



# CLIENT ALERT

## Employment, Labor & Immigration

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### United States Supreme Court Tackles Age and Disability Discrimination in New Term

The United States Supreme Court will consider two employment cases during its term that begins in October. In *Raytheon Co. v. Hernandez*, the Court will decide whether the Americans With Disability Act (“ADA”) confers preferential rehire rights on employees lawfully terminated for misconduct, such as illicit drug use. In *Cline v. General Dynamics Land System, Inc.*, the Court will determine whether the Age Discrimination in Employment Act of 1967 (“ADEA”) provides employees 40 years of age and older with a cause of action when their employer grants more favorable benefits to certain employees based solely upon age.

#### Disability Discrimination/ Rehire Rights

Joel Hernandez had worked for Hughes Missile Systems Company since the 1960s, starting out as a janitor and working his way up to Calibration Service Technician. In 1991, Hernandez, who was known by Hughes to be struggling with alcoholism, tested positive for cocaine use. Hughes permitted him to resign in lieu of being involuntarily discharged. Hughes noted on Hernandez’s personnel file that he “‘quit in lieu of discharge’ and that the reason for his leaving was ‘discharge for personal conduct.’”

Nearly three years after his resignation, Hernandez applied to be rehired. He attached letters of reference to his application, including one from an Alcoholics Anonymous counselor who worked with recovering alcoholics and stated that Hernandez regularly attended A.A. meetings, maintained his sobriety and was strongly committed to his recovery. Hernandez’s application also stated that he had previously been employed by Hughes.

In light of his prior employment by Hughes, the Labor Relations Department pulled Hernandez’s personnel file to determine whether or not he was eligible for rehire. At the time, the individual making the determination did not know the grounds for or conduct underlying Hernandez’s resignation. Based on the company’s unwritten policy of not rehiring individuals who were terminated or who resigned in lieu of termination, Hernandez was deemed ineligible for rehire.

Subsequently, in June 1994, Hernandez filed a charge of disability discrimination with the Equal Employment Opportunity Commission (“EEOC”), claiming that Hughes rejected his application because of his record of drug addiction and/or because he was regarded as a drug addict. In response, Hughes’ Manager of Diversity Development, who had no role in refusing to rehire Hernandez, submitted a position statement explaining 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.” The EEOC issued a determination on the merits and found “reasonable cause to believe that [Hernandez] was denied hire . . . because of his disability.” On July 6, 1998, Hernandez filed a lawsuit against Hughes, which had been acquired by Raytheon Company.

Hernandez argued that he was not rehired because he had a record of disability (positive drug test results in his personnel file), and/or he was regarded as disabled (perceived as being an alcoholic). It is not disputed that at the time of Hernandez’s resignation he was an alcoholic. If, however, Hernandez were rehabilitated, he could not be denied re-employment because of his past addiction.

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The district court granted Hughes' motion for summary judgment. On appeal, the Ninth Circuit Court of Appeals unanimously reversed, holding that Hughes' unwritten rule against hiring former employees who were terminated, "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." It reasoned that, while the ADA does not protect employees or applicants currently engaged in illicit drug use, it does protect qualified individuals who have been successfully rehabilitated.

This case is scheduled for oral argument on October 8, 2003.

#### **"Reverse" Age Discrimination**

Dennis Cline worked for General Dynamics Land Systems, Inc., a combat vehicle manufacturing plant in Ohio. He and 195 other employees brought a class action against the company alleging that the

health benefits retirement provision of the new collective bargaining agreement, which took effect July 1, 1997, violated the ADEA. Under the new agreement, General Dynamics agreed to provide full retirement health benefits only to retirees who were 50 years or older as of July 1, 1997, whereas the prior agreement obligated the Company to provide retirement health benefits to retirees who had 30 years of seniority. Under the new agreement, Cline, at 48 years of age, fell two years short of age 50. Despite his 30 years of seniority, he was excluded under the new collective bargaining agreement from receiving health/ benefits.

The plaintiff employees, all of whom were between 40 and 49 on July 1, 1997, filed charges with the EEOC which found that the new agreement adversely affected those employees who were within the ADEA's protected class. The employees then filed suit under the ADEA alleging that General Dynamic's provision of retirement health benefits solely to

those over 50 constituted age discrimination.

The district court dismissed the action, reasoning that older employees being favored over younger employees or "reverse" age discrimination does not violate the ADEA. Admitting "that the new agreement 'facially discriminates' by creating two classes of employees based solely on age," the district court "reasoned that the ADEA was drafted to aid 'older workers,' not those who suffer age discrimination because they are too young."

In a 2-to-1 decision, the Sixth Circuit Court of Appeals reversed. It ruled that the plain language of the statute controlled, i.e., it is unlawful to discriminate against any individual age 40 or older on the basis of that person's age.

The case is scheduled for oral argument on November 12, 2003.

*We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.*

#### **DEPARTMENT OF STATE UPDATES ON VISAS**

On September 9, 2003, senior Department of State ("DOS") officials participated in a teleconference sponsored by the American Immigration Lawyers Association ("AILA"). Below are some of the enhanced security measures, which are intended to strengthen visa screening procedures and monitoring, that were discussed at the teleconference:

- *Department of Homeland Security: Visa Processing.* A Memorandum of Understanding between the Department of Homeland Security ("DHS") and the DOS, mandated by the Homeland Security Act, is expected to be complete by the November 1, 2003 deadline. It will define the DHS's role with regard to the visa functions now being handled by the DOS. Changes are expected to occur gradually and some consulates already have DHS personnel working on visa related matters.
- *Biometric Processing.* Visa screening procedures and monitoring will be further enhanced by the implementation of biometric processing procedures which are expected to be in effect at all posts by October 1, 2004. As a result, all visa applicants will have to be fingerprinted in order to complete a visa application.
- *Transit Without Visa and International-to-International Transit Programs.* On August 2, 2003, these programs, which had allowed international air passengers to travel through the United States for transit purposes without first obtaining a visa, were suspended by the DHS and DOS.

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