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P R O C E E D I N G S

(10: 57 a. m.)

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

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS
ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

1 statement made to the EE0C, you can read that in different
2 ways. Maybe you should look at Bockmiller.

3 But the truth is in making the prima facie
4 showing, all that you really needed to look at was the
5 policy statement -- or the -- the response to the EE0C,
6 and that would be enough, I think, to get you past the
7 prima facie showing.

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

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

19 MR. PHILLIPS: Well, if there were a genuine
20 issue of fact, you -- you would -- you know, you'd remand
21 to allow the case to go forward. There's clearly not a
22 genuine issue of fact because if you -- once you get past
23 just looking at the EE0C statement that was made by the
24 employer and -- and you're in the district court and
25 you're looking at summary judgment and the question is

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

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

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

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

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

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

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

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

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

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

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

3 (Laughter.)

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

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

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

1 to show that this has been applied across the board.

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

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

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

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

19 (Laughter.)

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

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

17 Now, why could you turn him down?

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

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

25 QUESTION: And if --

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10

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MR. PHILLIPS: -- and also --

3

QUESTION: -- a whole bunch of people. He says

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-- he admits he's the only person who fits. So he can't

5

make a disparate impact argument. He just says you have a

6

duty to accommodate under this statute and your failure to

7

accommodate is discrimination when you know that the

8

reason for the policy doesn't apply --

9

MR. PHILLIPS: Well, there are sort of three

10

answers to that in terms of the reasonable accommodation

11

rationale. First of all, remember that this is not an

12

employee any longer who is in fact disabled. This is one

13

who's merely regarded as or has a record of. And the

14

statute specifically talks about accommodating the

15

limitations of the employee. So there -- there are no

16

limitations here. So I think (b)(5) by its terms doesn't

17

apply.

18

QUESTION: Is it your view there's no duty to

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accommodate for applicants? I'm just trying to -- is it

20

your view that the statute does not require any

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accommodation for applicants as opposed to actually

22

employed persons?

23

MR. PHILLIPS: No, I don't -- I don't know that

24

that doesn't require any -- anything with respect to

25

applicants or any accommodation with respect to

1 applicants. I don't -- I -- I think what it doesn't do is
2
3 allow you to look beyond whether there are limitations
4 that need to be accommodated. And I don't think it -- and
5 I don't think it is a reasonable accommodation within the
6 meaning of (b)(5) to say that you're entitled to a second
7 bite of the apple. If you have violated a misconduct rule
8 and been discharged for that reason, whether it's drug-
9 related or not, it seems to me clear under the statute --
10 certainly it's clear under -- under 114(c)(4) -- that that
11 is precisely the situation in which the employer is
12 allowed to discharge you and to impose on you a permanent
13 ban.

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

25 MR. PHILLIPS: Well, because I think the reason

1 is is that in order to allow this employee to come back
2 under these circumstances, you have to -- you have to
3
4 discriminate in his favor because if -- if this were a
5 person who --

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

8 MR. PHILLIPS: Right.

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

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

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

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

4

5 I don't think it's a flat rule against
6 applicants versus non-applicants. I think it's a (c)(4)
7 -- 114(c)(4) rule that says that you are always entitled
8 to treat the rehabilitated drug addict exactly the same
9 way you would treat anyone else who engaged in misconduct.

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

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

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

17 MR. PHILLIPS: Any more than it --

18 QUESTION: -- may be a serious question.

19 MR. PHILLIPS: Well, it might be and -- and I
20 don't think it would be in this case. As I say, I think
21 114(c)(4) is a complete answer to the reasonable
22 accommodation argument, and I think frankly 114(c)(4) is a
23 complete answer to the disparate impact argument, which
24 the court of appeals also not only didn't get into, but
25 found had been expressly waived.

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

5

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

16 MR. PHILLIPS: Well, because any employers who's
17 in the middle of litigation would be irrational not to try
18 to find some kind of a non-litigated solution to the
19 problem. And so we were looking for a non-litigated
20 solution to the problem. Since he wasn't qualified in
21 1999, it wasn't available to us to bring him back or to
22 try to come up with some other kind of a settlement. I
23 think it completely inappropriate to hold it against us to
24 try to come up with a solution to this case that wouldn't
25 have required us to take the time of the court at that

1 point.

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

5 MR. PHILLIPS: Right.

6

7 QUESTION: -- or applicants for employment.

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

10 QUESTION: Right.

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

15 QUESTION: I understand.

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

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

19 MR. PHILLIPS: That language clearly covers
20 this.

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

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

1 accommodation argument, if -- if it had been properly
2 raised and it were before the court. I think at the end
3 of the day, we'd win that, but Justice O'Connor -- I got
4 the name right there -- is clearly right that that issue
5 wasn't resolved by the Ninth Circuit, and therefore
6 remains open. I mean, it is not an issue for this Court
7
8 at this point.

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

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

1 the day.

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

4 QUESTION: Thank you, Mr. Phillips.

5 Mr. Clement, we'll hear from you.

6 ORAL ARGUMENT OF PAUL D. CLEMENT

7 ON BEHALF OF THE UNITED STATES,

8

9 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

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

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

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

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

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

2 MR. CLEMENT: Justice O'Connor, in our brief we
3 suggested that it would be possible to grant summary
4 judgment for the employer here on this record. I have to
5 confess, though, that that issue is of considerable less
6 importance to the Government than the broader validity of
7 this rule. One thing I -- I'll address why we think
8 summary judgment might be appropriate, but I want to
9
10 emphasize, though, that even if the Court thinks that
11 summary judgment is not appropriate here, the proper
12 disposition would be to vacate and remand.

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

1 this case. It is possible that the language of 42 U.S.C.
2 12112(b)(6), which embodies the Americans with
3 Disabilities Act disparate impact principles, could be
4 used to challenge the neutral policy. But whatever else
5 is true, when an employer applies a neutral policy, it has
6 not engaged in disparate treatment on the basis of
7 disability.

8 Now, if I can get back to the summary judgment
9 question. I think there's two reasons why we thought
10
11 summary judgment was -- would be appropriate for the
12 employer.

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

24 QUESTION: You mean the best evidence supporting
25 the plaintiff.

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

7 Unfortunately, though, Mr. -- Mr. Medina was not
8 the ultimate decision maker in this case. That was Joanne
9 Bockmiller. And the record is clear -- and this is at
10 joint appendix 51a and then 64a. It's clear that Ms.
11
12 Bockmiller did not participate in the preparation of that
13 Medina letter.

14 QUESTION: Then why did the company --

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

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

1 QUESTION: But there is.

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

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

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

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

12

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

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

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

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

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

6 I do want to be clear, though, that that really
7 is the less important issue for the -- from the
8 Government's perspective because the Ninth Circuit's
9 decision in this case does embody the position that this
10 kind of neutral policy, assuming it exists for a moment,
11 is somehow per se unlawful as applied to drug addicts.
12 And I think, again as Justice Stevens suggested, there may
13
14 be ways that a plaintiff could try to go after such a
15 neutral policy. They could suggest that it -- that under
16 a reasonable accommodation theory, a reasonable
17 accommodation must be given. But if that were brought
18 forward, I think an employer would have an opportunity to
19 say, no, that reasonable accommodation imposes an undue
20 hardship.

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

1 12112(b) (6).

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

4 MR. CLEMENT: No, that was not raised.

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

8 MR. CLEMENT: They --

9 QUESTION: Was that a claim?

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

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

14

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

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

25 The Ninth Circuit opinion assumes that there

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

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

14 I do think, though, that subsection (b)(6)
15
16 addresses very directly a neutral qualification standard
17 that's alleged to screen out an individual with a
18 disability or to tend to screen out an individual with a
19 disability. And with respect to that claim, that would
20 trigger the employer's burden to come forward and show
21 that the requirement was job-related and consistent with
22 business necessity.

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

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

13 I would like to also point out, though, that we
14 largely agree with Mr. Phillips that there is -- there is
15 much in 42 U.S.C. 12114(c)(4) that suggests that there may
16
17 be a basis for an employer to maintain this kind of
18 neutral policy, and I think an employer may be able to use
19 that section as a defense.

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

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

6 The difficult question becomes whether or not
7 there's something special about a bar on re-employment,
8 when you say that if you violate our conduct rules not
9 only are you terminated, but you need never darken our
10 door again. And I think with respect to that kind of
11 policy, there are two -- the act, in a sense, points in
12 two different directions. On the one hand, the act draws
13 a clear distinction between current drug users who are --
14 who are not protected by the act and draws a distinction
15 between recovered addicts who are protected by the act.
16 In -- in any event, the Court can reconcile those competing
17
18 policies in a subsequent case.

19 QUESTION: Thank you very much, Mr. Clement.

20 Mr. Montoya, we'll hear from you.

21 ORAL ARGUMENT OF STEPHEN G. MONTOKA

22 ON BEHALF OF THE RESPONDENT

23 MR. MONTOKA: Mr. Chief Justice, and may it
24 please the Court:

25 In the Ninth Circuit's opinion, the court made

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

14 And moreover, because this could be a mixed
15 motive case, even if this Court concludes that the alleged
16 oral practice is valid, the case would still have to be
17 remanded because you -- even if the employer had a valid
18
19 reason to terminate Mr. Hernandez, if it also had a mixed
20 motive and the other motive was invalid, it was -- he was
21 also terminated and based upon his history of drug and
22 alcohol addiction, the case has to be resolved by a jury.
23 And the question --

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

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

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

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

14 MR. MONTTOYA: Refuse to hire, yes. I -- I --
15 and -- and both --

16 QUESTION: I mean, that makes good sense, but
17 how do you reconcile that with footnote -- footnote 17?
18 It says, there is no question, the court says, that Hughes
19
20 applied its automatic policy, this policy, in rejecting
21 Hernandez's application. I mean, I -- it boggles the
22 mind.

23 MR. MONTTOYA: Your Honor, that is a -- I -- I
24 can't resolve that.

25 QUESTION: You want us to give text more weight

1 than footnotes.

2 MR. MONTOKA: I do, Your Honor --

3 QUESTION: That's not unreasonable.

4 MR. MONTOKA: -- because that footnote is
5 directly contrary to the record. In fact, in the
6 district --

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

9 (Laughter.)

10 MR. MONTOKA: I won't speculate on that, Your
11 Honor.

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

20
21 It doesn't represent -- or it doesn't indicate that
22 there's a policy. It just says there's a right, which is
23 very different.

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

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

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

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

18 QUESTION: We -- we didn't take the case to --
19 to determine whether -- you know, to determine that. I
20 mean, I -- the court of appeals proceeded on the
21
22 assumption that it did exist, and -- and the reason we
23 have the case is that it is a very important proposition
24 of law, which the Ninth Circuit adopted, that where you
25 have such a policy, it will not be applicable to someone

1 who's a rehabilitated drug addict.

2 MR. MONTOKA: Yes, that's --

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

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

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

11 MR. MONTOKA: Yes, we did, Your Honor.

12 QUESTION: That particular question?

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

19 QUESTION: Well, but the Ninth Circuit, I take
20 it, was entitled to proceed on the assumption that the
21 factual determination might turn out as -- as Hughes says
22
23 it is, and it then went on and gave instructions as to how
24 the case ought to be resolved. And we certainly can reach
25 that if we think it's in error.

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

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

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

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

20 MR. MONTOKA: Well, it would depend upon the
21 facts. If the assumed facts were identical, then perhaps
22 it would be binding. However, those facts are clearly
23
24 assumptions in this particular case.

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

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

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

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

18 MR. MONTROYA: That -- that --

19 QUESTION: -- that if there -- if there is a
20 firing solely by reason of policy, it is nonetheless
21 invalid as applied to a rehabilitated drug addict. That's
22 an important proposition. We would resolve that one way
23 or other, even though your case might continue on. So
24
25 what? We don't care whether your case continues on.

1 MR. MONTOKA: Well, in -- in that -- in that
2 event, Justice Scalia, the answer --

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

5 MR. MONTOKA: I understand.

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

16 QUESTION: Undue hardship being under the
17 accommodation requirement?

18 MR. MONTOKA: Yes.

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

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

25

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

4 MR. MONTAYA: Well --

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

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

18 QUESTION: What disability would you be
19 accommodating?

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

22 QUESTION: He doesn't have that disability.

23 MR. MONTAYA: Well, but the ADA --

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

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

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

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

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

15 MR. MONTTOYA: Well, it -- it -- Justice
16 O'Connor --

17 QUESTION: It doesn't fit.

18 MR. MONTTOYA: -- it doesn't fit in --

19 QUESTION: No.

20 MR. MONTTOYA: -- to the traditional reasonable
21 accommodation analysis.

22 QUESTION: No.

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

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

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

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

16 QUESTION: Well, they didn't address section
17 112, though.

18 MR. MONTTOYA: Well, it didn't cite 112, but it
19 -- it --

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

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

1 discriminatorily. And the ADA also --

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

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

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

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

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

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

1 no incentive to do that.

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

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

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

25 QUESTION: Even though this is -- this is solely

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

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

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

15 MR. MONTAYA: Well -- well --

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

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

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

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

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

3 QUESTION: Sobriety.

4 MR. MONTAYA: That is a general statement. And
5 there are many --

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

9 MR. MONTAYA: Yes, clean and sober.

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

12 MR. MONTAYA: I -- I think it can refer to
13 any --

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

16 (Laughter.)

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

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

23 MR. MONTAYA: That is true, Justice Ginsburg.

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

1 responsibility for his recovery.

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

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

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

23 MR. MONTAÑA: That is -- that is correct.
24 However, depending upon the weight of the evidence,
25 some --

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

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

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

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

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

1 That is unrefuted.

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

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

11 MR. MONTTOYA: That is correct.

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

15 MR. MONTTOYA: Well --

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

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

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

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

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

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

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

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

1 rule: Bockmiller and Medina.

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

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

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

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

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

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

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

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

4 MR. MONTOKA: Your --

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

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

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

17 MR. MONTOKA: Yes, Justice Scalia.

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

23 MR. MONTOKA: Yes, Your Honor. Based upon
24 12(b)(6), the screen out or tend to screen out, this
25 screened out this particular individual, and in that

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

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

11 QUESTION: Thank you, Mr. Montoya.

12 Mr. Phillips, you have 4 minutes remaining.

13 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

14 ON BEHALF OF THE PETITIONER .

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

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

25 I have not heard Mr. Montoya yet attempt to

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

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

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

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

25 Medina testified, without contradiction, that

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

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

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

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

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

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Phillips.

5 The case is submitted.

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

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