

Misconduct is the key to enforcing your 'no rehire' policy

Issue: When can you refuse to rehire a former employee who may be protected under the Americans with Disabilities Act (ADA)?

Benefit: You don't have to rehire people who are fired for misconduct, even if they fall under a protected ADA class.

Action: Make sure your termination policy punishes misconduct, not disability. And urge managers to enforce it equally and consistently.

The U.S. Supreme Court recently handed your organization more power to set and enforce policies that deny rehiring to employees fired for misconduct reasons. Having such a "no-rehire for misconduct" policy on the books, the court said, is a valid reason to turn away former drug users who violate company policy.

The case: A technician tested positive for cocaine in a random drug test and was promptly shown the door. He reapplied two years later, saying he was clean. The company refused to rehire him, citing its policy of not reinstating employees who violate company rules.

The 9th Circuit Court of Appeals sided with the technician, saying the no-rehire policy violated the Americans with Disabilities Act (ADA) because it screened out people who were addicted but rehabilitated.

But the Supreme Court rejected that interpretation, saying the company's no-rehire-for-rules-violation policy is a "legitimate nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules." (Raytheon Co. v. Hernandez, No. 02-749)

The downside: The decision fell short of answering the question many would hope it would tackle: To what extent does the law require employers to bend neutral rules to accommodate employees with disabilities?

For now, make sure your policy punishes misconduct, not a disability. And ensure that the policy is neutral, uniform and applied consistently. For example, you can't decide to rehire a former employee who stole from the organization but exclude all former drug users.