of discrimination, because even if he did, petitioner is entitled to summary judgment because respondent has failed to present evidence that petitioner's no-rehire policy was pretextual. Cf. *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983) ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.").

Noting that petitioner's response to the EEOC complaint states 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," respondent contends that the policy "was misused by Hughes as a pretext for discriminating against [him] based on his record of alcohol and drug addiction." Br. in Opp. 13. That letter is insufficient to prevent summary judgment. The undisputed evidence indicates that Bockmiller alone made the decision not to rehire respondent, and she was not involved, years later, in writing the letter to the EEOC. J.A. 50a-51a, 64a, 74a, 78a. Nor was the person in whose name the EEOC response was signed, George Medina, involved in the decision not to rehire respondent. J.A. 62a. "Because [Bockmiller] was the relevant decision-maker, [Medina's] somewhat inconsistent statement as to the factors he *believed [Bockmiller] considered* is simply not probative of pretext, particularly where * * * there is no evidence to discredit [Bockmiller's] explanation of [why] [s]he decided" not to rehire respondent. *Rowe* v. *Marley Co.*, 233 F.3d 825, 831 (4th Cir. 2000); accord *Krchnavy* v. *Limagrain Genetics Corp.*, 294 F.3d 871, 876-877 (7th Cir. 2002); *Chiaramonte* v. *Fashion Bed Group, Inc.*, 129 F.3d 391, 402 (7th Cir. 1997), cert. denied, 523 U.S. 1118 (1998).

Moreover, petitioner's response to the EEOC is not inconsistent with Bockmiller's testimony that she rejected respondent's application based on the no-rehire policy without knowing the nature of his misconduct. The EEOC response specifically mentions the no-rehire policy and the discussion of respondent's prior drug use is fairly read to explain what misconduct triggered application of the policy. See J.A. 20a; J.A.

73a (Medina stated, "essentially we argued that, hey, he violated company policy and we just don't bring back people who [do that]"). Moreover, the letter does not indicate that respondent was "regarded as" (42 U.S.C. 12102(2)) a disabled *addict*, merely that he had engaged in "drug use." J.A. 19a. See generally *Salley* v. *Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998) (employer's awareness of drug use "is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action"); *Parry* v. *Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 311 (6th Cir. 2000); *Nielsen*, 162 F.3d at 610.

Respondent has offered no evidence of any instances in which petitioner permitted reapplication by a former employee discharged for non-drug-related misconduct (or for drug-related conduct by a non-addict), nor has he proffered any other evidence to suggest the no-rehire policy was a pretext for discrimination.[8] The uncontradicted evidence in the record indicates that petitioner applied its no-rehire policy uniformly. See J.A. 57a-59a, 72a, 80a. Under the circumstances, respondent

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[8] Cf. *Salley*, 160 F.3d at 981 (summary judgment appropriate where plaintiff "has offered no evidence to suggest that drug policy violations were tolerated for non-addicts but used to justify firing addicts"); *Collings* v. *Longview Fibre Co.*, 63 F.3d 828, 834 (9th Cir. 1995) ("There is no indication that [plaintiffs] were treated differently from other employees who engaged in similar conduct. Therefore, they have not produced sufficiently specific facts of pretext to avoid summary judgment."), cert. denied, 516 U.S. 1048 (1996); *Maddox*, 62 F.3d at 848 ("There is no evidence in the record establishing that [employers] * * * failed to reprimand or terminate any [other employee] who they knew to have engaged in [similar] behavior.").

cannot carry his burden of proving causation and summary judgment is appropriate.

Moreover, the unrefuted evidence indicates that Bockmiller was unaware of respondent's past drug use when she made her decision. See J.A. 54a-56a, 60a. An employer cannot be said to have engaged in disparate treatment "because of" an individual's disability (42 U.S.C. 12112(a)) if it was unaware of the disability.[9] Cf. *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 273 (2001) (per curiam) (retaliation claim cannot be made under Title VII where "there is no indication that [the employer] even knew" the plaintiff had engaged in protected activity). Thus, the court of appeals plainly erred by holding that a disparate treatment claim could be made even when "the staff member who makes the employment decision [is] unaware of the 'disability.'" Pet. App. 12a.

The court of appeals concluded (Pet. App. 8a) that because Bockmiller *had access to* respondent's personnel file, and because respondent attached to his application a letter from his A.A. counselor indicating he was a recovering alcoholic, one could infer, contrary to Bockmiller's sworn testimony, that "she would have checked the personnel file to determine the reason for his earlier termination." Pet. App. 8a. Even assuming such speculation were warranted, it is insufficient to create a material issue of fact about whether the decisionmaker was aware of respondent's disability.

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[9] See, *e.g.*, *Taylor* v. *Principal Fin. Group*, 93 F.3d 155, 163 (5th Cir.) ("To prove discrimination, an employee must show that the employer knew of such employee's substantial physical or mental limitation."), cert. denied, 519 U.S. 1029 (1996); *Geraci* v. *Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996); *Hedberg* v. *Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995).

Bockmiller testified that the results of respondent's 1991 drug test would not have been in the personnel file she pulled (and that in any event, she did not determine the reason for his discharge). J.A. 55a-56a. That testimony was consistent with Medina's testimony. See J.A. 88a-91a. A finding that Bockmiller knew of the results of the drug test would require speculation that uncontradicted testimony was false. This Court, however, has held that summary judgment may not be avoided "by merely asserting that the jury might * * * disbelieve the defendant's [testimony]." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1985).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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