

***MAYER, BROWN, ROWE & MAW'S
SUPREME COURT DOCKET REPORT
OCTOBER TERM, 2002 – NUMBER 9***

Today the Supreme Court granted certiorari in two cases of potential interest to the business community. Amicus briefs in support of the petitioners are due on Thursday, April 10, 2003, and amicus briefs in support of the respondents are due on Monday, May 12, 2003.* Any questions about these cases should be directed to Miriam Nemetz (202-263-3253) or Robert Bronston (202-263-3244) in our Washington office.

1. *Americans with Disabilities Act — Employment Discrimination — Rights of Employee Terminated for Drug Use.* The Supreme Court granted certiorari in *Raytheon Co. v. Hernandez*, No. 02-749, to determine whether the Americans with Disabilities Act (“ADA”) confers the right to be considered for rehiring on an employee who has been lawfully terminated for violating an employer’s policy prohibiting illegal drug use.

Joel Hernandez was employed at Hughes Missile Systems Company (“Hughes”) for approximately twenty-five years, until his positive drug test for cocaine in July 1991. Hughes’s policy required the discharge of any employee who failed a drug test. Hughes gave Hernandez the option of resigning in lieu of termination, which he accepted. In January 1994, Hernandez reapplied for a job with Hughes. After reviewing Hernandez’s employee separation statement, the responsible employee in Hughes’s Labor Relations Department concluded that he was ineligible for rehire based upon Hughes’s unwritten policy of not rehiring former employees who had been terminated or who had resigned in lieu of termination.

Hernandez filed an administrative charge with the EEOC. He did not dispute the legality of his 1991 termination or allege that he was actually disabled when he applied to be rehired by Hughes in 1994. Instead, Hernandez contended that Hughes unlawfully refused to rehire him because he had a “record of * * * an impairment” (42 U.S.C. § 12102(2)(B)), and/or that Hughes “regarded [him] as having * * * an impairment” (*id.* § 12102(2)(C)). The EEOC found reasonable cause to believe that Hughes had refused to rehire Hernandez because it regarded him as having a disability — drug addiction — and accordingly issued Hernandez a right-to-sue letter. Hernandez subsequently filed suit in federal district court, which granted Hughes’s motion for summary judgment.

The Ninth Circuit reversed. 298 F.3d 1030 (2002). The court concluded that Hernandez had raised genuine issues of material fact with regard to whether he was denied re-employment because of his past record of drug addiction or because he was perceived as being a drug addict.

* If the Court sets the deadline for the respondents’ briefs under the revisions to its rules that go into effect on May 1, 2003, then briefs in support of the respondents will be due on Thursday, May 15, 2003.

Id. at 1034-1035. Observing that the ADA protects qualified individuals with a drug addiction who have been rehabilitated (42 U.S.C. § 12114(b)), the court reasoned that Hughes’s facially non-discriminatory policy was unlawful when applied to former drug addicts whose only work-related offense was testing positive for drug use. *Id.* at 1036.

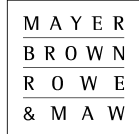
This case is of obvious interest to all employers covered by the ADA who have policies that affect the rehiring of employees terminated for unlawful drug use. If extended to other forms of employee misconduct that can be attributed to a disability, moreover, the Ninth Circuit’s holding could undermine the ability of employers to enforce basic standards of workplace conduct.

2. Clean Air Act — EPA Oversight of State Permitting Decisions. Under the Clean Air Act’s (“CAA”) Prevention of Significant Deterioration (“PSD”) program, a regulated entity must obtain a permit before constructing or modifying a pollutant-emitting source. 42 U.S.C. §§ 7470-7492. To obtain such a permit, a major emitting facility must employ the “best available control technology” (“BACT”) to control its emissions. *Id.* § 7475. The Supreme Court granted certiorari in *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, No. 02-658, to determine whether the EPA may invalidate a state-issued PSD permit based on its conclusion that the proposed new facility does not employ BACT.

In 1999, the Department of Environmental Conservation for the State of Alaska (“ADEC”) issued a permit for the construction of a new electric generator one hundred miles north of the Arctic Circle after determining that the facility employed the best available technology to control its emission. Because it disagreed with the state agency’s BACT determination, the EPA issued a series of orders prohibiting construction of the generator. In doing so, the EPA relied on two provisions of the CAA. First, the statute provides that “[w]henever * * * the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the [CAA] relating to the construction of new sources or the modification of existing sources, the Administrator may — (A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies.” 42 U.S.C. § 7413(a)(5). Second, it provides that the Administrator “shall * * * take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part [*i.e.*, the PSD program].” *Id.* § 7477.

The Ninth Circuit denied ADEC’s petition for review, “agree[ing] with the EPA that the plain text, structure, and history of the [CAA] compel the conclusion that the administrative orders fell within the EPA’s enforcement and oversight authority.” 298 F.3d 814, 818 (2002). The court found that “subjecting a facility to BACT is both a ‘requirement of this chapter’ * * * under [42 U.S.C. § 7413(a)(5)], and a ‘requirement of this part’ under [42 U.S.C. § 7477].” *Id.* at 819. “Because the EPA based its orders on the finding the ADEC had not complied with the BACT requirement, the orders were authorized by the plain language” of the CAA. *Id.* The court added that the “structure and legislative history of the [CAA] further support the EPA’s authority to issue the enforcement orders” because “[f]ollowing disappointing state response to

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air pollution concerns, Congress has consistently increased over time federal authority in pollution control.” *Id.*

Because the Supreme Court is likely to address the circumstances under which the EPA may override a state agency’s CAA permitting decisions, this case is of great interest to businesses whose facilities are subject to the Act.

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