Journal of Law and Health

Volume 2 | Issue 1 Article

1987

Drug Testing in the Workplace - Drug Screening in the Public Sector: Municipalities and Government Workers

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DRUG TESTING IN THE WORKPLACE

DRUG SCREENING IN THE PUBLIC SECTOR: MUNICIPALITIES AND GOVERNMENT WORKERS

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INTRODUCTION

The past year has witnessed growing public concern and media publicity regarding drug abuse in society and in the workplace.[1] Indeed, statistics suggest that literally millions of Americans are using illegal drugs.[2] The cost to employers is staggering, including decreased productivity, higher absenteeism and accident rates, and increased insurance and medical expenditures.[3]

Many employers are examining the means by which they can identify employees with drug problems and take appropriate action.[4] However, before implementing any drug testing program or testing an individual employee, a public employer must carefully consider not only its need for drug testing, but also the constitutional standards which the courts will apply due to the existence of state action.

Certainly, there are appealing rationales for drug testing many government employees and few would dispute that police and fire personnel should be free of any substances which might undermine their job effectiveness. But while government employees may have lesser expectations of privacy than those in the private sector, the courts readily recognize that they have not abandoned all of their individual rights, and do not hesitate to enforce constitutional protections.

For a public employer, the most immediate legal implications involve various constitutional considerations, most importantly those of the fourth

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[1]Most recently, there were reports of drug use surrounding a train accident resulting in the deaths of 16 people. *See* N.Y. Times, Jan. 15, 1987, at 1, col. 4; Cleveland Plain Dealer, Jan. 15, 1987, at 2-A, col. 6.

[2]*See* NATIONAL INSTITUTE ON DRUG ABUSE, DRUG ABUSE IN THE WORKPLACE 1 (1986) [hereinafter NIDA]; Marcotte, *Drugs at Work*, A.B.A. J., Mar. 1986, at 34.

[3]*See* NIDA, *supra* note 2, at 1-2.

[4]The United States Department of Transportation is now considering implementing random drug testing of thousands of airline and railroad employees. Cleveland Plain Dealer, Jan. 22, 1987, at 1-A, col. 1. One fourth of "Fortune 500" companies have drug testing programs. Rust, *Drug Testing: The Legal Dilemma*, A.B.A. J., Nov. 1986, at 50, 51.

amendment.[5] Of course, public employers must also be sensitive to numerous other constitutional guarantees,[6] state and federal anti-discrimination legislation,[7] and common law claims[8] which might effectively render a drug testing program invalid and may expose the employer to substantial liability.

I. CONSTITUTIONAL CONSIDERATIONS

Unlike private employers, employers in the public sector are bound through the fourteenth amendment to adhere to many requirements of the United States Constitution.[9] Public employees therefore have greater means to resist drug testing than their counterparts in the private sector. While the fourth amendment's prohibition on unreasonable searches and seizures has been at the forefront of challenges to drug testing in the courts,[10] there are due process,[11] equal protection,[12] and privacy[13] considerations as well. The constitutional implications of drug testing will be analyzed below.

A. *Self-Incrimination.*

Constitutional challenges to drug testing routinely include references to the constitutional right against self-incrimination.[14] With only one exception, these challenges have failed since the extraction of bodily fluids does not constitute testimonial compulsion and hence does not give rise to fifth amendment protections.

In *Schmerber v. California*,[15] the United States Supreme Court considered whether the taking of a blood sample against an individual's will violated his fifth amendment right against self-incrimination.[16] Schmerber had been driving home after an evening of drinking when he lost control of his car, striking

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[5]*See infra* notes 9-79 and accompanying text.

[6]*See infra* notes 80-114 and accompanying text.

[7]*See infra* notes 133-48 and accompanying text.

[8]*See infra* notes 149-59 and accompanying text.

[9]*E.g.*, Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

[10]*See infra* notes 14-79 and accompanying text.

[11]*See infra* notes 80-101 and accompanying text.

[12]*See infra* notes 102-08 and accompanying text.

[13]*See infra* notes 109-14 and accompanying text.

[14]*E.g.*, Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984); Ewing v. State, 160 Ind. App. 138, 310 N.E.2d 571 (1974).

[15]384 U.S. 757 (1966).

[16]U.S. CONST. amend V, provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

a tree. He was taken to a hospital for treatment of his injuries, where a police officer who had witnessed the accident scene and Schmerber's behavior suspected that the accident was alcohol-related. He ordered the taking of a blood test over Schmerber's objections, and the test showed that Schmerber was intoxicated. The results were admitted at trial, and Schmerber was convicted of driving under the influence.[17]

The court rejected Schmerber's claim that the extraction of his blood violated the fifth amendment. It drew a distinction between physical evidence and communications, finding that only communications fell under the fifth amendment's protection.[18] It held that the taking of the blood sample did not violate the fifth amendment since the blood test, "although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner."[19]

Relying upon *Schmerber*, the majority of courts have held that drug testing does not violate the fifth amendment.[20] Like the taking of a blood sample, the taking of a urine sample does not involve testimonial compulsion and therefore does not trigger fifth amendment protections.[21]

However, one district court has held that, under certain circumstances, compelled drug testing could violate the fifth amendment. In *Treasury Employees v. Von Raab*,[22] a federal district court considered the constitutionality of mass mandatory drug testing of customs service employees. The testing program in that case required any employee seeking promotion to certain enumerated positions to submit to urinalysis. Significantly, the tested workers were also required to fill out a form listing the medications they had taken within the past thirty days, and all instances in which they might have come in contact with illegal substances within the same period. The court found that the program violated the fifth amendment since the urinalysis and pretest form, taken together, constituted testimonial compulsion.[23]

It is difficult to discern from the opinion in *Von Raab* exactly which aspect of the testing violated the fifth amendment. The references to the fifth amendment were dicta as the court invalidated the testing program on nu-

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[17]384 U.S. at 758-59.

[18]*Id.* at 763-65.

[19]*Id.* at 765. The Court did, however, find fourth amendment implications. *See infra* notes 28-32 and accompanying text.

[20]*See* Storms v. Coughlin, 600 F. Supp. 1214, 1217 n.2 (S.D.N.Y. 1984); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1985).

[21]*E.g., Storms*, 600 F. Supp. at 1217 n.2.

[22]1 Individual Empl. Rights Cas. (BNA) 945 (E.D. La. 1986), *rev'd*, 2 Individual Empl. Rights Cas. (BNA) 15 (5th Cir. 1987).

[23]*Id.* at 951.

merous other grounds.[24] The court distinguished *Schmerber* on the grounds that in that case there had been probable cause to arrest the defendant, while there was no probable cause for the testing of the customs employees.[25] This consideration should have been irrelevant since probable cause is a fourth amendment, and not a fifth amendment concern. The Fifth Circuit in *Von Raab* reversed, finding that the drug testing and completion of forms did not violate the fifth amendment.[26]

B. *Search and Seizure.*

While the fifth amendment will not provide a bar to drug testing programs in most instances, urinalysis will usually raise fourth amendment concerns. The fourth amendment has become the most significant constitutional provision for testing purposes, and it is the constitutional provision most often relied upon by the courts to invalidate drug testing programs.

1. *Urinalysis Is A Search And Seizure.*

The fourth amendment provides that "[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[27] The prevailing view is that urinalysis is a search and seizure.

Though the Court in *Schmerber v. California*[28] held that the extraction of blood from the suspected drunk driver did not violate the fifth amendment, it did find that the blood test constituted a search and seizure.[29] Finding that the extraction and testing of Schmerber's blood constituted a search and seizure, the Court considered whether the state's actions were constitutionally permissible. This entailed an inquiry into whether the means and procedures used by the state satisfied the fourth amendment's reasonableness requirement.[30]

Turning to the facts of the case, the Court found that the arresting officer had probable cause to suspect intoxication since he smelled liquor on Schmerber's breath, and had witnessed evidence of intoxication both at the scene of the accident and at the hospital. There were no reasonable means for the officer to procure a warrant due to the speed at which alcohol naturally is removed from the blood. Further, the

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[24]2 Individual Empl. Rights Cas. (BNA) 15, 21-24 (5th Cir. 1987).

[25]*Id.* at 22.

[26]*Id.* at 22-23.

[27]U.S. CONST. amend. IV (emphasis added).

[28]384 U.S. 757 (1966).

[29]*Id.* at 767.

[30]*Id.* at 768.

blood test was a reasonable means of testing the blood alcohol percentage, and the test was performed in a reasonable manner by a physician in a hospital.[31] Since there was probable cause to suspect Schmerber of being under the influence of alcohol, and the test was performed in a reasonable manner, the test was proper under the fourth amendment.[32]

Following *Schmerber*, courts have generally found that urinalysis constitutes a search and seizure.[33] For example, in *Storms v. Coughlin*,[34] the court found that urinalysis was functionally indistinguishable from compelled blood testing for purposes of the fourth amendment. While urinalysis did not constitute an intrusion beyond the body's surface, the taking of urine was more degrading than the taking of a blood sample, and therefore constituted a search and seizure.[35]

However, in *Turner v. FOP*,[36] one judge questioned whether urinalysis could truly be analogized to the extraction of blood since, unlike blood, urine is a waste product, and is ordinarily discarded. Most courts do not accept this position, finding that an employee has a reasonable expectation of privacy in his urine up until the time that he disposes of it.[37]

2. *The Propriety of Urinalysis Depends Upon Reasonableness.*

Because drug testing, particularly urinalysis, has been considered to be a search and seizure within the meaning of the fourth amendment, its propriety will be dependent upon reasonableness. As a general rule, drug testing of a public employee is permissible under the fourth amendment only if there is a reasonable, objective basis for believing that he is using illegal drugs.

The fourth amendment requirements were first articulated for drug testing purposes, although not necessarily followed, in the context of the testing of prisoners. In *Storms v. Coughlin*,[38] the court found that the state could implement a program for the random drug testing of pris-

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[31]*Id.* at 770-71.

[32]*Id.* at 772.

[33]*E.g.*, McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984); Ewing v. State, 160 Ind. App. 138, 310 N.E.2d 571 (1974).

[34]600 F. Supp. 1214 (S.D.N.Y. 1984).

[35]*Id.* at 1218.

[36]500 A.2d 1005, 1011 (D.C. App. 1985).

[37]*E.g.*, Treasury Workers v. Von Raab, 2 Individual Empl. Rights Cas. (BNA) 15 (5th Cir. 1987); McDonnell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987).

[38]600 F. Supp. 1214 (S.D.N.Y. 1984).

oners. The court took judicial notice of the serious problem of heavy drug use in detention facilities, and found that under the circumstances, the state had a reasonable suspicion of drug use for any randomly selected prisoners.[39]

Prison guards, too, may be subjected to drug testing without a reasonable individual suspicion of illegal drug use. In *McDonell v. Hunter*,[40] a group of prison guards challenged a drug testing policy imposed by the state corrections department. McDonell had been asked to undergo urinalysis after he had been seen with persons being investigated for drug-related activities. When he refused to submit to the test, he was terminated, and then reinstated with ten days loss of pay. Other prison employees had been told that receipt of their paychecks would be conditioned upon their execution of a search consent form.[41] After deciding that urinalysis constituted a search and seizure, the district court held that the corrections department could test the prison guards only upon a reasonable individualized suspicion of illegal drug use, as a part of a pre-employment or periodic physical examination, or as a condition of continued employment after disciplinary action had been taken against the employee for illegal drug use.[42]

While recognizing that urinalysis had been held to be a search and seizure within the meaning of the fourth amendment, the Eighth Circuit modified the district court's order.[43] The court engaged in a balancing analysis and found that the state had a strong need to ensure that persons coming into contact with prisoners were not under the influence of drugs. Urinalysis was the least intrusive means of accurate drug testing, and was well tailored to the state's interest in maintaining prison safety. Accordingly, it held that entirely random drug testing of prison guards could be carried out along with testing of guards upon a reasonable suspicion of illegal drug use.[44]

Outside of the prison context, courts tend to apply more stringent standards. In *Amalgamated Transit Union v. Suscy*,[45] the Seventh Circuit affirmed the drug testing of transit employees, but under more limited circumstances. In *Suscy*, the transit employees' union challenged the

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[39]*Id.* at 1220. The court ultimately enjoined the testing based upon various procedural defects. *Id.* at 1226.

[40]612 F. Supp. 1122 (S.D. Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987).

[41]612 F. Supp. at 1126.

[42]*Id.* at 1130.

[43]809 F.2d 1302 (8th Cir. 1987).

[44]*Id.*

[45]538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

policy of the Chicago Transit Authority which permitted the drug testing of transit employees who were involved in serious accidents, upon the concurrence of two supervisors.[46] The court found that while the testing did give rise to the fourth amendment protection, it was done in a reasonable manner and was therefore constitutional.[47]

The court reached its conclusion through balancing the state's legitimate interest in insuring the safety of public transit against the intrusiveness of the procedure. It found that the union members had diminished reasonable expectations of privacy in light of the strong public safety interest, and that the conditions under which blood and urine samples were taken were reasonable.[48] Significantly, the court noted that the tests were given in a hospital and only to employees who were directly involved in a serious accident or who were suspected of being under the influence of alcohol or narcotics.[49] Further, the necessary concurrence of two supervisors provided an additional procedural safeguard.[50] Accordingly, it upheld the constitutionality of the testing at issue.[51]

Courts have also held that a search may be unreasonable if samples are not taken under conditions which protect the employees' privacy. In *Storms v. Coughlin*,[52] for example, several male inmates were forced to give urine samples in an open room by a hallway through which female nurses passed. Other courts have expressed concern over protecting an employee's privacy during the time at which the sample is taken.[53]

Allen v. City of Marietta[54] is one of a minority of cases in which the court did not rely upon a fourth amendment analysis to determine the propriety of drug testing. In *Allen*, sixteen public employees who routinely worked around high voltage lines were observed smoking marijuana by an undercover detective. Their employer offered them the choice of submitting to urinalysis to prove their innocence or of resigning. Six of the employees chose to submit urine samples for analysis.

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[46]538 F.2d at 1266, 1267.

[47]*Id.* at 1267.

[48]*Id.*

[49]*Id.*

[50]*Id.*

[51]*Id.*

[52]600 F. Supp. 1214, 1222 (S.D.N.Y. 1984).

[53]*E.g.*, Treasury Workers v. Von Raab, 1 Individual Empl. Rights Cas. (BNA) 945, 951-52 (E.D. La. 1986), *rev'd*, 2 Individual Empl. Rights Cas. (BNA) 15 (5th Cir. 1987).

[54]601 F. Supp. 482 (N.D. Ga. 1982).

When those samples tested positive for drug use, the employees were terminated.[55]

When the employees challenged their termination, the court drew a distinction between local governments acting as employers and as governing bodies. It found that the employees had no reasonable expectations of privacy with respect to the performance of their jobs and could not claim fourth amendment protection where testing had been undertaken solely to insure job safety.[56] Accordingly, it found that the testing did not rise to the level requiring fourth amendment analysis.[57] However, in *Allen*, the facts were such that the employer almost certainly did have a reasonable suspicion of illegal drug use since the employees had been observed smoking marijuana. Thus, the fourth amendment probably would have been satisfied even if the court had found that it applied.[58]

3. *Drug Testing As An Administrative Search.*

Employers in some instances have attempted to satisfy the fourth amendment's requirements by structuring drug testing programs as "administrative searches." Courts have upheld adminstrative searches in other contexts in which the public interest to be served is outweighed by the degree of intrusion.

For example, the searches which are given to all persons entering the flight areas of airports are constitutionally permissible because of the strong public interest in air safety and the only moderate private intrusion.[59] Similarly, housing inspections are proper because, though the public interest is less significant, the intrusion is minimal.[60]

Administrative searches are permitted at least in part because they are routine. Accordingly, they must also be given either to all persons, or be given entirely at random. In *Delaware v. Prouse*,[61] marijuana was discovered on the floor of the defendant's car after a supposedly "random" stop to determine whether the driver was licensed and the vehi-

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[55]*Id.* at 484-85.

[56]*Id.* at 491.

[57]*Id.*

[58]In Capua v. City of Plainfield, 1 Individual Empl. Rights Cas. (BNA) 625, 630 (D.N.J. 1986), the court distinguished *Allen* on the grounds that there was a reasonable suspicion of drug use in that case.

[59]United States v. Smith, 643 F.2d 942 (2d Cir.), *cert. denied*, 454 U.S. 875 (1981)(x-ray of luggage).

[60]Camara v. Municipal Court, 387 U.S. 523 (1967) (housing inspection warrant may be obtained without showing a reasonable suspicion of housing violations).

[61]440 U.S. 648 (1979).

cle registered. The Supreme Court found that the search violated the fourth amendment since, though it was "random" in the sense that not everyone was stopped, there were no standards to protect drivers from abuse of discretion in the selection of persons to be searched.[62]

In *Storms v. Coughlin*,[63] prisoners to be drug tested were selected "at random" by the choosing of names on a bulletin board. The court enjoined that method of selection since the individual choosing the names could read them on the board, and could then decide which persons to test. The court held that "random" testing could resume only once an entirely blind system of selection was instituted.[64]

Because the state's interest in conducting an administrative search must outweigh the intrusiveness of the search, the validity of a drug testing program will depend upon the employer's purposes and the means by which testing is carried out. A drug testing program will constitute a valid administrative search when it has been tailored to minimize the degree of intrusion and also serves a strong state interest.

At least one court has indicated that random drug testing, even for police and fire personnel, is not permissible. In *City of Palm Bay v. Bauman*,[65] the court struck down random drug testing for police and fire personnel, even though the persons found to have used drugs were referred to counseling and were not terminated. The court's decision appears to rest in part upon the purpose for which drug testing was implemented since it expressed cynicism over whether the departments' drug problem was sufficient to warrant widespread testing.[66]

Another facet of the necessary "routine" nature of an administrative search is that the same testing methods and standards must be used for all persons. Most recently, in *Lovvorn v. City of Chattanooga*,[67] the court rejected the city's justification of mass drug testing as an administrative search because not all employees were subjected to the same test and the testing standards were not uniformly applied.[68]

However, the adminstrative search exception to the fourth amendment may apply to drug testing under certain instances. In *Shoemaker v. Handel*,[69] five prominent jockeys challenged a set of regulations

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[62]*Id.* at 662-63.

[63]600 F. Supp. 1214 (S.D.N.Y. 1984).

[64]*Id.* at 1223.

[65]475 So. 2d 1322 (Fla. Dist. Ct. App. 1985).

[66]*Id.* at 1325.

[67]1 Individual Empl. Rights Cas. (BNA) 1041 (E.D. Tenn. 1986).

[68]*Id.* at 1044-45.

[69]795 F.2d 1136 (3d Cir.), *cert. denied*, ___U.S.___. 107 S. Ct. 577 (1986).

adopted by the New Jersey Racing Commission which authorized state racing stewards to require breathalyzer and urine tests for jockeys. The court found that the regulations would be valid as administrative searches if: first, there was a strong state interest in conducting the search; and second, the industry in which testing is implemented is so pervasively regulated that the individuals have reduced expectations of privacy.[70] Applying those standards to the drug testing of the jockeys, the court found that a search pursuant to the regulations was an administrative search.[71]

First, the state had strong interest in preserving not only the integrity of the horse-racing industry, but also in the public's perception of its integrity.[72] Second, the Racing Commission had traditionally acted in such a way as to reduce any justifiable expectations among racing participants, including the execution of warrantless searches of racing areas.[73] However, *Shoemaker* itself, and subsequent authority, emphasized the narrowness of its holding, and only in limited circumstances will the administrative search exception be found to apply.[74]

4. *Consent.*

Testing is permissible under the fourth amendment if the employee has consented to it. This exception has not been of great significance since it has not yet been litigated within the context of truly voluntary consent.

In *Patchogue-Medford Congress v. Board of Education*,[75] the employer justified drug testing under a collective bargaining agreement provision which required newly hired employees to submit to a single medical examination. Finding that the employees sought to be tested had already submitted to the examination, the court found that the labor agreement did not authorize any further drug testing.[76]

Courts are unlikely to enforce written consent agreements. In *McDonell v. Hunter*,[77] the district court construed a consent form which the

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[70]795 F.2d at 1142.

[71]*Id.*

[72]*Id.*

[73]*Id.*

[74]Capua v. City of Plainfield, 1 Individual Empl. Rights Cas. (BNA) 625, 630 (D.N.J. 1986); Treasury Workers v. Von Raab, 2 Individual Empl. Rights Cas. (BNA) 15, 21 (5th Cir. 1987); *Shoemaker*, 795 F.2d at 1142 n.5.

[75]119 A.D.2d 35, 505 N.Y.S.2d 888 (1986).

[76]*Id.* at 889.

[77]612 F. Supp. 1122, 1131 (S.D. Iowa 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987).

employee had signed as a condition of employment not as consent to any search, but only as a statement that the employee recognized that he would be searched if the employer had reasonable grounds for suspicion of illegal conduct. In *Treasury Employees v. Von Raab*,[78] the trial court found that employees seeking promotions could not be held to have waived their constitutional rights to refuse to consent to drug testing. The Fifth Circuit did not address the issue of written consent forms, but found that the testing was consensual "to some extent" because only persons applying for certain positions were tested.[79] Accordingly, only under completely voluntary circumstances will a court find that an employee's consent authorized what would otherwise be considered an unconstitutional drug test.

C. *Due Process.*

Due process becomes an issue in the drug testing of public employees when the accuracy, procedure, and disposition of test results are challenged. A rough outline of the due process requirements has taken shape under the developing case law for drug testing of public employees and may be set forth with some certainty.

1. *Due Process Issues.*

The first due process issue, and perhaps that most often raised in the media, is the accuracy of drug testing. There are, in fact, several types of drug tests which vary both in cost and accuracy. Confusion of the different tests is common and only clouds intelligent resolution of this issue.

Drug testing generally first involves use of the Syva EMIT test, which is relatively inexpensive and accurate. The manufacturer itself cautions that the test is not 100% accurate, and recommends confirmation by a different testing method. While the manufacturer represents the test as being 95% accurate, courts have found through the admission of expert testimony that the test is more likely to be 97% to 99% accurate.[80]

If an individual does test positive using an EMIT test, a second confirmation test by thin-layer chromatography or by mass spectrometry

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[78]1 Individual Empl. Rights Cas. (BNA) 945, 951 (E.D. La. 1986), *rev'd*, 2 Individual Empl. Rights Cas. (BNA) 15, 20 (5th Cir. 1987).

[79]2 Individual Empl. Rights Cas. (BNA) 15, 20 (5th Cir. 1987).

[80]*See* Storms v. Coughlin, 600 F. Supp. 1214, 1221 (S.D.N.Y. 1984); Jensen v. Lick, 589 F. Supp. 35, 38 (D.N.D. 1984); *see also* Peranzo v. Coughlin, 608 F. Supp. 1504, 1509-12 (S.D.N.Y. 1985) (noting expert testimony to the contrary, but upholding use of EMIT test).

should be performed. These tests are generally recognized to be 100% accurate.[81]

Taking action against a public employee based upon an unconfirmed positive EMIT test has been held to violate due process. In *Higgs v. Wilson*,[82] the court enjoined disciplining prisoners solely on the basis of an unconfirmed EMIT test. Similarly, in *Jones v. McKenzie*,[83] the court found that the discharge of a school bus attendant for marijuana use based upon an unconfirmed EMIT test violated due process.

While the EMIT test is relatively accurate, and follow-up testing is more expensive, the courts have generally concluded that disciplinary action may not be taken against an employee without adequate confirmation.[84] However, once such a test has been performed, due process accuracy requirements are satisfied.[85] Conceivably, an EMIT test might be sufficient without a follow-up test if, prior to testing, the employer had other evidence establishing that the employee was under the influence of drugs.[86]

Public employers must also pay careful attention to the chain of custody for urine or blood samples. In *Higgs v. Wilson*,[87] the court drew support for its grant of a preliminary injunction against the drug testing of prisoners from evidence that the custody procedure for urine samples was not always followed, and that other inmates could tamper with the samples. In *Treasury Employees v. Von Raab*,[88] the Fifth Circuit found that the Treasury Department's careful custody procedures and quality assurance prevented a due process challenge on the basis of reliability.

A testing program may also violate due process if it contains no safeguards to ensure the proper selection of individuals to be tested. In

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[81] *E.g.*, Higgs v. Wilson, 616 F. Supp. 226, 231 (W.D. Ky. 1985).

[82] *Id.* at 226.

[83] 628 F. Supp. 1500 (D.D.C. 1986).

[84] *E.g.*, Pella v. Adams, 638 F. Supp. 94, 97 (D. Nev. 1986); Wykoff v. Resig, 613 F. Supp. 1504, 1509-12 (N.D. Ind. 1985); Higgs v. Wilson, 616 F. Supp. 226, 230-32 (W.D. Ky. 1985). The courts are not entirely uniform on their treatment of the accuracy of the EMIT test, however. *Compare* Peranzo v. Coughlin, 608 F. Supp. 1504, 1513 (S.D.N.Y. 1985) (confirmation by second EMIT test sufficient) *with* Jones v. McKenzie, 628 F. Supp. 1500, 1505 (D.D.C. 1986) (confirmation must be by means other than EMIT test). *See also* Jensen v. Lick, 589 F. Supp. 35, 38, 39 (D.N.D. 1984) (prison discipline based upon single EMIT test permissible); Smith v. State, 250 Ga. 438, 298 S.E.2d 482, 484 (1983) (single EMIT test sufficiently reliable to be used alone at parole revocation hearing). However, the cases accepting the EMIT test on its own involved prisoners and not employees.

[85] *See* Storms v. Coughlin, 600 F. Supp. 1214, 1225 (S.D.N.Y. 1984).

[86] *See id.* at 1225.

[87] 616 F. Supp. 226, 231 (W.D. Ky. 1985).

[88] 2 Individual Empl. Rights Cas. (BNA) 15, 23 (5th Cir. 1987).

Storms v. Coughlin,[89] the court was troubled by the method used to select prisoners since testing was performed neither upon reasonable individualized suspicion nor in an entirely random manner. It ordered that a completely random method be employed to prevent the harrassment of certain individuals or classes of individuals.[90]

Employees should also be given a hearing and opportunity to examine and challenge the laboratory reports. In *Capua v. City of Plainfield*,[91] the court found the mass testing of police and fire personnel to violate procedural due process since the tested individuals were not given a full and fair opportunity to evaluate and review their own test results, or to have their urine samples retested by an independent laboratory.

In *Banks v. Federal Aviation Administration*,[92] the court overturned the dismissal of two air traffic controllers where the urine samples found to be positive had been destroyed by the laboratory. The court found that the employees should have been given the opportunity, consistent with due process, to have the samples retested, and that the employer should not have deprived them of that opportunity.[93]

Due process, then, requires fairness in the selection of persons to be tested, accuracy, and an opportunity to challenge the test results. Accordingly, most due process requirements may be satisfied through implementing a detailed procedure covering all aspects of drug testing.

2. *Examples.*

The federal government has already implemented a drug testing program using these standards. Executive Order No. 12,564, issued on September 15, 1986,[94] requires the establishment of drug testing programs by federal agencies except for those in the military. Specifically, the order authorizes the adoption of testing procedures for those in "sensitive" positions, upon reasonable suspicion of drug use, as part of accident investigation, and as a follow up to rehabilitation.[95]

Employees under the order must be given sixty days notice prior to the start of testing.[96] The order also requires that a procedure be adopted to protect results, and prohibits the taking of disciplinary ac-

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[89]600 F. Supp. 1214, 1223 (S.D.N.Y. 1984).

[90]*Id.* at 1226.

[91]1 Individual Empl. Rights Cas. (BNA) 625, 634 (D.N.J. 1986).

[92]687 F.2d 92, 93 (5th Cir. 1982).

[93]*Id.* at 94-96.

[94]51 Fed. Reg. 32,889 (1986).

[95]*Id.* at 32,890, § 8 3.

[96]*Id.* § 8 4(a).

tion in the absence of confirmation.[97] To satisfy due process requirements, records and samples must be retained to permit review and employees must be able to give urine samples in privacy unless they are suspected of altering or substituting specimens.[98] Finally, employees determined to have used illegal drugs by a confirmation test may be discharged if they refuse counseling.[99] Government agencies under the Order are not required to report test results to the criminal authorities.[100] While no court has adjudged the constitutionality of this Executive Order, based upon existing case law, it appears to parallel the guarantees which the courts have required.[101]

D. *Equal Protection.*

Equal protection claims arise in the drug testing arena when employees claim that the programs discriminate against particular classes of individuals. Constitutional challenges to drug policies based upon equal protection have generally failed because courts have applied a rational-basis test to the selection criteria. No higher scrutiny has ever been triggered due to a lack of appropriate evidence that there is any improper discrimination against any suspect class.

In *New York City Transit Authority v. Beazer,*[102] the New York City Transit Authority refused to employ any user of narcotic drugs, including methadone. The plaintiffs brought a class action to challenge the application of the rule to former heroin addicts participating in methadone maintenance programs.[103] The plaintiffs asserted that the exclusion of methadone users violated the equal protection clause because not all methadone users were incapable of performing their job duties.[104] The court did not accept that argument since methadone users are not a suspect classification, and their exclusion was rationally related to the Transit Authority's interest in public safety.[105] It also held that the different treatment given alcoholics and methadone users did not violate equal protection.[106]

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[97] *Id.* at 32,891, § 8 4(c).

[98] *Id.*

[99] *Id.* § 8 5(d).

[100] *Id.* at 32,892, § 8 5(h).

[101] *See also* Department of Defense Directive 1010.9, *cited in* National Fed'n of Fed. Employees v. Weinberger, 1 Individual Empl. Rights Cas. (BNA) 488, 490-91 (D.D.C. 1986).

[102] 440 U.S. 568, 571-72 (1979).

[103] *Id.* at 576-77.

[104] *Id.* at 588-89.

[105] *Id.* at 592.

[106] *Id.* at 591 n.37.

Equal protection arguments will most likely fail unless some suspect classification is involved since the state need only demonstrate that its decision regarding the persons to be tested is rational. For example, in *Shoemaker v. Handel*,[107] the plaintiffs argued that the State Racing Commission's regulations violated equal protection because they required daily breathalyzer tests and random urinalysis for jockeys only, and did not apply to officials, trainers, or grooms. Finding that the jockeys were the most visible human participants in horse racing, and that drug testing had been implemented to preserve the integrity of horse racing, the state's decision to test jockeys only was rational.[108]

E. *Constitutional Right Of Privacy.*

The impact of the constitutional right of privacy in the area of drug testing cannot yet be gauged. While the issue of the constitutional right of privacy has been raised in some cases, it has yet to be fully addressed by the courts. Certainly, patients have a constitutional right of privacy with respect to medical information.[109] At this point, however, this right of privacy appears to require nothing more than the confidentiality of results.

In *Treasury Employees v. Von Raab*,[110] the district court found that the taking of urine samples did violate the constitutional right of privacy. However, aside from recognizing the existence of the penumbral constitutional right, and finding that urine sample collection involved a bodily function ordinarily considered private, its opinion reflected little analysis. The Fifth Circuit found no need to reach the issue, but suggested that the countervailing state interests might prevail.[111]

The Third Circuit in *Shoemaker v. Handel*[112] declined to consider the plaintiffs' privacy claims since the plaintiffs' privacy concerns were satisfied by new regulations regarding confidentiality which had taken effect while the action was pending.

The constitutional right of privacy does require that steps be taken to protect the confidentiality of test results. In *Capua*,[113] the court also found the city

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[107]795 F.2d 1136 (3d Cir.), *cert. denied*, ___U.S.___, 107 S. Ct. 577 (1986).

[108]*Id.* at 1144.

[109]Whalen v. Roe, 429 U.S. 589 (1977) (patients have a constitutional right of privacy with respect to medical information).

[110]1 Individual Empl. Rights Cas. (BNA) 945, 952 (E.D. La. 1986).

[111]2 Individual Empl. Rights Cas. (BNA) 15, 23 (5th Cir. 1987).

[112]795 F.2d 1136 (3d Cir.), *cert. denied*, ___U.S.___, 107 S. Ct. 577 (1986).

[113]1 Individual Empl. Rights Cas. (BNA) 625 (D.N.J. 1986).

drug testing program to be unconstitutional because so little regard was given to protect the confidentiality of the test results. The public officials in *Capua* actually widely publicized their results to the media.[114]

II. SPECIFIC TYPES OF EMPLOYEES

The recent tide of cases involving drug testing is unique in that it does not constitute a change in the law, such as the growth of strict products liability, but represents the application of a well-developed body of law to a relatively new practice. Because the basic legal principles were well-settled prior to the recent increase in drug testing, the decisions have been fairly uniform, and their application has been relatively predictable. To determine the constitutionality of a drug testing program for a particular group of employees, courts will examine the job functions and expectations of privacy for individuals in the group and the means by which drug testing is performed.

A. *Police And Fire Personnel.*

Because of the serious and legitimate concerns regarding the fitness of safety personnel, drug testing is often considered for police and fire workers. Despite the strong state interest in public safety, the actions which may be taken are relatively limited.

Drug screening of applicants as part of a routine pre-employment medical examination is permissible.[115] However, employers should not inquire into non-job-related matters, such as the medical conditions which require prescription drugs.

Random testing of police and fire personnel is impermissible,[116] but individuals can be tested where there is a reasonable suspicion that they are using drugs.[117] A reasonable suspicion that the individual is using drugs on off-duty hours is sufficient since the state may validly require that its safety officers not engage in illegal conduct even on their own time.[118] A policy provision requiring only a "suspicion" of drug use will be construed as requiring reasonable suspicion.[119]

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[114]*Id.* at 629.

[115]*Cf.* Shield Club v. City of Cleveland, Nos. C72-1088, C77-346 (N.D. Ohio July 15, 1986) (testing of police cadets).

[116]FOP v. City of Philadelphia, 1 Individual Empl. Rights Cas. (BNA) 574 (E.D. Pa. 1986).

[117]City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985).

[118]475 S.2d at 1326.

[119]Turner v. FOP, 500 A.2d 1005 (D.C. 1985).

B. *School Employees.*

Random testing of teachers or aides is not permissible. However, testing upon a reasonable individual suspicion of drug use is constitutional provided that the appropriate procedural safeguards are observed.[120]

C. *Prisons.*

Prisons present one of the few situations in which entirely random drug testing is permissible. The well-publicized drug problems in prisons, coupled with the negligible reasonable expectations of privacy, and the unique circumstances justify random searches of prisoners.[121] Prison guards, too, can be tested at random because of the strong state interest in minimizing drug use in prisons, the work-related nature of such testing, and the diminished expectations of privacy.[122]

D. *Transit Employees.*

Transit employees are commonly cited as examples of employees suitable for drug testing, since there is a strong state interest in the safety of public transit, and since a drug-related accident may literally be a disaster.[123] Surprisingly, recent cases have treated transit employees similarly to other employees.

Public employers can exclude drug users from transit positions involving public safety.[124] The actual testing of transit employees, though, must be based upon a reasonable suspicion of illegal drug use. The testing of employees involved in serious accidents, or for whom there is otherwise a reasonable suspicion of illegal drug use, is constitutionally permissible. Transit employers should provide procedural protections to assure that only per-

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[120]Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) (school bus attendant); Patchogue-Medford Congress v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986) (teachers eligible for tenure). Conviction of drug-related offenses may constitute just cause for dismissal. *See* Elyria Bd. of Educ. v. Individual Grievant, 86 Lab. Arb. (BNA) 921 (1985) (Cohen, Arb.) (discharge of counsellor after drug trafficking conviction).

[121]*E.g.*, Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984).

[122]McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987). A corrections officer may also be discharged for off-duty drug use. *See* New York State Dep't of Corrections v. American Fed'n of State, County and Mun. Employees Local 1214, 86 Lab. Arb. (BNA) 793 (1985) (LaManna, Arb.) (corrections officer properly discharged after he smoked marijuana with three teenage boys while off-duty); New York Dep't of Correctional Services v. American Fed'n of State, County and Mun. Employees, Council 82, 87 Lab. Arb. (BNA) 165 (1986) (Babiskin, Arb.) (discharge of correctional officers observed using cocaine in night club parking lot upheld).

[123]*See* N.Y. Times, Jan. 18, 1987, at 1, col. 4.

[124]New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979).

sons who actually demonstrate drug-influenced behavior are tested.[125] Based upon existing precedent, random testing of transit employees probably would not be constitutional.

E. *"Sensitive" Positions.*

There is no bright line defining where the state's interest is strong enough, and the employee's reasonable expectations are sufficiently diminished, to permit random drug testing. Random drug testing is permitted for military personnel.[126] Persons in the armed forces, however, have greatly reduced legitimate expectations of privacy. Civilian security officials in military institutions probably are not subject to random testing.[127]

Air traffic controllers, like transit employees, present difficult issues because the government's interest in maintaining the safety of air transportation is extremely strong. There is little doubt that drug use by air traffic controllers would justify discharge or discipline,[128] but it remains to be seen whether the random testing could be implemented solely to enhance air traffic safety. Air traffic controllers will probably be subject only to routine screening as applicants, and to testing when there is a reasonable suspicion of illegal drug use.[129]

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[125]Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

[126]32 C.F.R. § 8 60 (1986). The constitutionality of this provision has not yet been ruled upon. However, in Committee for GI Rights v. Callaway, 518 F.2d 466 (D.D.C. 1975), the court upheld the constitutionality of warrantless drug inspections of military personnel without probable cause. The rule challenged in *Callaway* provided that:

> Inspections of skin areas for indications of drug abuse will be conducted with as much privacy as possible. Inspections of the groin or anal area will be conducted only by qualified medical personnel and only in complete privacy. Intrusions into the body are prohibited without probable cause or medical certainty.

The court upheld the drug inspections on the basis of: 1) the high incidence of drug abuse in the armed forces and deleterious effect on national security; 2) diminished expectations of privacy; 3) the rule's primary purpose was to preserve fitness, and not to penalize individuals; 4) the efficiency of drug inspections; and 5) protections of the individuals' right of privacy. 518 F.2d at 475-77.

[127]American Fed'n Gov't Employees v. Weinberger, 1 Individual Empl. Rights Cas. (BNA) 1137 (S.D. Ga. 1986).

[128]Borsari v. Federal Aviation Admin., 699 F.2d 106 (2d Cir.), *cert. denied*, 464 U.S. 833 (1983) (discharge of air traffic controller after shown to have engaged in illegal drug sale upheld).

[129]*See* FAA Advance Notice of Proposed Rulemaking, Control of Drug and Alcohol Use for Personnel Engaged in Commercial and General Aviation Activities, 51 Fed. Reg. 44,432 (1986) (to be codified at 14 C.F.R. pt. 91) (proposed Dec. 4, 1986).

Despite the importance of border control, and the need to prevent illegal drugs from entering this country, customs agents are also entitled to constitutional protections, and probably may not be subjected to random drug testing.[130] Even for sensitive positions, due process requirements regarding accuracy, notice, and an opportunity to contest results must be afforded the employee.[131]

Shoemaker v. Handel, the case upholding the random testing of jockeys, and *McDonnell v. Hunter*, in which random testing of prison guards was permitted, present two of the few circumstances under which random testing has been found to be proper, due to their unique setting and history.[132] From these cases, it appears that courts will permit testing when the state has an extremely strong interest in detecting persons who are using drugs, and when the specific governmental agency has historically intruded into the privacy of its employees to detect illegal or improper conduct, or for other reasons.

While few, if any, municipalities employ individuals who might fall within this category, *Shoemaker* and *McDonnell* indicate that governments may order the random drug testing of persons in sensitive positions who have no legitimate expectations of privacy. Unfortunately, this determination will probably be made by the courts on a case-by-case basis.

III. OTHER CONSIDERATIONS

While constitutional challenges have been at the forefront of litigation involving the drug testing by government employers, there are also federal and state law implications as well. The existence of federal and state labor and discrimination legislation and state common law causes of action may make drug testing not only difficult but expensive.

A. *Discrimination Legislation.*

Drug testing could someday be found to violate state and federal prohibitions against race discrimination. However, race discrimination claims based upon state or federal legislation have generally failed due to a lack of sufficient expert and statistical proof to demonstrate that testing disparately impacts upon minorities. Further, race discrimination claims may be refuted by an employer's showing that the exclusion of drug users is job-related.

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[130]Treasury Workers v. Von Raab, 2 Individual Empl. Rights Cas. (BNA) 15, 19-20 (5th Cir. 1987).

[131]*See* Banks v. Federal Aviation Admin., 687 F.2d 92 (5th Cir. 1982) (air traffic controllers must be given opportunity to retest samples).

[132]*See supra* notes 40-44, 69-74 and accompanying text.

In *New York Transit Authority v. Beazer*,[133] the plaintiffs argued that a rule excluding individuals on methadone maintenance programs violated Title VII because it disparately impacted upon blacks and Hispanics. The Court rejected that claim because there was no competent evidence concerning the proportions of minority methadone users who had either been refused employment or had been discharged. Further, it found that the exclusion of methadone users was job-related because of legitimate safety concerns.

Shield Club v. City of Cleveland,[134] is a second instance in which a disparate impact claim failed for lack of evidence. The City of Cleveland had implemented a drug testing program for its forty-three police cadets, twenty of whom were minorities and twenty-three of whom were non-minorities. Ten of the minorities and three of the non-minorities tested positive and either resigned or tested positive again under a confirmation test.[135]

The positive minority candidates raised the argument that the melanin pigment in darker-skinned minorities might lead to a greater number of false positive test results. They introduced expert evidence concerning this "melanin theory," and asserted that the test disparately impacted minorities.[136] The court did not accept that argument because the plaintiffs' expert set forth no scientific bases for his conclusion and, in fact, had never conducted the proper test to prove the existence of the theory.[137]

A more tenable position at present may be that a drug policy is in violation of handicap discrimination statutes. The prohibition of discrimination against the handicapped may provide an incentive to use drug testing as a means for providing rehabilitation rather than discipline.

Drug or alcohol addiction is a handicap under many handicap discrimination statutes. In *Davis v. Bucher*,[138] the court determined that drug addiction was a handicap within the meaning of the Rehabilitation Act of 1973.[139] While the Act was subsequently amended to exclude persons whose "current" abuse interferes with their job performance, prior addiction or a present use of drugs which does not unduly interfere with job performance is likely still

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[133]440 U.S. 648 (1979).

[134]Nos. C72-1088, C77-346 (N.D. Ohio July 15, 1986).

[135]*Id.* at 1, 2.

[136]*Id.* at 4-5, 21-25.

[137]*Id.* at 26-31. Further, in Davis v. City of Dallas, 777 F.2d 205 (5th Cir.), *cert. denied*, ___U.S. ___, 106 S. Ct. 1972 (1986), the court found that even if disparate impact were shown, a requirement that the police officers not use marijuana was job-related and therefore legal.

[138]451 F. Supp. 791, 792 (E.D. Pa. 1978).

[139]29 U.S.C.A. §§ 701-796 (West 1985 & Supp. 1987).

included.[140] Further, alcohol or drug addiction may fall within the definition of handicap under many state statutes.[141]

Whatever the uncertainty under state or federal law might be, it now seems clear that an ongoing and untreated drug addiction is not a handicap. In *Heron v. McGuire*,[142] a police officer with a heroin addiction had experienced a number of work-related problems due to his drug dependency. At one point, he was seen by a police psychologist who recommended that he surrender his weapon and that he be placed on non-patrol duty. His work problems continued, however, and four months later he fainted at his desk while at work and was taken to the hospital. A routine blood sample was taken at the hospital which was ultimately provided to the police department under court order. Testing of the sample indicated heroin use.[143]

Disciplinary proceedings were instituted against the officer, and he was discharged one day before a medical examination was scheduled to determine his eligibility for pension disability benefits. He filed actions in state and federal court to challenge the disciplinary proceedings, his dismissal, and the denial of his pension benefits.[144]

In the federal court action, the officer admitted both that he was addicted to heroin and that his heroin use rendered him unfit for duty.[145] The court found it unnecessary to determine whether an ongoing heroin addiction constituted a handicap since it was clear that he was not otherwise qualified as required by the Act, entitling the department to dismissal of the claim against it.[146]

The legality and effectiveness of drug testing may turn upon the applicable handicap discrimination statute. Whether an ongoing drug or alcohol problem is a handicap will vary with the particular jurisdiction. However, two conclusions are fairly certain. First, if an employee's drug abuse substantially interferes with his job performance, there likely will be no violation of any state or federal handicap legislation. Second, if an employee is rehabilitated, he may be entitled to protection as a former addict if he can substantially

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[140]*See* Heron v. McGuire, 803 F.2d 67, 68-69 (2d Cir. 1986).

[141]*E.g.*, Hazlett v. Martin Chevrolet, Inc., 25 Ohio St. 3d 279 (1986). In New York City Transit Auth. v. Beazer, 440 U.S. 568, 579-80 (1979), the Court noted, but made no comment on, whether certain methadone users might come within the federal definition of handicap.

[142]803 F.2d 67 (2d Cir. 1986).

[143]802 F.2d at 67-68.

[144]*Id.* at 68.

[145]*Id.*

[146]*Id.* at 68-69. *See also* McCleod v. City of Detroit, 39 Fair Empl. Prac. Cas. (BNA) 225 (E.D. Mich. 1985) (present marijuana use not a handicap; marijuana user not "otherwise qualified" to perform job duties).

perform his job duties.[147] The risk of litigation under the handicap discrimination statutes should actually deter drug testing since once an employer learns of an employee's drug use, it will be unable to deny knowledge of the condition if the employee is later discharged.

In extremely limited circumstances, drug testing may constitute a failure to accommodate religious beliefs. In *Toledo v. Nobel-Sysco, Inc.*,[148] a federal district court held that an employer's refusal to hire a member of the Native American Church due to the use of peyote during religious ceremonies violated Title VII.

B. *Common Law.*

1. *Defamation And Invasion Of Privacy.*

Common law causes of action for defamation and invasion of privacy may pose a significant threat to public or private employers who attempt to implement drug testing programs. These common law hazards of drug testing are illustrated by the recent First Circuit opinion in *O'Brien v. Papa Gino's of America, Inc.*[149]

O'Brien had supervised twenty-eight fast food pizza stores for the Papa Gino's pizza chain, but relations between him and upper management deteriorated after he refused to promote the son of one of his superiors. Sometime afterwards, company management confronted him with rumors that he was using cocaine, and forced him to undergo polygraph testing to keep his job. He failed the polygraph test and was dismissed.[150]

O'Brien brought an action against Papa Gino's for defamation and invasion of privacy based upon the accusations and testing. The jury returned a verdict of $448,200 on these claims and the First Circuit affirmed.[151]

The employer appeared to have been particularly careless with drug use accusations in *Houston Belt & Terminal Railway Co. v. Wherry*,[152] where the employee recovered $200,000 based upon a false report that

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[147]In Burka v. New York City Transit Authority, 1 Individual Empl. Rights Cas. (BNA) 672, 677 (S.D.N.Y. 1986), the court found the differences between present and former drug users significant enough to require separate classes for class certification.

[148]41 Fair Empl. Prac. Cases (BNA) 282 (D.N.M. 1986).

[149]780 F.2d 1067 (1st Cir. 1986). The Ohio law governing work place defamation is set forth in Hahn v. Kotten, 43 Ohio St. 2d 237, 331 N.E.2d 713 (1975).

[150]780 F.2d at 1070-71.

[151]*Id.* at 1076-77.

[152]548 S.W.2d 743 (Tex. Civ. App. 1976), *cert. denied*, 434 U.S. 962 (1977).

he was a methadone addict. In *Wherry*, the employee had been examined by a physician after having fainted while at work. The doctor had ordered a blood test to determine whether the fainting was due to diabetes or to drug use.[153]

Based upon a laboratory report which indicated a "trace" of methadone and a neutral doctor's report, a supervisor circulated a routine accident report among the responsible company officials indicating that the test had been positive for methadone. However, subsequent urinalysis indicated that there was no methadone use, and at trial the doctor testified that a "trace" reading was inconclusive at best.[154]

The employee was ultimately discharged for failing to file the appropriate accident report. In subsequent proceedings, however, the employer sent a letter to the Department of Labor suggesting that the employee was discharged for drug use. The Fifth Circuit affirmed the jury's verdict against the employer based upon the publication of those statements.[155]

Defamation liability may arise as a result of many communications concerning drug use. Conceivably, a testing laboratory may be liable for a false report that the employee's drug test was positive. Accusations regarding drug use based upon an unconfirmed EMIT test might be challenged by means of a defamation action, and may be difficult to defend if no confirmation tests were performed. An employee discharged for drug abuse on the basis of an erroneous drug test might also recover damages for his inability to find a job if the employer made accusations of drug use to prospective employers.[156]

2. *Exceptions To The Employment-At-Will Doctrine.*

Employees might also bring claims under the growing number of exceptions to the employment-at-will doctrine. Claims for breach of contract, implied contract, promissory estoppel, or fraud could be brought based upon statements of company policy regarding employee rights of privacy, or other promises of permanent employ-

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[153]*Id.* at 746.

[154]*Id.*

[155]*Id.* at 744-55. Similarly, in Norman v. General Motors Corp., 122 L.R.R.M. (BNA) 277 (D.N.M. 1986), the court denied the employer's motion for summary judgment when it had provided police with its written reports and notes that the employee had used drugs.

[156]*See* Lewis v. Equitable Life Assurance, 389 N.W.2d 876, 880 (Minn. 1986) (employer liable for statement made by employees in interviews concerning the reasons given for their discharge).

ment.[157] If an employee argues that his drug use did not affect his employment, such as the smoking of marijuana on off-hours, it may be up to a jury to decide whether a discharge for a positive drug test constituted just cause. The actual initiation of drug testing may be argued to be inconsistent with previous employer promises.[158]

3. *Other Causes Of Action.*

Future case law may reveal other causes of action which might be raised as well. Assault and battery claims might be brought against an employer if the employee claims that he did not consent to the testing, or alleges that his consent was obtained under duress. Similarly, a drug testing laboratory may be liable for interference with contractual relations if an employee is discharged or disciplined based upon an incorrect test result. An employer who recognizes a drug problem, yet fails to take corrective action might also be held responsible for the employee's torts.[159]

C. *Local Ordinances.*

Employers considering drug testing should also be aware of local ordinances which might place limits on drug testing. A growing number of communities are adopting laws to prevent the mass testing of employees, and may require that testing be performed only in narrow circumstances. The San Francisco Municipal Code, for example, now prohibits drug testing in the absence of reasonable grounds for suspicion.[160]

D. *Collective Bargaining Agreements.*

A public employer may also be prevented from drug testing by the provisions of a collective bargaining agreement covering unionized employees. Before any drug program is implemented, the provisions of the collective bargaining agreement should be considered.

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[157]Not all jurisdictions would recognize such a claim due to the existence of remedies under a civil rights statute. *See* Bruffett v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982) (Pennsylvania would not recognize a common law public policy wrongful discharge claim for handicap discrimination due to existence of state Human Relations Act).

[158]*See* Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100, 483 N.E.2d 150 (1985).

[159]*See* Otis Eng'g Co. v. Clark, 668 S.W.2d 307 (Tex. 1983) (employer held liable for fatal automobile accident involving employee which it had sent home for reporting to work intoxicated).

[160]SAN FRANCISCO, CAL., POLICE CODE Ch. VIII, pt. II, art. 33.A (1985). Legislation has also been introduced on the federal level. *See* S. 356, 100th Cong., 1st Sess. (1987) (providing for random testing of airline and railway employees).

The results of arbitral decisions where the employer has implemented drug testing programs most often turn upon the language of the agreement, and the bargaining history between the parties. In the case of the *National Football League*,[161] an arbitrator found that the drug testing of football players was not permissible since the subject had been raised in negotiations, and the players' union had refused to agree to it. In contrast, an arbitrator upheld the discharge of two correctional officers who were observed using cocaine at a night club parking lot based upon their positions and the language of the collective bargaining agreement.[162]

In yet another arbitration involving drug testing, the arbitrator refused to permit random drug testing at the Three Mile Island nuclear power plant since the collective bargaining agreement authorized drug testing only for reasonable cause, and since the arbitrator found drug testing to be offensive.[163] Conversely, another arbitration upheld the discharge of an employee who refused to sign an acknowledgment of the company's drug and alcohol policy which permitted random testing where the implementation of the policy had never been challenged by the union.[164] Just as the employers in these arbitrations were either bound or authorized by the collective bargaining agreement, public employers must be sensitive to the provisions of their employment agreements as well.[165]

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[161]National Football League and NFL Players Ass'n v. National Football League Management Council, 209 Daily Lab. Rep. (BNA) A-7 (Oct. 25, 1986) (Kasher, Arb.).

[162]New York Dep't of Correctional Services v. American Fed'n of State, County and Mun. Employees, 87 Lab. Arb. (BNA) 165 (1986) (Babiskin, Arb.).

[163]Metropolitan Edison Co. v. Internationl Bhd. of Electrical Workers Local 536, 199 Daily Lab. Rep. (BNA) A-5 (Oct. 9, 1986) (Aarons, Arb.).

[164]Concrete Pipe Prods. Co., Inc. v. International Bhd. of Teamsters, Local 969, 87 Lab. Arb. (BNA) 601 (1986) (Caraway, Arb.).

[165]*See also* Maverick Tube Co. v. Steelworkers Local 8867, 86 Lab. Arb. (BNA) 1 (1985) (Miller, Arb.) (employee properly discharged for marijuana possession under plant rule providing for immediate discharge for narcotics possession); Signal Delivery Service, Inc. v. Truck Drivers, 86 Lab. Arb. (BNA) 75 (1985) (Weis, Arb.) (discharge of driver involved in two accidents and whose breath smelled of alcohol after lunch proper; refusal to submit to blood test not insubordination); Weyerhauser Co. v. Graphic Communications Union, 86 Lab. Arb. (BNA) 182, 183 (1985) (Levin, Arb.) (employer obligated to refer employee to rehabilitation prior to discharge under collective bargaining agreement); Georgia-Pacific Corp. v. Paper Workers Local 335, 86 Lab. Arb. (BNA) 411 (1985) (Clarke, Arb.) (positive screening test alone insufficient to support discharge for marijuana use); Pacific Motor Trucking v. Freight Drivers Union Local 208, 86 Lab. Arb. (BNA) 497 (1986) (D'Spain, Arb.) (discharge based upon blood test indicating intoxication improper where chain of custody not protected); Pacific Bell v. Communications Workers of Am., 87 Lab. Arb. (BNA) 313 (1986) (Schubert, Arb.) (discharge for illegal drug use must be proven beyond reasonable doubt; testimony of undercover agent alone insufficient).

IV. TESTING

The implementation of a drug testing program, particularly by a public employer, must be done with extreme care. Consideration should be given to the need for testing, how it will be conducted, and what action may be taken if drug use is shown.

A. *Why Test?*

A public employer should first examine the reasons why a drug testing program is necessary. If there are genuine, legitimate safety or productivity concerns, testing may be in order. Employers should consider not only the cost of testing itself, but the cost of necessary confirmation, and the rights of their employees. Courts will look with disfavor upon employers who implement drug testing programs for personal, religious, or moral reasons, and not for the primary purpose of enhancing the safe and efficient operation of the workplace. Not every employer should test its employees.

B. *Who To Test?*

Next, a public employer should decide which employees should be subject to testing. Even the federal government does not require the testing of persons in all positions. The drug testing of cleaning personnel in most situations is probably neither legal nor necessary, though few would dispute the testing of armed police officers evidencing unusual behavior. Any drug testing program should be tailored to those persons for whom drug testing is necessary, and should exclude any persons for whom drug testing is less than essential.

C. *How To Test?*

Most importantly, a public employer should set forth, in writing, a complete drug testing program, governing the selection of those to be tested, the conduct of the testing, and the disposition of the results, whether negative or positive. It is the existence and strict enforcement of such a written procedure which may ultimately determine its constitutionality.

The written policy should first address the screening of applicants. Drug testing of applicants for positions where safety is of concern may be conducted as part of an overall medical examination. Safety concerns will carry little weight before a court if the employer has taken no other steps to determine physical fitness for the job. Conversely, if the employer has undertaken to examine the employee's general fitness, safety and health concerns will be considerably more credible.

The selection of employees for testing is also an important phase of a drug testing program. Except in narrow instances, random testing generally is not permitted, and is likely to be challenged in court. A legally sufficient drug testing program will generally require testing only if an employee demonstrates objective symptoms giving rise to a reasonable suspicion of illegal drug use. A safer policy would require the concurrence of supervisors or some other procedural check. To insulate themselves from potential liability, public employers should strive to insure that only persons who are truly exhibiting altered behavior are made to subject to testing.

The taking of samples, too, is a sensitive phase of a drug testing program. The employee's privacy, and the confidentiality of results, should be preserved to the greatest extent practicable. Even when an EMIT test is positive, all references to the test should be purged from the employee's record if the ultimate test result is negative. If the confirmed test results are positive, they should be communicated to as few persons as possible and only to those having a business-related need to know about them. Even the fact of testing should be kept from the other employees to avoid defamation liability, and to protect the employee's dignity. Unless there is a genuine concern about the substitution or alteration of samples, employees should be permitted to give samples privately.

Public employers, as all employers, must also pay close attention to the chain of custody for specimens to be tested. The results of any test will be subject to challenge unless steps are taken to prevent tampering or confusion of specimens. Any testing should be done by a reputable laboratory or hospital, and positive samples should be retained in case the employee requests independent confirmation.

A proper drug testing program should provide for confirmation of any test results. Many courts require confirmation of an EMIT test by gas chromatography or mass spectroscopy tests before any disciplinary action is taken against an employee. Publication of the positive results of an unconfirmed EMIT test may result in liability under the common law, and may violate the constitutional right of privacy.

Just as in any disciplinary situation involving public employees, due process must be followed for any action taken against an employee who has been shown to have used drugs. Employees must be given notice, an opportunity to examine their laboratory reports, and hearings at which the results may be challenged.

Employers should also consider, in advance, exactly what action may be taken against an employee who is shown to have taken illegal drugs. Referring the employee to rehabilitation or counseling is the best means of avoid-

ing litigation, of helping the employee, and of preserving employee morale. Discharge or discipline should be considered when safety concerns are paramount or when the employee refuses to seek or follow prescribed treatment.

V. CONCLUSION

The public has a right to expect a drug-free work environment for public employees. However, the individual rights of those employees are substantial, and due regard must be made for complying with the constitutional, statutory, and common law requirements. Public employers should consider whether drug testing is appropriate for their workers and implement programs, if necessary, for identifying and assisting employees who are using drugs. With care, public employers can create drug-free work places without infringing upon the constitutional rights of their employees.