CSU
College of Law Library

Journal of Law and Health

Volume 2 | Issue 1 Article

1987

Legal Implications of Drug Testing in the Private Sector

Thomas H. Barnard

Follow this and additional works at: https://engagedscholarship.csuohio.edu/jlh

 Part of the Labor and Employment Law Commons

How does access to this work benefit you? Let us know!

Recommended Citation

Thomas H. Barnard, Legal Implications of Drug Testing in the Private Sector, 2 J.L. & Health 67 (1987-1988)

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

LEGAL IMPLICATIONS OF DRUG TESTING IN THE PRIVATE SECTOR

Thomas H. Barnard*

Drug testing, or perhaps more appropriately substance abuse testing, is a double-edged sword in the private sector. Not only can the employer be sued as the result of testing but he also can be sued for not testing. Private employers find themselves in the classic "damned if you do, damned if you don't" situation. Large corporations are seen as deep pockets when matched against one of their employees and if the plaintiff's lawyer can find an issue and then get his or her case to the jury, corporate pockets can be very deep indeed. Hence, before examining the legal implications of testing, there is good reason to consider the legal implications of *not* testing.

I. *The Legal Implications of Not Testing*

When an employer considers whether or not to test for substance abuse, primary considerations include questions of productivity, such as absenteeism and accidents, or increased costs, such as increased workers' compensation and benefits. There is recent precedent suggesting that there is legal support for testing employees or job applicants, or if the private employer does not test, there is support for instituting a comprehensive substance abuse control program within the workplace.

A. *Third Party Causes of Action*

A number of recent decisions hold employers liable for third party claims arising out of the actions of employees under the influence of drugs or alcohol. In *Chesterman v. Barmon*,[1] the Oregon Court of Appeals held that an employer's liability for the criminal actions of an employee who was taking mescaline and amphetamines was a question for the jury to decide. In two other recent cases,[2] drunk employees were involved in serious automobile accidents. In both drunk driving cases it is apparent that the employer either already had knowledge or should have had knowledge that the employee

*Partner in Duvin, Cahn & Barnard, Cleveland, Ohio; LL.B., Columbia University; LL.M., Case Western Reserve University.

[1] 82 Or. App. 1, 727 P.2d 130 (1986).

[2] Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983); Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968), *aff'd on other grounds*, 24 Cal. App. 3d 171, 100 Cal. Rptr. 752 (1972).

was too drunk to drive and did not take action. In *Otis Engineering Corp. v. Clark*,[3] a drunk machine operator sent home by his employer was involved in an automobile accident en route killing himself and two occupants of another car. The Texas Supreme Court held the employer liable. In the other case, *Brockett v. Kitchen Boyd Motor Co.*,[4] the employer was held liable for injuries suffered by third parties involved in an automobile accident caused by a drunk employee who left an office Christmas party.

Although not directly addressing the question of testing, these three cases demonstrate that employers may be held liable for the actions of employees under the influence of drugs or alcohol. With the proliferation of drug testing services, it is a small step from knowing a person is "high" by observation to requiring testing, at least under questionable circumstances.[5] For example, if an employer-defendant testifies that he did not know an employee was under the influence of drugs or had a drinking problem, plaintiff's counsel is likely to inquire if the employer made an attempt to find out in light of the employee's suspicious behavior.

Not only have employers been held liable for negligence regarding specific incidents where the employer had or should have had knowledge of employee intoxication; employers have been held to be generally knowledgeable of their employees' habits pursuant to a cause of action for negligent hiring.[6] At least two courts have held employers liable, in the substance abuse context, under the theory of negligent hiring. In *Colwell v. Oatman*,[7] the employer was held liable for hiring an intoxicated laborer who later injured a fellow employee. In *Pittard v. Four Seasons Motor Inn*,[8] the New Mexico Court of Appeals allowed an employer to be sued for negligence by the parents of a young boy who was sexually assaulted by an intoxicated hotel employee.

---

[3] 668 S.W.2d 307 (Tex. 1983).

[4] 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968).

[5] *See, e.g.*, Snitow v. Southeastern Pa. Transp. Auth., No. 4815 (Philadelphia C.P. Jan. 30, 1987), *noted in* 22 Daily Lab. Rep. (BNA) A-2 (Feb. 4, 1987) (Three passengers injured in a commuter train collision filed a multimillion dollar damage suit against the Southeastern Pennsylvania Transportation Authority (SEPTA) and three operating unions for failing to prevent drug use by the train crew. Plaintiffs' counsel contends that both the transit agency and the union should have known that the operators had drug problems and should have cooperated in an extensive drug testing program.).

[6] This is a bitter pill for employers to swallow, especially in light of restrictions placed on employers' inquiries of job applicants, *see, e.g., Ohio Pre-employment Inquiry Guide*, 3 Empl. Prac. Guide (CCH) ¶ 26,650 (1984).

[7] 32 Colo. App. 171, 510 P.2d 464 (1973).

[8] 101 N.M. 723, 688 P.2d 333 (1984).

B. *Injuries to the "High" Employee*

Following the Ohio Supreme Court's decision in *Blankenship v. Cincinnati Milicron Chemicals, Inc.*,[9] employees may bring intentional tort actions above and beyond their workers' compensation claims against employers for injuries suffered on the job. In *Jones v. V.I.P. Development Co.*,[10] the Ohio Supreme Court's interpretation of three fact situations enlarged the meaning of an intentional tort. The court applied a "substantial certainty" test. Subsequently enormous numbers of cases were filed by employees whose own culpability led to their job injury or occupational disease.[11] For example, in virtually every occupational disease case handled by the author where respiratory illnesses were alleged, the plaintiff was currently or recently a heavy tobacco smoker. Neither law nor society defines substance abuse as including the use of nicotine. Social mores distinguish nicotine use from alcohol and marijuana use. However, there is little practical difference in holding an employer accountable for employee alcohol and marijuana excesses while disregarding the tobacco excesses of employees.

C. *Statutory Liability*

In addition to the foregoing employer common law liability, employer liability also arises for violation of the Occupational Safety and Health Act (Act)[12] where employers are not vigilant about employee substance abuse. While the Act contains no specific standard requiring regulation of substances on the job, the Occupational Safety and Health Administration can cite an employer pursuant to the General Duty Clause.[13] Under this provision an employer can be cited for failing to "furnish to each of his employees employment and a place of employment which are free from *recognized hazards* that are causing or are likely to cause death or serious physical harm to his employees."[14] Permitting an employee to work while intoxicated or under the influence of drugs could be construed as a recognized hazard.

---

[9] 69 Ohio St. 2d 608, 433 N.E.2d 572, *cert. denied*, 459 U.S. 857 (1982).

[10] 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1985).

[11] For example, in drunk driving cases like Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983) and Brockett v. Kitchen Boyd Motor Co., 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968), an Ohio employee or his estate might sue an employer for allowing the employee to drive home drunk claiming that it was substantially certain the employee would kill or injure himself. OHIO REV. CODE ANN. § 4121.80 (Baldwin 1986) specifies that an employer retains his common law defenses. Prior to passage of the new law, however, assertion that an employee's conduct constituted assumption of the risk in a contributory negligence action was impermissible.

[12] 29 U.S.C. §§ 651-678 (1982). *See* § 654(a)(1) (The General Duty Clause is a catchall provision used by officials at the Occupational Safety and Health Administration when there is no clear violation of a specific standard of the Act.)

[13] 29 U.S.C. § 654(a)(1) (1982).

[14] *Id.* (emphasis added).

The foregoing examples of potential legal liability do not necessarily lead to the conclusion that an employer should engage in substance abuse testing at the workplace. They do suggest, however, that an employer may suffer legal and productivity losses without some form of a substance abuse program.[15]

II. *Legal Concerns With Testing*

The other edge of the sword, of course, is the legal risk an employer faces if he *does* test for substance abuse. In general, there is much less risk in the private sector than in the public sector. There is limited legal risk in testing job applicants if precautions such as adequate notice of the testing and maintenance of confidential test results are taken.[16] Legal issues surface, however, when employers test current employees.

A. *The Union Context*

In recent years, either union contracts or rules and regulations promulgated pursuant to those contracts have permitted employers to terminate or discipline employees for having possession of alcohol or for being intoxicated on the premises. Grievances arise pursuant to union contracts where employees are disciplined for either the use or possession of alcohol on company premises during work hours.

There are some changes that have an impact on this common issue arising under union contracts. First, drug use has increased. Drugs are new and frightening to employers who had come to expect and tolerate, to a certain degree, the use of alcohol. Secondly, as the result of employee assistance programs (EAP), a more sympathetic view of alcohol and drug abuse has arisen. Substance abuse is generally treated as a disease and the employer assists in helping the employee's cure. Along with this development has been a greater leniency on the part of many arbitrators in their treatment of employees intoxicated or under the influence of drugs on the job. Arbitrators *expect* the employer to assist the employee with his problem. Finally, sub-

---

[15] Manufacturing and transportation employers are particularly vulnerable to liability. Because of the nature of the jobs, employees are more likely to be exposed to on-the-job hazards and are in positions more likely to precipitate injuries to other employees or to third parties.

[16] *But see supra* note 6. *Cf.* OHIO ADMIN. CODE § 4112-5-08 (B)(1)(a) (1984). An employer may encounter trouble testing a handicapped applicant. In Ohio, employers may make "[i]nquiries necessary to determine [an] applicant's ability to substantially perform [a] specific job without significant hazard" but may not make "any other inquiry which would reveal [a] handicap." The Ohio Civil Rights Commission's Handicap Discrimination Guidelines permit pre-employment inquires and pre- employment physical examinations "designed to . . . [d]etermine whether an applicant can perform the job without significantly increasing the occupational hazards to himself or herself, to others, to the general public, or to the work facilities. . . ."

stance abuse testing programs are increasingly reliable and relatively inexpensive. With the increased availability of testing, not only is the employer more likely to test; but, in a grievance proceeding, the union may argue that the employer who did not test made a subjective determination as to whether the grievant was actually intoxicated. These factors have precipitated an increased interest in the union setting for the implementation of substance abuse testing programs.

Prior to implementing a drug testing program, the employer has a duty to negotiate with the union about the program. A drug testing program is a mandatory subject of bargaining since it affects a condition of employment within the meaning of section 8(a)(5) of the National Labor Relations Act.[17] In some instances, however, the union may waive its rights to bargain about the subject.[18]

Once a testing program is implemented, it is likely grievances will follow. There are numerous arbitration cases centered on drug testing problems.[19]

While the factors that arbitrators consider in alcohol and drug abuse cases are similar to those considered in various other types of arbitration cases, there tends to be a wider disparity of views by arbitrators towards alcohol and drug abuse. Most arbitrators consider the following factors in arbitrations involving substance abuse:

— The collective bargaining agreement and the work rules upon which the discipline was based;

— The substantiality of the evidence presented; [20]

---

[17] 29 U.S.C. § 158(a)(5) (1983).

[18] *See, e.g.*, Concrete Pipe Prods. Co. v. International Bhd. of Teamsters Local 969, 87 Lab. Arb. (BNA) 601 (1986) (Caraway, Arb.) (The arbitrator found that the company had the right to implement a drug and alcohol testing policy. The arbitrator stated that implementation of the policy clearly was an exercise of management rights and an integral part of the company's responsibility to maintain safety, efficiency and discipline in the work place. He also emphasized that the program protected the public from injury which might be inflicted by an intoxicated employee.).

[19] From March, 1980, through January, 1985, there were 46 cases reported in Labor Arbitration Reports involving drug- related discharges.

[20] *See, e.g.*, United States Borax & Chem. Corp. v. Longshoremen's Union Local 30, 84 Lab. Arb. (BNA) 32 (1984) (Richman, Arb.) (the appropriate standard of proof is that of clear and convincing evidence); A.R.A. Mfg. Co. v. Allied Indus. Workers Local 300, 83 Lab. Arb. (BNA) 580 (1984) (Canestraight, Arb.) (reinstatement where employee discharged for alleged possession and consumption of marijuana on company premises was based on uncorroborated testimony of undercover agent); Amax Chem. Corp. v. International Chem. Workers Local 37, 83 Lab. Arb. (BNA) 635 (1984) (Bell, Arb.) (reinstatement ordered where employer failed to establish by clear and convincing evidence that discharged employee had control or physical possession of marijuana found in truck used by other employees as well as grievant).

— The consistency of the discipline with other similar cases; [21]

— The severity of the infraction in relation to the kind of work needed to be performed; [22] and

— The employee's seniority, attendance, and work performance records.[23]

Testing relates directly to issues surrounding work rules, substantiality of the evidence and consistency. While a comprehensive program may be preferable, at a minimum the contract clause should specify when testing can occur and the employment-related consequences of a positive test. In *Roadway Express, Inc. v. Teamsters Local 705*,[24] the collective bargaining agreement provided that "[t]he [e]mployer may request an [e]mployee to take a medical test to determine whether he was under the influence of intoxicating liquor or drugs."[25] The grievant submitted to a drug test following his supervisor's observations that he was acting in a confused and disoriented manner. The drug test revealed the presence of marijuana and the employee was discharged. The arbitrator ruled that, although the collective bargaining agreement did not contain an express standard the employer must fulfill before demanding the drug test, the employer did have an honest and reasonable suspicion that the employee was under the influence of drugs or alcohol before asking the employee to submit to the drug test.

There is a similarity between issues arising in the public sector under the fourth amendment[26] and issues arising under union contracts in the private

---

[21] Discharge for on-the-job marijuana possession and/or use but not for employee alcohol use has led arbitrators to reverse or modify company discipline. *See* Ethyl Corp. v. Oil Workers Local 4-16000, 74 Lab. Arb. (BNA) 953 (1980) (Hart, Arb.); Hooker Chem. Co. v. Niagara Hooker Employees Union, 74 Lab. Arb. (BNA) 1032 (1980) (Grant, Arb.). *But see* Issacson Structural Co. v. International Ass'n of Bridge Workers Local 506, 72 Lab. Arb. (BNA) 1075, 1079 (1979) (Peck, Arb.) (describing alcoholism as a "disease" subject to treatment and marijuana as a "social drug used by choice," having no addictive proclivity).

[22] *See, e.g.*, Freeman United Coal Co. v. United Mine Workers Local 5134, 82 Lab. Arb. (BNA) 861, 865-66 (1984) (Roberts, Arb.) (The arbitrator upheld the discharge for a road grader operator with a meritorious work record who operated a grader along a heavily traveled road in an extreme state of intoxication. The arbitrator stated, "[i]rrespective of the Company's leniency with respect to less serious alcohol related incidents in the past, any Employee must be charged with knowledge that the operation of dangerous equipment in a state of extreme intoxication is intolerable and will be dealt with severely.").

[23] *See* Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 124 L.R.R.M. (BNA) 2300 (D.C. Cir. 1987) (unblemished disciplinary record of 16 years with airline leads to reinstatement of airline pilot who was discharged for flying under the influence).

[24] 87 Lab. Arb. (BNA) 224 (1986) (Cooper, Arb.).

[25] *Id.* at 228.

[26] The right of the people to be secure in their persons, houses, papers, and efforts, against unreasonable searches and seizures, shall not be violated. U.S. CONST. amend. IV.

sector. One of the problems of testing for substance abuse is that the test cannot distinguish between the use of a substance while on the job versus use while off the job. If the contract or rule merely prohibits the use of alcohol or drugs on the job, the test is unlikely to reveal whether the alcohol/drug use took place on the premises or before the employee came on duty. The employer may find himself testing for or controlling a permissible activity undertaken on the employee's own time and off the employer's premises. Arbitrators are likely to find that these activities are of no concern to the employer *unless* the employer can demonstrate that they damage the company's reputation or product, interfere with the employee's attendance or performance,[27] or result in a fellow employee's refusal, reluctance, or inability to work with that employee.

Arbitrators also have dealt with the issue of terminating an employee for refusing to submit to a drug search.[28] In *Shell Oil Co. v. Oil Workers Union Local 4-367*[29] and *Kraft, Inc. v. Food Workers Local 34*,[30] arbitrators found grievants to be insubordinate for refusing to submit to *searches* where reasonable suspicion existed that they were using drugs on the job. Refusal to submit to a test also could be considered insubordination where the employer reasonably suspects an employee is under the influence of drugs. In *American Standard v. International Brotherhood of Teamsters Local 651*,[31] the arbitrator suggested that in the absence of a published rule or policy, an employer cannot terminate an employee solely for his refusal to take a drug screening test. The arbitrator upheld that employee's termination because the employee *repeatedly* refused to take a drug test after fellow employees' observations that she was under the influence of drugs. The employer had a policy prohibiting working under the influence of drugs. The collective bargaining agreement gave the employer the right to require medical exams *at any time* to determine the employee's "fitness to work."[32] The arbitrator concluded that observations of

---

[27] *See, e.g.*, APCOA, Inc. v. Automotive Chauffeurs Local 926, 81 Lab. Arb. (BNA) 449 (1983) (Hewitt, Arb.) (arbitrator upheld the termination of a valet driver who, having received warnings, reported to work smelling of alcohol in unfit condition for work in violation of company rules); *but see* Texas Utils. Generating Co. v. International Bhd. of Elec. Workers Local 2337, 82 Lab. Arb. (BNA) 6 (1983) (Edes, Arb.) (arbitrator found employer had no authority to require grievant to take test to determine marijuana use when the employee was off company premises).

[28] *See* Shell Oil Co. v. Oil Workers Union Local 4-367, 84 Lab. Arb. (BNA) 562 (1985) (Milentz, Arb.); Kraft, Inc. v. Food Workers Local 34, 82 Lab. Arb. 360 (1984) (Denson, Arb.).

[29] 84 Lab. Arb. (BNA) 562 (1985) (Milentz, Arb.).

[30] 82 Lab. Arb. (BNA) 360 (1984) (Denson, Arb.).

[31] 77 Lab Arb. (BNA) 1085 (1981) (Katz, Arb.).

[32] *Id.* at 1087 (emphasis added).

the grievant's apparently intoxicated condition coupled with her refusal to submit to the medical test in light of published and posted company policy justified the grievant's discharge.

In January, 1987, the United States Supreme Court agreed to review *Misco, Inc. v. United Paperworkers International Union*.[33] In *Misco*, the Supreme Court will address the question of whether public policy warrants a federal court reversing an arbitration award.

The Court of Appeals for the Fifth Circuit affirmed the district court's determination that the arbitrator's award of reinstatement and back pay to an employee fired for smoking marijuana contravened "well defined public policy - the Louisana law against possession of marijuana"[34] and public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."[35]

While the Court may defer to the decision of the arbitrator, in light of "federal policy of settling labor disputes by arbitration,"[36] the *Misco* case gives the Court a vehicle by which it may comment on substance abuse in the workplace.

C. *Handicap Discrimination*

An employer must be cognizant of federal and state handicap discrimination laws when undertaking drug testing.

1. *Federal Law*

The Rehabilitation Act of 1973,[37] generally prohibits employment discrimination against handicapped persons who are employees of or applicants for employment with federal contractors.[38] Although a "handicapped individual" for purposes of this statute has been broadly interpreted by the courts, subsequent amendment has narrowed the statute's coverage. In 1978, a district court in Pennsylvania held that three employees who were former her-

---

[33] 768 F.2d 739 (5th Cir. 1985), *cert. granted*, ___ U.S. ___ , 107 S. Ct. 871 (1987).

[34] *Id.* at 741.

[35] *Id.* at 743.

[36] Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). *See also* United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) (the three cases comprise the so-called *Steelworkers Trilogy*).

[37] 29 U.S.C. §§ 701-774 (1982).

[38] Handicapped employees do not have direct causes of action against employers if the employer is a government contractor. Employees must file a charge of discrimination with the Office of Federal Contract Compliance Programs which files administrative complaints where apropriate. *See* 29 U.S.C. § 793(b) (1982).

oin addicts on a methadone program were "handicapped individuals" within the statutory definition.[39] However, the Rehabilitation Act's definition of a "handicapped individual" was amended in the same year to exclude from coverage:

> any individual who is an alcohol or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.[40]

The foregoing amendment, however, does not preclude drug addiction and alcoholism from being considered handicaps under certain circumstances.[41] Some courts have held that former addicts are handicapped because they have a past record of an impairment within the meaning of the Rehabilitation Act. One court suggested in dictum that current addicts under some circumstances could be considered handicapped. "[C]ertainly Congress intended to include an individual with a history of drug abuse as 'handicapped' . . . where the drug addiction substantially affects the addict's ability to perform a major life activity."[42]

While former addicts who may be deemed to have a record of substantial impairment of a major life activity are handicapped within the meaning of the Act,[43] former addicts and/or recovering alcoholics are something quite different from the current abuser. Hence, the Rehabilitation Act does not appear to preclude testing. Testing would not, under most ordinary circumstances, reveal the use of alcohol or illegal drugs from the past, but testing would disclose current use and therefore falls squarely within the exception provided by the 1978 amendment.

2. *State Law*

State laws governing handicap discrimination widely vary on whether alcoholism and drug addiction are covered handicaps. Three states, Wisconsin, Montana and Ohio, hold that current addicts and alcoholics are cov-

---

[39] Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978).

[40] 29 U.S.C. § 706(7)(B) (1982).

[41] *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 581 (1979) (The "language of the statute, even after its amendment, is not free of ambiguity.").

[42] McCleod v. Detroit, 39 Fair Empl. Prac. Cas. (BNA) 225, 228 (E.D. Mich. 1985) (dictum).

[43] Simson v. Reynolds Metal Co., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980) (dictum) (employees with prior history of drug addiction are handicapped); Johnson v. Smith, 39 Fair Empl. Prac. Cas. (BNA) 1106, 1108 (Minn. 1985); *cf.* Davis v. Bucher, 451 F. Supp. 791, 796 (E.D. Pa. 1978) (stating in pertinent part "it is not surprising that Congress would wish to provide assistance for those who have overcome their addiction").

ered.[44] Two states, Iowa and Illinois,[45] hold that *recovering* alcoholics are handicapped. In several states there are statutes, cases or opinions that drug addiction and alcoholism are *not* handicaps. Texas and California specifically provide this in their respective codes.[46]

Even in states where alcoholics and drug abusers are considered handicapped and protected as such, there are limits to the protection afforded. In *Coleman v. Illinois Bell Telephone Co.*,[47] the Commission stated that although alcoholism is a protected handicap, where the complainant admitted to drinking a pint of alcohol a day and admitted there was a connection between his drinking and attendance/performance problems on the job, the complainant's discharge was held not unlawful. In *Hubbard v. United Press International, Inc.*,[48] an award-winning news photographer, a known alcoholic, was held lawfully dismissed for poor news judgment, lack of aggressiveness in serving clients and failure to coordinate with newsside. Similarly in *Squires v. Labor and Industry Review Commission*,[49] the Wisconsin Court of Appeals held that an alcoholic employee must still satisfy job standards set by an employer.

Perhaps the most far-reaching state case to date is *Hazlett v. Martin Chevrolet, Inc.*.[50] In *Hazlett* the Ohio Supreme Court not only held that drug addiction and alcoholism are handicaps under Ohio law but went on to state that drug addicts and alcoholics must be accommodated in the same manner as persons with other medical handicaps. Nevertheless, the Ohio Supreme Court acknowledged that an individual who is unable to perform his responsibilities may be discharged.

The facts in *Hazlett* helped the plaintiff/employee. Hazlett was terminated when he took the initiative to seek a twenty-eight day leave for treatment of his alcohol and cocaine addiction. The decision raises the question of

---

[44] *See* Hazlett v. Martin Chevrolet, Inc., 25 Ohio St. 3d 279, 496 N.E.2d 478 (1986); Connecticut Gen. Life Ins. Co. v. Department of Indus., Labor & Human Relations, 86 Wis. 2d 393, 273 N.W.2d 206 (1979); American Indian Action Council, Case No. 288, (Mont. Comm'n for Human Rights 1976) (final order).

[45] *See* Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Comm'n, 37 Empl. Prac. Dec. (CCH) ¶ 35,297 (Iowa 1985); Athanas v. Board of Educ., 28 Fair Empl. Prac. Cas. (BNA) 569 (N.D. Ill. 1980).

[46] TEX. REV. CIV. STAT. ANN. art. 5221k, § 2.01(7)(A) (Vernon 1987); CAL. ADMIN. CODE tit. 2, § 7293.6(a)(4)(19__). *See also* 63 Op. Md. Att'y Gen. 408 (1978) (stating that drug addiction does not constitute a physical or mental handicap).

[47] 10 Ill. Reg. 2 (Human Rights Comm'n 1983).

[48] 330 N.W.2d 428, 443 (Minn. 1983).

[49] 97 Wis. 2d 648, 294 N.W.2d 48 (1980).

[50] 25 Ohio St. 3d 279, 496 N.E.2d 478 (1986).

whether the court would have been as sympathetic toward the plaintiff had he not sought treatment but had been detected as a drug addict or alcoholic or if his job performance resulted in a problem.

Notwithstanding the distinction between the employee who seeks treatment and the employee who is detected to be a substance abuser, most state statutes and the federal statute provide that handicapped individuals must be accommodated. This does not foreclose testing, but it does raise questions about what the employer should or should not do when it is determined the employee has a substance abuse problem, even if the problem has no obvious impact on his work.

D. *Common Law Actions*

With the change of presidential administrations and philosophies in 1980, the battleground between employees and employers shifted from the federal to the state courts. In the last seven years a rapid expansion of state common law claims brought by employees against their employers has occurred. The most prominent of these claims is "wrongful discharge." Others include defamation, intentional or negligent infliction of emotional distress, and assault and battery. Each of these claims may arise as a result of drug testing.

1. *Wrongful Discharge.*

In Ohio, the law regarding wrongful discharge is unsettled. Ohio recognizes a cause of action for wrongful discharge arising out of an implied contract and promissory estoppel.[51] But the Ohio Supreme Court rejected a wrongful discharge cause of action for a violation of public policy.[52] This is relevant to substance abuse testing, because an employer who does not follow company policy on substance abuse testing is vulnerable to a wrongful discharge suit. Where a substance abuse testing policy is set forth in writing, it is imperative that it be followed. One may avoid such a lawsuit by attaching a disclaimer to the policy stating that it is a guideline and does not establish a contract between the employer and employee. This approach followed with reinforcing company handbooks is one method by which an employer might avoid a lawsuit by non-unionized employees at will.[53]

A wrongful discharge cause of action for violation of public policy is less likely than a wrongful discharge based on a contract claim. The employee

---

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

[52] Phung v. Waste Mgmt., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

[53] *See, e.g.*, Dell v. Montgomery Ward, 811 F.2d 970 (6th Cir. 1987) (court rejected the claim of a former employee who signed an express statement that his employment was for no definite period and could be terminated at any time).

must identify the public policy violated. Public policy arguably favors drug testing. Testing protects the general public and other employees from potential injury.

In states where polygraph testing is prohibited, and the employer uses a polygraph to determine whether the employee is abusing alcohol or drugs, the employer is vulnerable to a lawsuit. For example in *Perks v. Firestone Rubber Co.*,[54] the court held that a cause of action for tortious discharge existed where the plaintiff's termination resulted from a refusal to submit to a polygraph exam. The federal court specifically noted that Pennsylvania law prohibits employers from requiring employees to take polygraph tests. Similarly in *Leibowitz v. H.A. Winston Co.*,[55] a Pennsylvania state judge submitted the polygraph issue to a jury.[56]

In states where there are no statutes prohibiting the use of polygraph tests, wrongful discharge claims have been denied. In *Todd v. South Carolina Farm Bureau Mutual Insurance Co.*,[57] the court denied a wrongful discharge claim when the company terminated the plaintiff for refusal to take a polygraph test. The court held that "in the absence of a statute barring polygraph tests as a condition for hiring or continuation of employment, we find the appellants' actions in terminating Todd consonant with the public policy of this state."[58]

Unless the state has an identifiable statute or explicit public policy relative to testing, it is unlikely that a wrongful discharge cause of action would arise for violation of public policy.

2. *Defamation*

A private employer's greatest exposure to potential lawsuits against private employees arises when test results are disclosed. In *Houston Belt & Terminal Railway Co. v. Wherry*,[59] a former employee was awarded $200,000 in damages where the employer falsely reported the employee was a drug user and based the report on incomplete test results. A doctor reported "DRUG SCREEN METHADONE POSITIVE . . . trace" and suggested during a telephone call that "it might be investigated further." A written report was circu-

---

[54] 611 F.2d 1363 (3d Cir. 1979).

[55] 342 Pa. Super. 111, 493 A.2d 111 (1985).

[56] *See also* Molush v. Orkin Exterminating Co., Inc., 547 F. Supp. 54 (E.D. Pa. 1982); State v. Community Distribs., Inc., 64 N.J. 479, 317 A.2d 697 (1974); 18 PA. CONS. STAT. ANN. § 7321(a) (Purdon 1983).

[57] 283 S.C. 155, 321 S.E.2d 602 (1984), *modified*, 287 S.C. 190, 336 S.E.2d 472 (1985).

[58] *Id.* at ____ , 321 S.E.2d at 613.

[59] 548 S.W.2d 743 (Tex. Ct. App. 1976), *cert. denied and appeal dismissed*, 434 U.S. 962 (1977).

lated to seven officials in the railway system and finally utilized in a hearing before a Public Law Board pursuant to the Railway Labor Act. The report was false. A subsequent report revealed that the substance detected as methadone was not methadone at all but a substance which gave a similar response. These facts removed the employer's case out of the qualified privilege, protecting internal communications and supported a finding of malice by the court.

The best defense to a defamation action is the truth. In *Rosemond v. National Railroad Passenger Corp.*,[60] a summary judgment was granted in favor of an employer who reported in newspapers that marijuana was detected in an employee's blood following the employee's involvement in an on-the-job accident. The employee lost his defamation lawsuit because he admitted it was true that he had traces of marijuana in his blood.

Notwithstanding *Rosemond*, an employer is flirting with a lawsuit anytime a report on the results of testing is made to any person not having a need to know. Considering the attitude towards drugs in our society, a false report on drug abuse, may be construed as defamation *per se*.

In Ohio, there is an additional incentive to the employer to assure accuracy of test results. A statute provides the employee, upon written request, with the right to see his medical records.[61] Employers in Ohio have a statutory duty to make test results available to the employee. The statute provides access to important information for any employee suing an employer for defamation following disclosure of drug test results.

3. *Common Law Right To Privacy*

The private employer is not vulnerable to assertions of violations of the right to privacy to the extent that a public employer is vulnerable. Public employer claims usually arise out of the federal Constitution and/or state constitutional protections. Nonetheless, federal constitutional guarantees of privacy form the basis for state common law tort causes of action.

In *K-Mart Corp. Store No. 7441 v. Trotti*,[62] for example, the Texas Court of Appeals held that an employee who used her own lock on a company locker had a reasonable expectation of privacy in the locker. Accordingly a search not based on any reasonable suspicion violated her common law right to privacy. In another case, *International Brotherhood of Electrical Workers, Local*

[60] No. 85 Civ. 5661 (S.D.N.Y. Sept. 19, 1986).

[61] OHIO REV. CODE ANN. § 4113.23 (Baldwin 1986).

[62] 677 S.W.2d 632 (Tex. Ct. App. 1984).

1900 v. Potomac Electric Power Co.,[63] the Court of Appeals for the D.C. Circuit categorized random testing of employees for drugs as an "hysterical" invasion of privacy.[64]

The use of polygraphs poses the greatest risk to actual liability for invasion of privacy. In *O'Brien v. Papa Gino's of America, Inc.*,[65] an employee was required to take a polygraph test when it was suspected he was using drugs away from the workplace. He alleged that he was required to answer questions unrelated to his employment in the examination. The Court of Appeals for the First Circuit held that the company violated the employee's common law right of privacy, notwithstanding the company's policy prohibiting drug use. The jury awarded the plaintiff/employee $450,000.

A case involving a urinanysis led to a different result. In *Satterfield v. Lockheed Missiles and Space Co.*,[66] a summary judgment was granted in favor of the employer where the employee resigned after a drug test revealed the presence of marijuana in his urine. The court noted that the employer did not inform the general public of the test results nor did it publicize that the employee had been terminated because of the drug test and therefore there was no invasion of privacy.

4. *Intentional Infliction of Emotional Distress*

In *Satterfield*, the plaintiff alleged intentional infliction of emotional distress in addition to a violation of privacy. The employer's conduct was not found to be "so extreme and outrageous as to exceed all possible bounds of decency."[67] The court emphasized that the employer allowed the employee to tender his resignation rather than be terminated and that the employer investigated the employee's concerns about the validity of the test.

A recent Minnesota case, however, found an employer liable for intentional infliction of emotional distress resulting from an unreasonable search.[68] The employee recovered a jury award of $60,000 for emotional injury resulting from a polygraph test administered by her employer in violation of Minnesota law. The plaintiff testified that she had nightmares after taking the polygraph exam. The case involved neither drugs nor alcohol but involved the accusation of theft.

---

[63] 634 F. Supp. 642 (D.D.C. 1986).

[64] *Id.* (dictum).

[65] 780 F.2d 1067 (1st Cir. 1986).

[66] 617 F. Supp. 1359 (D.S.C. 1985).

[67] *Id.* at 1366.

[68] Kamrath v. Suburban Nat'l Bank, 363 N.W.2d 108 (Minn. Ct. App. 1985).

5. *Assault and Battery*

In general, any nonconsented touching can give rise to a potential lawsuit for battery. A surgeon, for example, may be liable for battery if he performs an operation without the patient's consent.[69] Similarly, in the employment context, a battery claim could arise if blood were taken and tested without the donor's consent. However, the employee must be competent to consent to a test. An intoxicated person may not be deemed competent to consent.[70]

III. *Employer's Checklist*

The private employer who decides to implement a testing program is susceptible to minimal risk of employee lawsuits if the employer uses a modicum of good judgment in establishing and administering it. Following is a check list employers should consider before implementing a program.

1. What is the *purpose* of the program? Is it safety to the employees or the public? Is it to increase production? Or is the employer implementing the program because everyone else is?
2. *Who is* to be *covered* by the program? Is it drivers or operators of dangerous equipment, *i.e.*, the so called "critical jobs?" Is it to be extended to all plant and production employees? Is it to extend to managers and supervisors and sales people?[71] Will the program include participants in the so-called two martini lunch where the salesman or manager subsequently drives a motor vehicle or will it be limited to the machine operator who has a can of beer for lunch?
3. What *substances* are to be *covered*? In today's world, testing for drugs and not alcohol is a mistake. Alcohol simply is another drug, a substance subject to abuse. The potential abuse of prescription drugs should also be considered. In a drug testing program the employee or person being tested should be asked which prescription drugs he or she takes and in what dosages. While prescription drugs may be beneficial in proper dosages, it is well recognized that in excess dosages some can be habit forming and as dangerous as illegal drugs.

---

[69] *See* Lacey v. Laird, 166 Ohio St. 12, 139 N.E.2d 25 (1956).

[70] *See, e.g.*, Hollerud v. Malamis, 20 Mich. App. 748, 174 N.W.2d 626 (1969).

[71] According to a recent survey of vice presidents and personnel directors of large companies, it is estimated that 26.4% of U.S. executives drink during a typical lunch today. (This is down from 37.7% five years ago.) *Ideas & Trends*, HUMAN RESOURCE MGMT., Feb. 20, 1987, at 26.

4. *Prohibited conduct* should be clearly described by including use, possession and sale of the substance on company premises. The meaning of premises should be precisely defined. Consideration must be given to parking lots and/or other property adjacent to the company and to employees conducting company business off company property.
5. *Notice* to employees is crucial to compliance. Notice must be clear. The policy must include provisions protecting employee privacy in taking the test and dissemination of results. "Under the Influence" should be defined. This is crucial because it gives notice to employees and provides consistency in the enforcement of rules. In arriving at such a definition, a professional should be consulted to make certain that the line is drawn at a reasonable place.

   The usual policy would not prohibit the use of alcohol or drugs away from the employer's premises. However, an employee might become intoxicated at home, come to work and thereby seriously impair his work performance and the safety of other employees and the public. A standard which applies to conduct off premises which leads to poor performance or safety risks on premises should be considered.
6. *Supervisory training* should be implemented. Supervisors are the employees most likely to recognize employee behavior leading to the reasonable suspicion which justifies testing. Supervisors should be well-trained. They also should be fully acquainted with the policy and its administration. Further, supervisors should be cautioned to apply the program consistently.

IV. *Conclusion*

Substance abuse testing has captured the attention of industry today. The abuse is not new. The apprehension of offenders is not going to be a panacea for the ills of American industry. Nonetheless, it is well-documented that drug and alcohol abuse seriously impede efficiency and pose substantial hazards to other employees and to the general public. It is prudent for the private employer to implement a substance abuse program. Testing, also should be considered. The most effective program is one which is combined with an employee assistance program, where the employer is willing to provide help to the employee who admits to his or her substance abuse problem. It is imperative that employers make it clear that there is no place in the enterprise for employees risking health and safety through drug and alcohol abuse.