

December, 2003
No. 3

Employment Law

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Supreme Court Update: Drugs, Sex, and Money

By Eve Barrie Masinter and Stephanie G. John

The United States Supreme Court continues to keep employment lawyers on their toes by dealing with cases involving employment issues this term. During the first week of December, the Court issued its decision in *Raytheon Co. v. Hernandez*, an ADA case involving the legality of an employer policy prohibiting the rehire of individuals fired for violating the employer's drug use policy. Also, the Court agreed to consider two other employment cases. First, in *Pennsylvania State Police v. Suders*, the Court will decide whether constructive discharge is a "tangible employment action" for purposes of sexual harassment claims. Second, in *Central Laborers' Pension Fund v. Heinz*, the Court will tackle an issue involving ERISA's anti-cutback rule for pension benefits.

In *Raytheon Co. v. Hernandez*, No. 02-749, ___ S Ct. ___ (2003) (reported on in the October 2003 and November 2003 newsletters), the Court declined to decide the issue generating interest among employment law practitioners (and upon which it had granted certiorari): "whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules." According to the defendant, the plaintiff in the case had been refused rehire under the defendant's policy prohibiting rehiring employees who were discharged for misconduct after the plaintiff was fired for violating the defendant's drug use policy. The plaintiff articulated his claim only under the disparate treatment model. The Court held that the lower court (the 9th Circuit) mistakenly analyzed the issue under a disparate impact formula, rather than as a disparate treatment claim. Justice Thomas, writing for the Court explained where the court of appeals went wrong:

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committee program
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Regulations: Wage and Hour
Litigation Heats Up Again*
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In other words, while ostensibly evaluating whether petitioner had proffered a legitimate, nondiscriminatory reason for failing to rehire respondent sufficient to rebut respondent's *prima facie* showing of disparate treatment, the Court of Appeals held that a neutral no-rehire policy could never suffice in a case where the employee was terminated for illegal drug use, because such a policy has a disparate impact on recovering drug addicts. In so holding, the Court of Appeals erred by conflating the analytical framework for disparate-impact and disparate treatment claims.

The Court confirmed that a "no-rehire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules." The Court then sent the case back to the Ninth Circuit Court of Appeals for further proceedings.

Now that the suspense is over on the *Raytheon* case, employment attorneys can eagerly await resolution of two additional issues. In the *Pennsylvania State Police* case, the Third Circuit Court of Appeals reversed the district court's grant of summary judgment to the defendant. (*Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003)). The plaintiff had sued her former

employer for sexual harassment by three supervisors. The court of appeals held that the *Burlington/Faragher* affirmative defense was not available because the plaintiff had sufficient evidence of constructive discharge, a tangible employment action. This decision adds to an existing split in authorities on whether constructive discharge is a tangible employment action for purposes of sexual harassment claims. The Third and Eighth Circuit Courts of Appeals have held that constructive discharge is a tangible employment action. The Second and Sixth Circuit Courts of Appeals have held the opposite.

Central Laborers' Pension Fund v. Heinz presents the question of whether a pension plan amendment expanding the types of post-retirement employment that trigger mandatory suspension of early retirement benefits violates ERISA's anti-cutback rule. The Seventh Circuit Court of Appeals, at 303 F.3d 802 (7th Cir. 2002), ruled that such an amendment does constitute an ERISA violation. This position conflicts with the Fifth Circuit Court of Appeals ruling in *Spacek v. Maritime Association*, 134 F.3d 283 (5th Cir. 1998). Attorneys for the pension fund and the United States Department of Justice argue this split will create havoc for multiemployer plans and undermines ERISA's goal of creating uniform standards for administering benefit plans.

It will be interesting to see how the Supreme Court resolves these important issues over the coming months. Watch this space for a report on the outcomes.