

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 06-1308

JOHN GALE, in his official capacity as Secretary of State of Nebraska, and
JON BRUNING, in his official capacity as Attorney General of Nebraska,

Appellants,

v.

JIM JONES; TERRENCE M. SCHUMACHER; SHAD DAHLGREN;
HAROLD G. RICKERTSEN; TODD EHLER; and ROBERT E. BECK III,

Appellees.

ON INTERLOCUTORY APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Honorable Laurie Smith Camp, District Court Judge

BRIEF OF AMICUS CURIAE NEBRASKA LEAGUE OF RURAL
VOTERS and NEBRASKANS FOR PEACE

In Support of Appellants JOHN GALE and JON BRUNING
And In Support of REVERSAL

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STATEMENT OF THE IDENTITY AND INTERESTS OF THE AMICUS CURIAE

The Nebraska League of Rural Voters is a non-profit membership organization founded in 1984. Its mission is voter education and issue advocacy focused on the economic interests of family farmers and rural communities. Nebraskans for Peace is a statewide grassroots advocacy organization working nonviolently for peace with justice through community building, education, and political action.

Both the Nebraska League of Rural Voters and Nebraskans for Peace have been active supporters of the family farm section of the Nebraska Constitution for more than two decades.

Both the Nebraska League of Rural Voters and Nebraskans for Peace have an interest in this case because the organizations and their members believe strongly in protecting and promoting the family farm system of agriculture and the communities that depend on such a system. The district court's decision to strike down the Nebraska constitutional provision that restricts corporate farming in the state will undermine family farming and result in a significant diminution in the quality of life in communities across Nebraska.

The issues involved in this appeal concern not only the parties and the movants, but are also of considerable public interest and import, and it is therefore highly important that the legal issues be developed and presented fully.

ARGUMENT

The District Court improperly applied a disparate impact analysis in a disparate treatment case. For this reason, the judgment must be reversed. *Raytheon v. Hernandez*, 540 U.S. 44 (2003).

Two different theories of liability are available to the plaintiff in an ADA discrimination claim: disparate treatment and disparate impact. The disparate treatment theory can be further subdivided into two subtheories: facial discrimination and pretextual discrimination.

The Appellees alleged in their Complaint: “Initiative 300 discriminates on its face against disabled persons who cannot satisfy the day to day labor qualification.” Complaint at ¶ 83. They argued in their Brief in Support of Summary Judgment that “[t]o state a claim under Title II of the ADA, a plaintiff must allege: (1) that he is a ‘qualified individual with a disability;’ (2) that he was ‘excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity’ or

otherwise ‘discriminated [against] by such entity’ ‘ (3) ‘by reason of such disability.’” Appellees’ Brief in Support of Summary Judgment at page 43.

In other words, the Appellees alleged and argued a quintessential disparate treatment claim. At no point in their pleadings or in their briefs did they allege or argue a disparate impact theory of liability.

The District Court correctly ruled *against* the Appellees on their disparate treatment claim and then committed reversible error with this finding: “The *facially-neutral* standards in Initiative 300 have a disparate impact on Dahlgren and Ehler, due to their disabilities.” In going beyond the Appellees’ failed disparate treatment claim and basing its ruling on a disparate impact analysis, the District Court committed clearly reversible error by directly contradicting the U.S. Supreme Court’s holding in *Raytheon v. Hernandez*, 544 U.S. 44 (2003).

The United States Supreme Court “has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact.” *Raytheon* at 52.

“Because ‘the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes, courts

must be careful to distinguish between these theories.” *Raytheon* at 53, citing *Texas Dep’t. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

In *Raytheon*, the District Court concluded and the Court of Appeals agreed that the plaintiff had not timely pursued a disparate impact claim, thus limiting his case to a disparate treatment theory. *Raytheon* at 53. The Supreme Court affirmed the ruling that the case was thus limited, but then reversed and remanded because the Court of Appeals had inappropriately considered disparate-impact factors in reaching its conclusion. *Raytheon* at 54.

The Supreme Court wrote:

Petitioner’s proffer of its neutral no-rehire policy plainly satisfied its obligation under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to rehire respondent. Thus, the only relevant question before the Court of Appeals, after petitioner presented a neutral explanation for its decision not to rehire respondent, was whether there was sufficient evidence from which a jury could conclude that petitioner did make its employment decision based on respondent’s status as disabled despite petitioner’s proffered explanation. Instead, the Court of Appeals concluded that, as a matter

of law, a neutral no-rehire policy was not a legitimate, nondiscriminatory reason sufficient to defeat a prima facie case of discrimination. The Court of Appeals did not even attempt, in the remainder of its opinion, to treat this claim as one involving only disparate treatment. Instead, the Court of Appeals observed that petitioner's policy "screens out persons with a record of addiction," and further noted that the company had not raised a business necessity defense, factors that pertain to disparate-impact claims but not disparate-treatment claims. By improperly focusing on these factors, the Court of Appeals ignored the fact that petitioner's 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 of Appeals rejected petitioner's legitimate, nondiscriminatory reason for refusing to rehire respondent because it "serves to bar the re-employment of a drug addict despite his successful rehabilitation." We hold that such an analysis is inapplicable to a disparate-treatment claim. Once respondent had made a prima facie showing of discrimination the next question for

the Court of Appeals was whether petitioner offered a legitimate, nondiscriminatory reason for its actions so as to demonstrate that its actions were not motivated by respondent's disability. To the extent that the Court of Appeals strayed from this task by considering not only discriminatory intent but also discriminatory impact, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

Raytheon at 53-55 (citations omitted).

The District Court in this case committed essentially the same error as the Court of Appeals in *Raytheon*. It strayed from the task before it by considering not only discriminatory intent but also discriminatory impact. In so doing, it illustrated why the Supreme Court has stressed the need for clarity in discrimination cases: the State was not given notice of the nature of the claim to which it was responding; as a result, it did not have the opportunity to present the kind of evidence necessary to respond to a disparate impact claim and it did not have the opportunity to argue the appropriate legal standard to be applied to that evidence.

Alexander v. Choate, 469 U.S. 287 (1985), provides a cautionary tale for courts faced with disability discrimination cases challenging systemic

state actions. The Court expressly “reject[ed] the boundless notion that all disparate impact showings constitute prima facie cases of disability discrimination” when state action of general applicability is at issue. *Alexander* at 299. In other words, disparate *effect* is not necessarily the sort of disparate *impact* that federal law might recognize in this context. *Id.*

The District Court erred when it applied disparate impact analysis in the absence of the claim having been properly pleaded and fully argued. The enormous impact of the error is readily apparent – the District Court’s ADA analysis is painfully inadequate given the powerful and countervailing forces at issue here.

CONCLUSION

Initiative 300 is neutral on its face, is not alleged to rest on a discriminatory motive, and does not deny the handicapped access to or exclude them from the particular package of farmland ownership options Nebraska has chosen to provide. I-300 makes the same options equally available to both handicapped and nonhandicapped persons, and the State is not required by the ADA to provide the handicapped with more options than the nonhandicapped. The District Court’s ruling should have been summary

judgment in the State's favor on the ADA claim. In the absence of such a ruling from this Court, this matter should be reversed and remanded to the District Court for further proceedings consistent with a disparate treatment case.

Dated: _____

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief was created using WordPerfect 12.0, that the font and size are Times New Roman 14 point, and that the number of words is 1347. The attached diskette has been scanned for viruses and is virus-free.

Patricia A. Knapp

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Brief of *Amici Curiae* and one computer diskette were served upon all parties of record by mailing the same by regular United States mail, postage prepaid on this 12th day of May, 2006, to the following persons:

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