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Evidentiary and Constitutional Implications of Employee Drug Testing through Hair Analysis

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EVIDENTIARY AND CONSTITUTIONAL IMPLICATIONS OF EMPLOYEE DRUG TESTING THROUGH HAIR ANALYSIS

I. INTRODUCTION

Controversy surrounds the use of radioimmunoassay of hair (RIAH)[1] as a method of drug detection.[2] The use of this technique by employers has steadily increased in recent years.[3]

Since 1987, the number of companies with drug testing programs has nearly quadrupled.[4] Seventy-eight percent of large corporations are drug testing their employees.[5] The wide majority of those drug tests, ninety-seven percent, are done through urinalysis.[6] Hair analysis has taken over a small share of the drug testing market. Psychemedics Corporation, the largest company marketing hair analysis tests, services 600 corporations[7] and has tested over one million employees.[8]

This note addresses the legal issues affecting hair analysis as a drug detector. Part II outlines a background of hair analysis. Part III presents the scientific controversy that surrounds hair analysis. Part IV addresses cases involving hair analysis. Part V examines the privacy implications of employee drug testing through hair analysis. Part VI overviews statutes which affect this method of employee drug testing.

II. BACKGROUND OF RIAH

A. Development of the Technique

Hair analysis has a much longer history in the field of drug detection than many would suspect. Hair analysis was used to test for the presence of drugs as far back as 1954.[9] Since then many scientists have used assay techniques to analyze hair for the presence of drugs.[10]

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[1] Rosa Jordan, *Hair Analysis: A New Turn in Drug Testing*, RISK MGMT., Apr. 1988, at 69 (Rosa Jordan was director of public relations for Psychemedics Corporation.).

[2] *See* Tom Mieczkowski, *New Approaches in Drug Testing: A Review of Hair Analysis*, ANNALS AM. ACAD. POL. & SOC. SCI., 132 (May 1992).

[3] Margaret O. Kirk, *At Work, a Different Test for Drugs*, N.Y. TIMES, Jan. 21, 1996, at F11.

[4] *Id.* A $750 million market exists for drug testing. Mark Frankel, *Mom and Pop Test for Drugs*, NATION, Jan. 29, 1996, at 20.

[5] Kirk, *supra* note 3.

[6] *Experts Debate Merits of Hair Testing for Drug Use*, ALCOHOLISM & DRUG ABUSE WEEK, July 29, 1996, at 3.

[7] *Id.*

[8] *Workers Allege Hair Tests Invade Genetic Privacy; Employee Drug Testing*, ALCOHOLISM & DRUG ABUSE WEEK, Dec. 16, 1996, at 6.

[9] Mieczkowski, *supra* note 2, at 135.

[10] *Id.* at 135-36.

In the 1970's, researchers Werner Baumgartner and Annette Baumgartner began to develop radioimmunoassay procedures for detecting drugs in hair.[11] They also explored ways to determine the amount of exposure to a drug based on the outcome of the test.[12] The use of RIAH to detect the presence of drugs came to the public's attention in 1986 when Werner Baumgartner analyzed nineteenth century poet John Keats' hair and found the pain-killer Laudanum.[13]

Soon after, Werner Baumgartner and associates started Psychemedics Corporation.[14] Psychemedics provided large-scale commercial hair analysis services.[15] It was the first lab to develop a patent for RIAH.[16] In addition to testing employees, Psychemedics offered home test packets for parents who suspected that their children were abusing drugs.[17]

B. Purported Advantages and Disadvantages

Officials from Psychemedics Corporation argue that hair analysis offers advantages that urinalysis does not.[18] First, a hair sample is taken in a non-intrusive manner by snipping off a sample of hair. This is in comparison to the potential embarrassment in providing a urine sample for testing.[19] Second, RIAH is able to test for drug use over a longer period of time, "[t]ypically several months," as compared to a shorter time span for urinalysis.[20] Psychemedics officials argue that this knowledge allows testers to determine chronic drug use.[21] Third, RIAH is able to determine the amount of

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[11] Constance Holden, *Hairy Problems for New Drug Testing Method*, SCIENCE, Sept. 1990, at 1099.

[12] Mieczkowski, *supra* note 2, at 136.

[13] Lynn Crawford, *Roots of Evil*, SCIENCE, July/August 1986, at 67. Werner Baumgartner performed the analysis on the hopes of receiving publicity and, in turn, funding for his research. *Id.* at 68. Lord Byron's hair was also tested but nothing was found. *Id.*

[14] Mieczkowski, *supra* note 2, at 136-37.

[15] *Id.* at 137.

[16] Claudia Pinto, *Hospitals Aren't Rushing to Adopt New Drug Test*, MODERN HEALTHCARE, June 19, 1995, at 160.

[17] Frankel, *supra* note 4, at 20. The test packet was introduced in July, 1995. *Id.* When the news of the test packet was released, Psychemedics' stock rose 71% in one day. James S. Hirsch, *Psychemedics Stock Surges 71% on News of Private Drug Test*, WALL ST. J., July 13, 1995, at B7.

[18] Jordan, *supra* note 1, at 69.

[19] *Id.* at 68.

[20] Mieczkowski, *supra* note 2, at 135. Urinalysis can detect drugs "[g]enerally 2 to 3 days" after use "except marijuana, which may be detected generally from 5 to 30 days after use." *Id.*

[21] Jordan, *supra* note 1, at 69.

drugs taken. This enables the tester to distinguish frequent users from casual users.[22] Fourth, the longer window of detection makes the method more cost-effective.[23] Hair analysis costs more on a per test basis than urinalysis but hair analysis tests do not need to be done as often because of its longer window of detection.[24] Fifth, it is nearly impossible to cheat on a hair analysis test.[25] In urinalysis, individuals avoid detection by substitution,[26] flushing,[27] or abstaining from drugs for a few days.[28] Sixth, charges that a sample has been substituted or contaminated can be more easily answered. Another sample can simply be taken and retested.[29]

Psychemedics officials admit that there are some disadvantages to their product.[30] RIAH does not test for immediate impairment.[31] They suggest that a blood analysis or a breathalyzer test would be better to determine immediate impairment.[32] Others note that urinalysis would be more suited to determine whether drugs were taken in the days immediately prior to the test.[33]

C. How RIAH Works

Hair analysis is based on the premise that drugs are absorbed into the hair shaft.[34] These substances become bound in the hair where they remain for a

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Chris Berka & Courtney Poignand, *Hair Follicle Testing- An Alternative to Urinalysis for Drug Abuse Screening*, EMPLOYMENT REL. TODAY, Winter 1991/1992, at 405, 405-06 (Chris Berka and Courtney Poignand were employed by Psychemedics Corporation as the vice president of sales and marketing and account specialist, respectfully.). In the case of baldness or a shaved head, chest or arm hair can be tested. Sabra Chartrand, *Patents: A New Test Can Detect Marijuana Use by Analyzing a Snippet of Hair. Baldness is Not A Defense*, N.Y. TIMES, Dec. 4, 1995, at D2.

[26] Two vials of drug free urine can be bought for $19.95. Special adulterants for urine can also be bought. Chartrand, *supra* note 25, at D2.

[27] In urinalysis, drinking excessive fluid prior to the test may allow the individual to avoid drug detection. Berka & Poignand, *supra* note 25, at 405-06.

[28] Chartrand, *supra* note 25, at D2.

[29] Jordan, *supra* note 1, at 68. Specifically, "[t]he information in a second sample grown during the same time period as the first would contain identical information." *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Jerry G. Stevenson & Roger Williamson, *Testing for Drugs: Bathrooms or Barbershops?*, PUB. PERS. MGMT., Winter 1995, at 467, 469.

[34] Mieczkowski, *supra* note 2, at 137. Controversy exists as to the precise manner in which drugs enter hair. *See infra* Part III.A.1.

long period of time.[35] To test hair samples for drugs, sixty to eighty, one and one-half inch strand samples are obtained.[36] The samples are then washed.[37] The radioimmunoassay test performed next is described as follows:

> The kit contains an antibody and a special antigen, a radioactively tagged drug. When placed together, the antigen binds to the antibody in predictable proportions. If there are drugs in the hair sample, they will also bind to the antibody. Therefore, when the sample and the labeled antigen are allowed to compete for the antibody in a test tube, the amount of drug in the sample can be inferred from the amount of labeled antigen that has succeeded in binding.[38]

This radioimmunoassy test is a screening procedure. If a positive result occurs, it is followed by a sensitive gas chromatography/mass spectrometry (GC/MS) hair follicle test.[39] The combined method of immunoassay screening followed by GC/MS confirmation is considered the "gold standard" in drug testing.[40]

III. SCIENTIFIC CONTROVERSY

A. Criticisms of Hair Analysis

The scientific community does not question whether hair analysis can detect the presence of drugs in hair.[41] More than eighty studies worldwide attest to this fact.[42] But some scientists do question how to interpret the outcome of these positive results. Tom Mieczkowski, a criminologist, stated that scientists question the "interpretation of hair analysis outcomes and how these outcomes may or may not be appropriately employed."[43] H. Westley Clark, an addiction-medicine specialist, stated that "[t]here are no standards on which people agree, and there are no agreed-upon cutoffs below which a test will be called negative, as there are in urinalysis."[44]

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[35] Mieczkowski, *supra* note 2, at 137.

[36] Pinto, *supra* note 16, at 160.

[37] Chartrand, *supra* note 25, at D2. A chemical existing naturally in hair mimics marijuana. Psychemedics has a patented washing process that removes the mimicking chemical from the hair. *Id.* For more information on studies dealing with washing methods and their effect on eliminating external contamination, see *infra* Part III.A.1.

[38] Crawford, *supra* note 13, at 68.

[39] Berka & Poignand, *supra* note 25, at 405-06.

[40] *Id.*

[41] Mieczkowski, *supra* note 2, at 138. Mieczkowski stated that "in the literature on hair testing there is not any challenge to the basic concept of the hair analysis technique." *Id.*

[42] Pinto, *supra* note 16, at 160.

[43] Mieczkowski, *supra* note 2, at 138.

[44] *Experts Debate Merits of Hair Testing for Drug Use*, *supra* note 6, at 3.

1. External Contamination

Controversy surrounds whether external contamination can affect the outcome of drug testing through hair analysis.[45] The exact mechanism by which drugs are absorbed into the hair is unknown. Martha R. Harkey described two theories of how drugs are absorbed into one's hair. One theory suggests that:

> [drugs] enter the growing hair follicle by passive diffusion from the capillaries at the base of the hair follicle. According to this model, drugs are trapped in the hair cells during early development, are bound in the hair shaft during keratogenesis, and can be detected in the hair shaft as it emerges from the scalp .... In this model, drug concentration in hair should be proportional to the drug concentration in blood at the time of hair synthesis. The time of drug ingestion also can be calculated from the location of the drug along the hair shaft (assuming a constant hair growth rate of one centimeter per month).[46]

Another theory suggests that:

> drugs may be absorbed into hair from capillaries, sebaceous glands, sweat glands, as well as from the external environment. Using this model, drugs could be incorporated into hair from multiple pools during various times of the hair life cycle (i.e., from blood during growth and differentiation, from sweat and sebum after formation, and from the external environment after formation).[47]

A study conducted by the University of California, Davis, Medical School found that clean hair samples tested positive for cocaine after being handled by individuals who had ingested cocaine.[48] This study indicates that it is difficult to determine if a positive result occurs because of drug ingestion or external exposure.[49]

Another study conducted by the University of Alabama, Birmingham analyzed hair samples from thirty-five children that lived in homes in which crack cocaine was smoked routinely. The study found that two-thirds of the children (many of whom were eight years old or younger) tested positive for

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[45] Frankel, *supra* note 4, at 21.

[46] Martha R. Harkey, *Technical Issues Concerning Hair Analysis for Drugs of Abuse, in* MEMBRANES AND BARRIERS: TARGETED DRUG DELIVERY 218, 222 (Rao S. Kapaka ed., 1995).

[47] *Id.* at 224.

[48] Frankel, *supra* note 4, at 21.

[49] *Id.* Some research has indicated that people in certain professions, such as a bank teller who handles contaminated currency, are chronically exposed to small traces of drugs. Mieczkowski, *supra* note 2, at 139. In Miami, it is reported that there is cocaine on every dollar bill. Holden, *supra* note 11, at 1099.

cocaine.[50] The study abstract stated that "[i]f one assumes that young children are not intentional cocaine users, these results show that their hair can become cocaine positive through passive exposure."[51]

In response to these criticisms, Psychemedics President Raymond Kubacki stated that Psychemedics' washing method eliminates all environmental contaminants.[52] Additionally, Kubacki stated that all samples that are found to contain drugs are confirmed through a GC/MS test.[53] Critics argue that Psychemedics' special washing method cannot be scientifically confirmed because Psychemedics has never voluntarily handed over its data to independent researchers.[54]

Various studies done of similar washing methods show conflicting results.[55] A study by W.A. Baumgartner and V.A. Hill reported that their wash protocol either removes external contamination or indicates when all contamination cannot be removed.[56] A study by G. Koren et al. also found "only trace amounts of cocaine and its metabolites" after using a washing method.[57]

Contrastably, studies by E. Cone et al. and G.L. Hendersen et al. "concluded that similar washing of artificially contaminated hair left enough cocaine behind to cause false positive results."[58] A study by D. Blank and D. Kidwell "reported failure to successfully wash cocaine from hair soaked in strong aqueous concentrations of cocaine."[59]

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[50] Frankel, *supra* note 4, at 21. The study also found that some children had higher levels of cocaine residue in their hair than adults also living in the home. *Id.*

[51] *Id.* Fred Smith, a co-author of the study stated "I was a proponent of hair testing until I started looking at reports." *Id.*

[52] *Id.* at 22. Kubacki, in turn, criticized the University of Alabama's study by claiming it "specious" and claiming that it had never been peer reviewed. *Id.*

[53] Frankel, *supra* note 4, at 21.

[54] *Id.* at 22.

[55] Stephen Magura et al., *Measuring Cocaine Use by Hair Analysis Among Criminally Involved Youth*, 25 J. DRUG ISSUES 683, 686 (1995).

[56] *Id.* (citing W.A. Baumgartner & V.A. Hill, *Sample Preparation Techniques*, Presented at the First International Meeting on Hair Analysis as a Diagnostic Tool for Drugs of Abuse Investigation (Dec. 10-11, 1992, Genoa, Italy)).

[57] *Id.* (citing G. Koren et al., *Hair Analysis of Cocaine: Differentiation Between Systematic Exposure and External Contamination*, 32 J. CLINICAL PHARMACOLOGY 671-75 (1992)).

[58] *Id.* (citing G.L. HENDERSEN ET AL., HAIR ANALYSIS FOR DRUGS OF ABUSE (Natural Institute of Justice Final Report) (Grant # NIJ 90-NIJ-CX-0012)); E. Cone et al., *Testing Human Hair for Drugs of Abuse. II. Identification of Unique Cocaine Metabolites in Hair of Drug Abusers and Evaluation of Decontamination Procedures*, 15 J. ANALYTICAL TOXICOLOGY 250-255 (1991).

[59] Tom Mieczkowski & Richard Newel, *Comparing Hair and Urine Assays for Cocaine and Marijuana*, 57 FED. PROBATION 59 (1993) (citing D. Blank & D. Kidwell, *External Contamination of Hair by Drugs of Abuse: A Problem Looming for Forensic Analysis*, Presented at the First International Conference on Hair Analysis for Drugs of Abuse

Proponents of hair analysis also claim that it is held to a higher standard than urinalysis.[60] Tom Mieczkowski stated that the problem of external contamination still exists in urinalysis. He stated as follows:

> Passive contamination as a problem for urinalysis has never been definitively resolved. While cutoff levels are the device used in urinalysis to control for the effects of passive contamination, they are arbitrary, clinically and not theoretically derived, often variable in their application from institution to institution, and still controversial today. Positions are taken that urine cutoffs ought to be lower, to reduce false negatives, or higher, to prevent false positives. Yet few scientists advocate abandoning urinalysis testing because there is lack of consensus on cutoff values.[61]

Likewise, an argument can be made that hair analysis should not be abandoned despite insufficient research on passive contamination.[62] It has been hypothesized that "it is reasonable to expect that passive ingestion would result only in very low hair concentrations. Cutoff levels can be set high enough-higher than practical for urinalysis-to minimize the possibility of mistaking a small amount of passively ingested drug for active drug use."[63]

2. Absorbency Rates Differences

Controversy also surrounds whether individual differences in hair texture and type can affect drug outcomes.[64] Some scientists argue that two individuals may ingest the same amount of drugs but have different results on their RIAH tests due to absorbency rates.[65] This may occur because "[h]air morphology and physiology differ with race, gender, and age . . . ."[66] The exact way in which these differences affect hair analysis outcomes is not known.[67]

Some studies have indicated that differences in hair type can affect RIAH outcomes. An animal research study done by the Center for Human Toxicology

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(Dec. 10-11, 1992, Genoa, Italy)).

[60] Mieczkowski, *supra* note 2, at 142.

[61] *Id.* at 143.

[62] *Id.* at 144.

[63] Magura et al., *supra* note 55, at 687 (citing W.A. Baumgartner & V.A. Hill, *Sample Preparation Techniques*, Presented at the First International Meeting on Hair Analysis as a Diagnostic Tool for Drugs of Abuse Investigation (Dec. 10-11, 1992, Genoa, Italy)).

[64] Holden, *supra* note 11, at 1099. In an online message, H. Westley Clark expressed concerns regarding the effect of hair type differences as well as external contamination on hair analysis results. *Experts Debate Merits of Hair Testing for Drug Use*, *supra* note 6, at 3.

[65] Holden, *supra* note 11, at 1099.

[66] Harkey, *supra* note 46, at 231.

[67] *Id.*

at the University of Utah "indicates that darkly pigmented hair containing high levels of melanin accumulates more cocaine residue than lighter colored hair."[68] Another study done by David A. Kidwell of the Naval Research Laboratory indicated that "coarse black hair retains more drug than brown hair."[69] Additionally, another study conducted by the Center for Human Toxicology at the University of Utah "raises the possibility that women's hair might hold more drug residue than men's."[70]

Raymond Kubacki, CEO of Psychemedics, points to a University of Southern Florida study that "attributed African-American subjects higher positive-test rates through hair testing to higher use of cocaine, not to any racial bias in the test."[71] Psychemedics officials also argue that a double standard is used for hair analysis as opposed to alcohol testing.[72] When testing for alcohol, a standardized test is used for both sexes even though women metabolize alcohol more slowly than men.[73]

B. FDA

The U.S. Food and Drug Administration (FDA) issued a compliance policy guide entitled *RIA Analysis of Hair to Detect the Presence of Drugs of Abuse* in May 1990.[74] The guide stated that drug testing through hair analysis is "unproven," "unreliable," and "not generally recognized by qualified experts as effective."[75]

In July 1995, when Psychemedics started marketing home test packets for parents to test children suspected of abusing drugs, the FDA sent a warning letter to Psychemedics.[76] It stated that Psychemedics must seek approval for the unapproved "medical device" or pay a fine up to $15,000 per packet sold.[77]

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[68] Frankel, *supra* note 4, at 20-21.

[69] Holden, *supra* note 11, at 1099-1100.

[70] Frankel, *supra* note 4, at 22.

[71] *Experts Debate Merits of Hair Testing for Drug Use, supra* note 6, at 3.

[72] Holden, *supra* note 11, at 1100.

[73] *Id.*

[74] Mieczkowski, *supra* note 2, at 147.

[75] *Id.* at 147. A notice was published in the Federal Register on June 13, 1990, by FDA's Center for Devices and Radiological Center. *No Proof That Hair Analysis Detects Illegal Drugs*, FDA CONSUMER, Nov. 1990, at 3. The Center found the following: " [(1)] [t]he scientific consensus is that RIA hair analysis for drugs of abuse is unreliable[;] (2)] [n]o FDA-regulated product on the market has been shown effective in this use of RIA; and [(3)] [n]o manufacture has submitted evidence to FDA to support such a product." *Id.* The article concluded by stating that "[p]romoting or selling R.I.A. devices for this unapproved use [was] illegal." *Id.*

[76] Frankel, *supra* note 4, at 22.

[77] *Id.* Psychemedics had been worried for quite some time about receiving FDA approval. J. Michael Walsh, the former director of applied research at NIDA who later went on to be executive director of the President's Drug Advisory Council under George

The alleged unapproved "medical device" was the envelope mailed to consumers in which parents were instructed to place snippets of their child's hair.[78]

Then, in a letter mailed to Psychemedics in March 1996, the FDA stated that they had no plans to "actively regulate" the company.[79] This letter formally withdrew the warning letter of August 1995.[80] The FDA "didn't rule out any future action against the company."[81] As a result, Psychemedics is left to be regulated by a federal agency called the Health Care Finance Administration which oversees medical testing laboratories.[82]

C. SOFT

In June 1990, a conference was held by the Society of Forensic Toxicologists (SOFT) to discuss hair analysis as a drug detector. This conference was held by SOFT at the request of the National Institute on Drug Abuse (NIDA).[83]

A committee at the conference issued a report[84] in which it "took the position that the use of hair analysis for employee and preemployment screening is premature and cannot be sustained by current information on hair analysis for drugs of abuse."[85] Conversely, the committee "supported the use of hair analysis for forensic testing 'when supported by other evidence of drug use (e.g., urinalysis)' and 'when performed under the generally accepted guidelines for forensic drug testing.'"[86] Some commentators have criticized the report for opposing hair analysis in one area, employment testing, while advocating it in another, forensic testing.[87]

Bush, described a 1991 meeting with Tom O'Neill, a Psychemedics lobbyist, in which O'Neill wanted to know in what time span the FDA could approve hair analysis. *Id.* at 20-21. Walsh recalled that O'Neill "said dollars were no object in terms of [spending on the required lab work necessary] for FDA approval." *Id.* at 21.

[78] Frankel, *supra* note 4, at 22.

[79] *FDA Won't Regulate Psychemedics Product*, WALL ST. J., Mar. 28, 1996, at B8.

[80] *Id.*

[81] *Id.*

[82] Frankel, *supra* note 4, at 22.

[83] Mieczkowski, *supra* note 2, at 144.

[84] The report was completed "by a committee from among these panelists participating in the conference discussion. It does not represent an official position statement endorsed by the Society of Forensic Toxicologists at this time." *Id.* at 145.

[85] *Id.* at 144.

[86] *Id.* at 145.

[87] *Id.*

IV. RIAH AS EVIDENCE OF DRUG USE

A. Standards for Admissibility of Scientific Evidence

Traditionally, the admissibility of scientific evidence has been determined by the standard established in *Frye v. United States*,[88] a 1923 District of Columbia Circuit decision.[89] In *Frye*, the court held that scientific evidence is admissible if it is "sufficiently established to have gained general acceptance in the particular field for which it belongs."[90] The defendant sought to introduce test results taken from a systolic blood pressure deception test.[91] The court determined that the test was inadmissible since it had "not yet gained such standing and scientific recognition."[92]

The *Frye* standard was not codified in the Federal Rules of Evidence (FRE).[93] Courts were in conflict over whether *Frye* should remain the standard.[94] In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[95] the Supreme Court rejected the use of the *Frye* general acceptance standard as a "prerequisite" to admissibility.[96] In doing so, the Court noted that the (FRE) had superseded the *Frye* standard.[97]

The Court held that in determining the admissibility of scientific evidence a trial judge must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[98] The Court stated that the following factors should be assessed in determining admissibility: (1) "whether it can be (and has been) tested;" (2) "whether the theory or technique has been subjected to peer review and publication;" (3) "the

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[88] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[89] 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 6266, at 265 (1997).

[90] *Frye*, 293 F. at 1014.

[91] *Id.* at 1013.

[92] *Id.* at 1014.

[93] 29 WRIGHT & GOLD, *supra* note 89, at 266. Rule 702 states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702.

[94] 29 WRIGHT & GOLD, *supra* note 89, at 266.

[95] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

[96] *Id.* 597.

[97] *Id.* at 589 n.6.

[98] *Id.* at 592.

known or potential rate of error;" (4) "the existence and maintenance of standards controlling the technique's operation;" and (5) "general acceptance."[99] The plaintiffs sought to offer expert testimony to link Bendectin, "a prescription anti-nausea drug" with birth defects.[100] The court remanded the case so that the district court could assess the expert testimony in terms of the new standard.[101]

A split still exists in state courts as to the applicable standard for assessing the admissibility of scientific evidence. Some states follow *Daubert* while others continue to follow *Frye*.[102]

B. Case Law

The first cases to address RIAH dealt with the issue of whether a party could be compelled to submit to a hair analysis test during discovery. In *Burgel v. Burgel*,[103] a New York court held that a wife could be compelled to submit hair samples for RIAH during discovery when reasonable grounds for suspicion arose concerning drug use.[104] Reasonable grounds for suspicion existed in this case because the wife admitted to cocaine use in the past.[105] The court reasoned that the broad scope of discovery permitted a husband to compel a wife to submit to RIAH, a "minimally intrusive procedure, because the material sought is relevant, and reasonable grounds exist for the request."[106] The court stated that "we express no opinion in regard to whether the test results would be admissible."[107]

Burgel was followed by another New York custody case, *Garvin v. Garvin*.[108] The husband in *Garvin* wanted to compel his wife to submit to a RIAH test during discovery.[109] In contrast to *Burgel*, the *Garvin* court held that the wife could not be compelled to submit to a RIAH test since there were no reasonable grounds for suspicion.[110] Reasonable grounds did not exist for drug testing

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[99] *Id.* at 593-94.

[100] *Daubert*, 509 U.S. at 582.

[101] *Id.* at 597-98.

[102] 29 WRIGHT & GOLD, *supra* note 89, at 267 & n.22, 269, 270 & n.23.

[103] Burgel v. Burgel, 533 N.Y.S.2d 735 (App. Div. 1988).

[104] *Id.* at 737.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 737. The court noted that "the material which the defendant seeks to discover, even if not admissible itself, may be discovered if it could lead to the discovery of admissible evidence." *Id.*

[108] Garvin v. Garvin, 556 N.Y.S.2d 699 (App. Div. 1990).

[109] *Id.* at 700-01.

[110] *Id.* at 701.

because there was only the suspicion that the wife smoked marijuana.[111] The court based its decision solely on the lack of reasonable grounds for suspicion.[112] The opinion did not delve into the merits of drug testing through hair analysis.

In *United States v. Foote*,[113] the Eighth Circuit Court of Appeals held that a district court's denial of a motion to compel a RIAH test did not constitute an abuse of discretion.[114] In *Foote*, a criminal defendant charged with conspiracy to distribute cocaine and various other distribution and weapons charges requested that one of the arresting police officers be compelled to submit to a RIAH test.[115] The criminal defendant requested that the officer be compelled to submit to a RIAH test because the defendant had seen the officer use cocaine during an undercover period of investigation.[116] The Eighth Circuit noted that the district court denied defendant's motion to compel drug testing of the officer due to "Fourth and Fifth Amendment implications," the "intrusive and unreliable nature of the experimental" RIAH tests, and "the lack of any evidence" regarding drug use on the part of the officer.[117]

United States v. Medina[118] has been consistently cited in cases determining the admissibility of RIAH as evidence.[119] The United States District Court for the Eastern District of New York held that RIAH test results are admissible as scientific evidence in a probation revocation proceeding.[120] The court stated that the "primary issue that must be resolved in determining admissibility of RIA hair analysis is reliability. A court should take judicial notice of the relevant body of scientific literature to assist it in evaluating advances in scientific techniques such as RIA hair analysis."[121]

The court reasoned that "[e]xtensive scientific writings on RIA hair analysis establishes both its reliability and its acceptance in the field of forensic

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[111] *Id.*

[112] *Id.*

[113] United States v. Foote, 898 F.2d 659 (8th Cir. 1990).

[114] *Id.* at 665.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] United States v. Medina, 749 F. Supp. 59 (E.D.N.Y. 1990).

[119] *See* Bass v. Florida Dep't of Law Enforcement, 627 So. 2d 1321, 1322 (Fla. Dist. Ct. App. 1993); Nevada Employment Sec. Dep't v. Holmes, 914 P.2d 611, 614-15 (Nev. 1996); *In re* Adoption of Baby Boy L., 596 N.Y.S.2d 997, 1000 (Fam. Ct. 1993), *aff'd sub nom. In re* Baby Boy L., 614 N.Y.2d 566 (App. Div. 1994).

[120] *Medina*, 749 F. Supp. at 59. Probationer was required to submit a hair sample for drug testing to see if he violated conditions of his probation, which required him to refrain from drugs. *Id.*

[121] *Id.* at 61.

toxicology when used to determine cocaine use."[122] The case cited a number of scientific studies, the SOFT consensus,[123] *United States v. Riley*,[124] *Burgel*, and *Foote*.[125] The court noted that some studies expressed concerns regarding hair analysis.[126] The court resolved these concerns by stating that they are "not based upon a challenge to the basic scientific principles of analytical chemistry which are the foundation of radioimmunoassay."[127] The court concluded by stating "[t]hese accepted principles establish that radioimmunoassay is an effective and accurate method of detecting the presence of various compounds including narcotics."[128]

The holding in *Medina* has become a frequently cited authority upon which subsequent cases rely. One such case is *In re Adoption of Baby Boy L.*,[129] in which the New York State Family Court ruled that RIAH evidence was admissible in a best interests hearing following a natural mother's revocation of her adoption consent.[130] The court relied on the testimony of two experts to establish the accuracy of RIAH testing.[131] Based on that testimony, the court concluded that RIAH in conjunction with GC/MS confirming procedures "has been accepted by the scientific community as a reliable and accurate method of ascertaining

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[122] *Id.*

[123] *Id.* (citing SOCIETY OF FORENSIC TOXICOLOGISTS, BIBLIOGRAPHY OF CONFERENCE ON HAIR ANALYSIS FOR DRUGS OF ABUSE (1990)).

[124] *Id.* (citing United States v. Riley, 906 F.2d 841, 853 (2d Cir. 1990) (Weinstein, J., dissenting) ("hair . . . could be analyzed to show use of narcotics")).

[125] *Medina*, 749 F. Supp. at 61.

[126] Id. The court stated as follows:

> Some forensic scientists caution against widespread use of RIA hair analysis until more is known about the mechanism by which controlled substances are incorporated into human hair and the minimum amount necessary to produce a positive result can be standardized.

Id.

[127] *Id.*

[128] *Id.*

[129] *In re* Adoption of Baby Boy L., 596 N.Y.S.2d 997 (Fam. Ct. 1993), *aff'd sub nom. In re* Baby Boy L., 614 N.Y.S. 2d 566 (App. Div. 1994).

[130] *Id.* The Supreme Court Appellate Division upheld the decision of the Family Court that it was in the best interests of the adoptive child to be placed with the adoptive parents rather than the natural parents. *Id.*

[131] *Id.* at 1000. Adoptive parents expert testified that if RIAH process was done correctly it "yields a reliable result which is accepted by the relevant scientific community." *Id.* at 999. Additionally, the natural mother's expert testified on cross examination that "he personally and professionally regarded the test as being accurate and reliable." *Id.*

and measuring the use of cocaine by human subjects . . . [and] may therefore be offered in evidence."[132]

A Florida Appellate court in *Bass v. Florida Department of Law Enforcement*,[133] held that RIAH evidence should have been admitted into evidence.[134] The plaintiff in *Bass* was a corrections officer who was fired after failing a urinalysis test.[135] The plaintiff voluntarily underwent further testing (including RIAH) with no evidence of cocaine use.[136] The plaintiff requested that the RIAH test results be admitted into evidence.[137] This was denied by the hearing officer.[138] In reversing the hearing officer, the court reasoned that if RIAH was "generally accepted in the scientific community" it would meet the admissibility test.[139] The court cited *Riley, Medina, In re Adoption of Baby Boy L., Cole v. Texas*,[140] *Burgel*, and two scientific studies to support the conclusion that RIAH was generally accepted in the scientific community and therefore admissible.[141] This case was decided prior to the 1996 amendment to Florida's Drug Free Workplace Act which approved hair analysis as a drug testing method.[142]

In *United States v. Nimmer*,[143] the U.S. Court of Appeals for the Armed Forces remanded a case to relitigate whether a hair analysis expert's testimony should be admissible.[144] The defendant, a petty officer, was court-martialed as a result of a urinalysis test.[145] The defendant denied ever taking cocaine. To prove his

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[132] *Id.* at 1000. The court also stated that the weight of these test results once admitted into evidence are to be determined by the trier of fact. *Id.* at 1000.

[133] Bass v. Florida Dep't of Law Enforcement, 627 So. 2d 1321 (Fla. Dist. Ct. App. 1993).

[134] *Id.* at 1322.

[135] *Id.* at 1321. Plaintiff had held the job for eight years in which she had received numerous commendations and outstanding performance evaluations. *Id.*

[136] *Id.* at 1322.

[137] *Id.* In addition to the results of the RIAH test, Plaintiff sought to introduce a letter from Werner Baumgartner, the original researcher who discovered RIAH, discussing urinalysis and false positive test results. *Id.*

[138] *Bass*, 627 So. 2d at 1322.

[139] *Id.*

[140] *Id.* (citing Cole v. Texas, 839 S.W.2d 798 (Tex. Crim. App. 1990)).

[141] *Id.*

[142] FLA. STAT. ANN. § 112.0455(13) (West 1996). *See infra* Part VI.A.

[143] United States v. Nimmer, 43 M.J. 252 (C.M.A. 1995).

[144] *Id.* at 259. The trial court did not allow the hair analysis results to be submitted into evidence. *Id.* The United States Navy Marine Corps Court of Military Review affirmed the trial court's ruling. United States v. Nimmer, 39 M.J. 924 (N-M.C.M.R. 1994), *rev'd*, 43 M.J. 252 (C.M.A. 1995).

[145] *Nimmer*, 43 M.J. at 252-53.

contention, he submitted to an RIAH test and tested negative for cocaine.[146] The trial court refused to allow defendant's expert witness to testify as to those results.[147] The trial court's decision was affirmed by the United States Navy Marine Corps Court of Military Review.[148] The U.S. Court of Appeals for the Armed Forces remanded the case so that the trial court could assess the admissibility of evidence in light of *Daubert*.[149]

In another military case, *United States v. Bush*,[150] the U.S. Air Force Court of Criminal Appeals held that hair analysis was admissible as evidence to sustain a drug conviction.[151] This case was one of "first impression for federal criminal jurisprudence."[152] The defendant, an Air Force medical technican, was required to submit to a hair analysis test after he cheated on a urinalysis test by providing a sample of saline solution instead of urine.[153] The defendant tested positive for cocaine on the hair analysis test.[154] The court based its reasoning on the expert testimony of both the prosecution and the defense.[155] The two experts agreed "(a) that cocaine appears in the hair of users; and (b) that scientific analysis using MS/MS (or even GC/MS) instruments can reliably and validly detect that cocaine."[156]

In an unreported case, *Koch v. Harrah's Club*,[157] a Nevada trial court held that an employer's drug testing program which included RIAH did not violate an employee's right to privacy.[158] The court noted that according to the drug testing program employees who tested positive to the RIAH test could then submit to two unannounced urinalysis tests.[159]

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[146] *Id.* at 253.

[147] *Id.*

[148] *Id.* at 254-55.

[149] *Id.* at 260.

[150] United States v. Bush, 44 M.J. 646 (C.M.A. 1996).

[151] *Id.* at 646.

[152] *Id.* at 647.

[153] *Id.* at 647-48.

[154] *Id.* at 648.

[155] *Bush*, 44 M.J. at 652. The only study referred to by the court was the SOFT consensus. *Id.*

[156] *Id.* at 651. The court noted "[i]n short, MS/MS hair analysis is a far cry from palmistry, phrenology or chicken guts, and clears the pseudo-science hurdle easily." *Id.* at 652.

[157] Koch v. Harrah's Club, 5 Individual Employment Rts. Cases (BNA) 1295 (Nev. Dist. Ct. 1990).

[158] *Id.* at 1296.

[159] *Id.*

The court, however, also noted that an employee could not be terminated on the basis of RIAH testing alone.[160] It stated that "the RIAH screen test alone has not, at this stage, developed sufficiently to form a basis for termination of current employees. Under Harrah's existing policy, current employees are not terminated based on RIAH alone."[161] The court offered no explanation as to how it came to the conclusion that RIAH results were not enough reason to terminate an employee.

In *Nevada Employment Security Department v. Holmes*,[162] the Supreme Court of Nevada held that RIAH test results constituted substantial evidence.[163] In *Holmes*, the plaintiff's employer informed all employees that the defendant company would be starting a random drug testing program.[164] The plaintiff, a slot hostess at a hotel, was given ninety days notice. She voluntarily agreed to take an RIAH test.[165] The plaintiff tested positive for cocaine and, due to concerns over the chain of custody of the hair sample, a retest was taken. Once again, the plaintiff's RIAH test was positive for cocaine.[166] She was terminated from her job because of the drug test.[167]

The plaintiff subsequently filed a claim with the Nevada Employment Security Department (NESD) for unemployment compensation.[168] NESD denied her unemployment claim because she was terminated for misconduct.[169] The plaintiff appealed the decision. It was upheld by both the appeals referee and the NESD Board of Review.[170] The plaintiff then filed a petition for judicial review.[171] The district court held that substantial evidence did not support the NESD's decision.[172] Therefore, the decision to withhold unemployment compensation was reversed.[173]

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[160] *Id.*

[161] *Id.*

[162] Nevada Employment Sec. Dep't v. Holmes, 914 P.2d 611 (Nev. 1996).

[163] *Id.* at 614.

[164] *Id.* at 613.

[165] *Id.* Plaintiff's employer screened the employees for drugs with a RIAH test. If positive results occurred, a GS/MS confirmatory test was performed. *Id.* These tests were used to check for cocaine ingestion during the previous ninety days. *Id.*

[166] *Id.* at 613.

[167] *Holmes*, 914 P.2d at 611.

[168] *Id.*

[169] *Id.* The denial of unemployment benefits because of misconduct was pursuant to NEV. REV. STAT. § 612.385 (1995).

[170] *Id.*

[171] *Id.*

[172] *Holmes*, 914 P.2d at 612. "Additionally, the district court stated that '*hair drug screens*, standing alone, *are scientifically unreliable* at this time to sufficiently form a legal basis for disqualifying claimants for state unemployment insurance benefits without violating

The Supreme Court of Nevada reversed the district court's decision and held that the administrative body's decision would stand because it was based on substantial evidence.[174] The court stated that the appeals referee based her decision, that RIAH was an acceptable form of drug testing, on *Medina*, the testimony of two experts, and articles in scientific journals.[175] The court reasoned that this evidence met the criteria of the substantial evidence test.[176] As a result, the RIAH results constituted substantial evidence.[177]

The cases in this section are important in that they are the first to deal with the results of drug testing through hair analysis. They are also important because they allow one to see a contrast between a court which viewed RIAH as an "experimental technique"[178] to another court which held that RIAH results constitute substantial evidence of employee drug use.[179]

In *Burgel*, the first holding to support RIAH, the New York court opened the door to the admissibility of hair analysis by allowing it to be compelled from a party during discovery.[180] The court stated that this ruling was based on the liberal discovery rule and in no way sanctioned the admissibility of hair analysis as evidence.[181]

Yet, two years later, in *Medina*, the court relied on *Burgel*'s ruling, along with articles in scientific journals, to support the admissibility of hair analysis.[182] The court noted "that radioimmunoassy is an effective and accurate method of detecting the presence of various compounds including narcotics."[183] External contamination and differences in hair absorbency of different races or genders were not discussed in the opinion.

Once some courts had held that hair analysis was admissible as evidence, it was inevitable that cases dealing with employee drug testing through RIAH would appear in court. Nevada State courts have addressed employee drug testing in two instances. The *Koch* court held that RIAH drug testing of employees did not constitute an invasion of privacy when the tested employee

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the due process clause of the Fourteenth Amendment of the U.S. Constitution.'" *Id.* at 613.

[173] *Id.* at 612.

[174] *Id.* at 614.

[175] *Id.*

[176] Id.

[177] *Holmes*, 914 P.2d at 614.

[178] *See* United States v. Foote, 898 F.2d 659, 665 (8th Cir. 1990).

[179] Nevada Employment Sec. Dep't v. Holmes, 914 P.2d 611, 614 (Nev. 1996).

[180] Burgel v. Brugel, 533 N.Y.S.2d 735, 737 (N.Y. App. Div. 1988).

[181] *Id.*

[182] United States v. Medina, 749 F. Supp. at 59 (E.D.N.Y. 1990).

[183] *Id.* at 61.

had an option of subsequent urinalysis testing and GC/MS confirmation of positive test results.[184] The *Holmes* court relied heavily on *Medina* and its string cite of scientific journals in ruling that RIAH results constituted substantial evidence.[185] Future employee drug testing through RIAH cases may cite to and follow *Holmes*.

V. PRIVACY IMPLICATIONS

A. Overview of Drug Testing Cases

1. Public Employees

The Supreme Court has ruled that the Fourth Amendment right against unlawful search and seizure applies in instances of drug testing of public employees.[186] Two landmark Supreme Court cases dealing with employee drug testing were issued on the same day in 1989.[187]

In *Skinner v. Railway Labor Executives' Association*,[188] the Court held that in some circumstances employee drug and alcohol tests were reasonable under the Fourth Amendment and did not unduly infringe on an employee's privacy interests.[189] The Railway Labor Executives' Association and various labor organizations sued the Secretary of Transportation to enjoin specific drug and alcohol regulations issued by the Federal Railroad Administration (FRA).[190] The disputed regulations required railroads to see that blood and urine tests of covered employees are conducted following accidents.[191] Furthermore, the regulations authorized railroads to conduct breath or urine tests in certain situations.[192]

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[184]Koch v. Harrah's Club, 5 Individual Employment Rts. Cases (BNA) 1295, 1296 (D. Nev. Sept. 12, 1990).

[185]Nevada Employment Sec. Dep't v. Holmes, 914 P.2d 611, 614 (Nev. 1996).

[186]Craig M. Cornish & Donald B. Lauria, *Employment Drug Testing, Preventive Searches, and the Future of Privacy*, 33 WM. & MARY L. REV. 95 (1991).

[187]*See* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). These cases were decided on March 21, 1989: *Von Raab*, 489 U.S. at 656; *Skinner*, 489 U.S. at 602. Both opinion were written by Justice Kennedy. *Von Raab*, 489 U.S. at 658; *Skinner*, 489 U.S. at 605.

[188]*Skinner* , 489 U.S. at 602 .

[189]*Id.* at 634.

[190]*Id.* at 612.

[191]*Id.* at 606.

[192]*Id.* The regulations state that breath or urine tests may be required if an employee violates certain rules, or if the employee is suspected of acts that contributed to an accident. *Id.* at 630-34.

The Court held that these tests of employees' blood, urine, and breath were searches under the Fourth Amendment.[193] The Court stated that two intrusions of privacy occur during drug testing. In urinalysis, the first intrusion occurs during collection, and the second occurs during chemical analysis.[194] Similarly, in blood testing, the first intrusion occurs when the needle pierces the skin. The second intrusion also occurs during chemical analysis.[195]

The Court stated that in certain circumstances beyond normal law enforcement, searches could occur without the usual warrant and probable cause requirement of a search.[196] Such a circumstance occurs if the government's compelling interest outweighs an employee's privacy expectation.[197] The Supreme Court held that the government's interest in the prevention of accidents and casualties in railroad operations resulting from employee's impairment was such a compelling interest.[198]

The Court then applied a balancing test between the government's interest and the employee's expectation of privacy.[199] The Court stated as follows:

> [t]hough some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees . . . . By contrast, the Government interests in testing without a showing of individualized suspicion is compelling.[200]

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[193] *Skinner*, 489 U.S. at 617. The court stated:

> [i]t is not disputed, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interest . . . . Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . these intrusions must be deemed searches under the Fourth Amendment.

Id.

[194] *Id.* at 626.

[195] *Id.* at 625.

[196] *Id.* at 619.

[197] *Id.* at 628. The *Skinner* Court noted that employees in the railroad industry may cause serious injuries because of a momentary lapses of attention. *Id.* The Court quoted the dissenting judge in the circuit court's decision as follows: "An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." *Id.*

[198] *Skinner*, 489 U.S. at 628.

[199] *Id.*

Based on that reasoning, the regulations were upheld as a reasonable intrusion into the privacy of the railroads' employees.[201]

In *National Treasury Employees Union v. Von Raab*,[202] the Court upheld employee drug testing of "employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm."[203] The plaintiffs in *Von Raab*, a union of federal employees and a union official, objected to the Customs Service's drug testing program.[204] Under the Customs Service's drug testing program, drug tests were made a condition of employment for certain positions. The positions which required drug tests were ones in which employees carried firearms, handled classified materials, or were involved in drug interdiction or enforcement of related laws.[205]

The *Von Raab* Court reiterated the holding in *Skinner* that when a Fourth Amendment intrusion serves special governmental needs it is necessary to balance the individual's privacy expectations against the government's interest to determine if the intrusion is unreasonable.[206] The Court stated "that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment."[207] This is required because the public's interest in self-protection could be damaged if those policing the borders for narcotics have drug habits.[208] The Court noted that many Customs Service employees are exposed to criminals. They are often the targets of attempted bribery by drug smugglers.[209] Additionally, the Court stated that the government has a public interest in preventing drug users from carrying firearms.[210]

The government's interests were then weighed by the *Von Raab* Court against the individual employee's expectation of privacy.[211] Like the *Skinner* Court, the

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[200] *Id.*

[201] *Id.*

[202] National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

[203] *Id.* at 677.

[204] *Id.* at 663.

[205] *Id.* at 679.

[206] *Id.* at 655.

[207] *Von Raab*, 489 U.S. at 670.

[208] *Id.*

[209] *Id.* at 669. Many employees were removed in the past for accepting bribes and other integrity violations. *Id.*

[210] *Id.* at 670. The court stated "[w]e agree with the Government that the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.* at 670-71.

[211] *Id.* at 670-71.

Court in *Von Raab* also stated that intrusions that are unreasonable in non-work situations may be reasonable in work situations.[212] The Court concluded that in regards to positions involving drug interdiction or firearms the Customs Service's drug test was a reasonable intrusion.[213] The Court remanded the issue of drug testing of employees who "handle classified material" to the trial court to determine if "the Service has defined this category of employees more broadly than is necessary."[214]

In *Legal Issues Surrounding Employee Hiring, Privacy and Investigation*, author Jill L. Rosenberg states that lower court cases "reveal three relatively narrow categories of competing employer interests that will justify invading conceded employee privacy rights under Fourth Amendment standards."[215] The first category consists of an interest in the protection of public safety in law enforcement and the transportation industry.[216] Courts are split as to the constitutionality of drug testing police officers and firefighters.[217]

The next category consists of an interest in monitoring employees who hold sensitive positions of public trust.[218] Drug testing in this category "has been upheld when the employees subject to testing occupy positions which expose them to users or peddlers of illicit drugs."[219]

The third category consists of the employers interest in the protection against disclosure of highly sensitive information.[220] Lower courts focus "on the potential harm which could arise if such information were disclosed."[221]

2. Private Employees

Courts have held that the Fourth Amendment's prohibition against unlawful search and seizure does not extend to drug testing of private employees.[222]

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[212] *Von Raab*, 489 U.S. at 670-71.

[213] *Id.* at 677.

[214] *Id.*

[215] Jill L. Rosenberg, *Legal Issues Surrounding Employee Hiring, Privacy and Investigation*, 547 PRACTICING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES LITIG. 569, 609 (1996).

[216] *Id.*

[217] *Id.* at 611.

[218] *Id.* at 609.

[219] *Id.* at 612.

[220] Rosenberg, *supra* note 215, at 609.

[221] *Id.* at 612.

[222] *See, e.g.*, Edward L. Raymond, Jr., Annotation, *Liability for Discharge of At-Will Employee for Refusal to Submit to Drug Testing*, 79 A.L.R. 4th 105, § 3 (1990 & Supp. 1997) (citing Borse v. Pierce Goods Shop, Inc., 758 F. Supp. 263 (E.D. Pa. 1991); Johnson v. Carpenter Tech. Corp., 723 F. Supp. 180 (D.C. Wyo. 1987); Greco v. Halliburton Co., 674 F. Supp. 1447 (D.C. Wyo. 1987); Monroe v. Consolidated Freightways, Inc., 654 F. Supp 661 (E.D. Mo. 1987); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska

Private employees may still raise privacy objections by either claiming wrongful discharge in violation of public policy or wrongful discharge due to breach of an implied covenant of good faith and fair dealing.[223] Many jurisdictions reject one or both of these claims.[224] This section examines cases which indicate that an employee may have such a claim when he/she is terminated as a result of a drug test.

a. Wrongful Discharge in Violation of Public Policy

In *Semore v. Pool*,[225] a California appellate court held that "when a private employee is terminated for refusing to take a random drug test, he may invoke the public policy exception to the at-will termination doctrine to assert a violation of his constitutional right of privacy."[226] The plaintiff, an employee of nine years, was terminated when he refused to take a pupillary reaction eye test.[227] The test was used to determine if employees were taking drugs.[228]

The court reasoned that the California Constitution[229] "provides that privacy is one of our inalienable rights. Since privacy can be invaded by government agencies, businesses, or individuals, the courts and commentators agree that the constitutional provisions provides at least some protection against nongovernmental action."[230] The court stated that this expectation of privacy needs to be balanced against the employers interest in regulating the conduct of its employees.[231] The court stated that the issue of whether a pupillary reaction eye test was nonintrusive could not be decided on demurrer since the court did not have facts regarding "the nature of the test, the equipment used, the manner of administration, its reliability, the handling of test results and

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1989)).

[223] *See, e.g.*, Raymond, *supra* note 222, at § 2.

[224] *See, e.g., id.* at §§ 5(b), 7, 8 (citing Ritchie v. Walker Mfg. Co., 963 F.2d 1119 (8th Cir. 1992); Borse v. Pierce Goods Shop, Inc., 758 F. Supp. 263 (E.D. Pa. 1991); Greco v. Halliburton Co., 674 F. Supp. 1447 (D. Wyo. 1987); Monroe v. Consolidated Freightways, Inc., 654 F. Supp. 661 (E.D. Mo. 1987); Folmsbee v. Tech Tool Grinding & Supply Inc., 630 N.E.2d 586 (Mass. 1994); Gilmore v. Enogex, Inc., 878 P.2d 360 (Okla. 1994); Roe v. Quality Transp. Servs., 838 P.2d 128 (Wash. Ct. App. 1992)).

[225] Semore v. Pool, 266 Cal. Rptr. 280 (Ct. App. 1990).

[226] *Id.* at 282.

[227] *Id.*

[228] *Id.*

[229] CAL. CONST. art. I, § 1 states as follows: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

[230] *Semore* , 266 Cal. Rptr. at 283.

[231] *Id.* at 286.

similar concerns."[232] The court also noted that the complaint did not indicate plaintiff's "type of work."[233] The court concluded that without these facts, the case could not be decided on demurrer.[234] The case was remanded to the trial court to allow plaintiff to amend his complaint.[235]

In *Twigg v. Hercules Corp.*,[236] the Supreme Court of Appeals of West Virginia answered a certified question from the United States District Court for the Northern District of West Virginia regarding whether employee drug testing may violate public policy.[237] The court held that:

> [I]t is contrary to public policy in West Virginia for an employer to require an employee to submit to drug testing, since such testing portends an invasion of an individual's right to privacy. We do, however, temper our holding with two exceptions to this rule. Drug testing will not be violative of public policy grounded in the potential intrusion of a person's right to privacy where it is conducted by an employee based upon reasonable good faith objective suspicion of an employee's drug usage or where an employee's job responsibility involves public safety or the safety of others.[238]

A New Jersey Supreme Court case, *Hennessey v. Coastal Eagle Point Oil Co.*,[239] held "that mandatory random urine testing by private employers can be an invasion of privacy sufficient to breach public policy . . . ."[240] In *Hennessey*, the plaintiff, a lead pumper in an oil refinery, was terminated after testing positive for marijuana in a random drug test through urinalysis.[241]

The court stated "[t]o constitute a 'clear mandate of public policy' supporting a wrongful-discharge cause of action, the employee's individual right (here,

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[232] *Id.* at 287.

[233] *Id.*

[234] *Id.*

[235] *Semore*, 266 Cal. Rptr. at 283.

[236] Twigg v. Hercules Corp., 406 S.E.2d 52 (W. Va. 1990).

[237] *Id.* at 52-53. The Northern District of West Virginia's certified question was as follows:

> Can the discharge of an employee for refusing to submit to urinalysis as part of a random drug test violate a substantial public policy of West Virginia and subject the employer to damages under *Harless v. First National Bank* in Fairmont when the employer has no individualized suspicion of drug usage and the drug test is not prohibited by state statute.

Id. (citation omitted).

[238] *Id.* at 55 (footnote omitted).

[239] Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992).

[240] *Id.* at 19.

[241] *Id.* at 12-13.

privacy) must outweigh the competing public interest (here, public safety)."[242] The court noted that the public's interest in ensuring that workers in safety-sensitive positions are drug free outweigh an employee's right to privacy.[243] Because the plaintiff's position at the oil refinery was a safety-sensitive position, the court held that under these circumstances his firing did not violate public policy.[244]

b. Breach of Implied Covenant of Good Faith and Fair Dealing

In *Luedtke v. Nabors Alaska Drilling, Inc.*,[245] the Supreme Court of Alaska held that a breach of the implied covenant of good faith and fair dealing may occur when an employer is in violation of the "public policy supporting the protection of employee privacy."[246] One of the plaintiffs, an employee who worked for an oil rig, was drug tested and suspended because of a positive result.[247] That plaintiff refused to take another drug test and in turn was terminated.[248] A second plaintiff refused to submit to an initial drug test and was also terminated.[249]

The *Luedtke I* court held that the terminations did not constitute a breach of the covenant of good faith and fair dealing because of "the competing public concern for employee safety present in the case at bar . . . ."[250] The court also noted that even in cases where drug testing is acceptable "the drug test must be conducted at a time reasonably contemporaneous with the employee's work time"[251] and "an employee must receive notice of the adoption of a drug testing program."[252] In regard to the terminations of the plaintiffs, these criteria were met.[253] The case was remanded to determine if the suspension of one of the plaintiffs after he tested positive to the initial drug test constituted a breach of the covenant of good faith and fair dealing occurred.[254]

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[242] *Id.* at 20.

[243] *Id.*

[244] *Hennessey*, 609 A.2d at 21.

[245] Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123 (Alaska 1989) [hereinafter *Luedtke I*].

[246] *Id.* at 1130.

[247] *Id.* at 1125-26.

[248] *Id.* at 1126.

[249] *Id.*

[250] *Luedtke I*, 768 P.2d at 1130.

[251] *Id.* at 1136.

[252] *Id.* at 1137.

[253] *Id.*

[254] *Id.*

On remand, the trial court held that the employee did not breach the covenant of good faith and fair dealing when it suspended the plaintiff.[255] The case was again appealed to the Supreme Court of Alaska.[256] On second appeal, the Supreme Court of Alaska held that the employer's suspension of the employee violated the covenant of good faith and fair dealing.[257] The court noted that the covenant of good faith and fair dealing "requires that the employer by objectively fair."[258] The court also noted that the plaintiff "was tested for drug use without prior notice, that no other employee was similarly tested, and that [the employer] suspended [the plaintiff] immediately upon learning of the results of the test."[259] The court stated that "as a matter of law, these facts constitute a violation of the covenant of good faith and fair dealing."[260]

In a California appellate case, *Luck v. Southern Pacific Transportation Co.*,[261] the court upheld a jury's verdict that an employer breached an implied covenant of good faith and fair dealing when it terminated an otherwise satisfactory employee because she refused to submit to a urinalysis test.[262] The court reasoned that the plaintiff's job as a computer programmer could not be characterized as a safety position.[263] The court stated:

> Luck's job did not have sufficient safety aspects to constitute a safety interest that might be balanced against the intrusion upon her privacy rights. When we also consider that the interest must be compelling in order to justify an intrusion of her privacy rights under our state Constitution-a higher showing than would be required under the Fourth Amendment analysis used by federal courts-it is clear that the trial court's implied ruling that Southern Pacific's safety interest did not justify the invasion of Luck's privacy was correct.[264]

Additionally, the court held that an employer's bad faith is a prerequisite to a claim of wrongful termination due to contractional breach of an implied covenant of good faith and fair dealing.[265] This is an evidentiary determination

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[255] *See* Luedtke v. Nabors Alaska Drilling, Inc., 834 P.2d 1220, 1222 (Alaska 1992) [hereinafter *Luedtke II*].

[256] *Id.*

[257] *Id.* at 1226.

[258] *Id.* at 1250.

[259] *Id.* at 1226.

[260] *Luedtke II*, 834 P.2d at 1226.

[261] Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618 (Ct. App. 1990).

[262] *Id.* at 634.

[263] *Id.* at 631.

[264] *Id.* at 631-32.

[265] *Id.* at 633.

best left to the trier of fact.[266] The court found that there was substantial evidence that bad faith existed.[267] Therefore, the plaintiff had a claim for wrongful termination.[268]

B. Intrusiveness of RIAH

Proponents of RIAH argue that hair analysis is less intrusive than urinalysis or blood analysis because of the simpler collection process.[269] In *Skinner*, the Supreme Court quoted the Fifth Circuit's opinion in *Von Raab* as follows:

> [t]here are few activities in our society more personal or private than the passing of urine. Most people describe it in euphemisms if they talk about it at all. It is a function traditionally performed without public observation, indeed, its performance in public is generally prohibited by law as well as social custom.[270]

Similarly, the taking of blood is often a traumatic experience for many employees because of the fear or discomfort associated with the process.[271]

As compared to urinalysis or blood analysis, the collection of hair is nominally intrusive. Few people find a collection process in which eighty or so hairs are cut from one's head embarrassing, offensive, or traumatic. Yet, because of recent advances in deoxyribonucleic acid (DNA) technology, greater amounts of information can be obtained from blood and hair than previously known. DNA can be extracted from both hair bulbs and white blood cells.[272]

A 1990 report by the Office of Technology Assessment entitled *Genetic Monitoring and Screening in the Workplace*[273] examines the applications and limitations of such testing.[274] The report stated the following:

> Genetic monitoring and screening have the potential to significantly change the workplace by detecting both occupational and nonoccupational diseases. They can identify genetic abnormalities which may be associated with inherited diseases, susceptibilities, and

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[266] *Luck*, 267 Cal. Rptr. at 633.

[267] *Id.*

[268] *Id.* at 618.

[269] Jordan, *supra* note 1, at 68.

[270] Stephen A. Plass, *Testing Hair Follicles for Drugs: In Search of Privacy, Accuracy, and Reliability*, 42 LAB. L.J. 111, 113 (1991) (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989), and quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).

[271] *Id.*

[272] LORNE T. KIRBY, DNA FINGERPRINTING 1 (1992).

[273] U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, GENETIC MONITORING AND SCREENING IN THE WORKPLACE U.S. CONGRESS No. OTA-BA-455 (1990).

[274] *Id.* at 3.

> traits in otherwise healthy, asymptomatic individuals. The ability to diagnose latent conditions (both occupationally and nonoccupationally related) through genetic monitoring and screening raises policy questions about the proper use of such technologies.[275]

In 1996, a lawsuit filed in Boston's Suffolk Superior Court, by two employees terminated for failure to comply with an RIAH test, centered on the issue of genetic privacy.[276] The plaintiffs, former employees of Boston based Global Access Telecommunications, Inc., sued for wrongful termination.[277] The plaintiffs were fired when they agreed to submit to urinalysis but refused to provide hair samples for medical research and drug testing. The plaintiffs "feared their hair would be used in genetic testing that could reveal confidential information, such as sexual orientation or predisposition to diseases that could be used to deny them insurance coverage."[278] A stipulation of dismissal was filed in that lawsuit in July, 1997.[279]

The issue of genetic privacy was not examined by the Supreme Court's 1989 decisions in *Skinner* and *Von Raab*. As genetic testing becomes more common, courts will need to address the constitutionality of requiring employees to part with samples that could provide genetic information.

Evidence of the growing importance of genetic information can be seen through the Centers for Disease Control and Prevention's (CDC) concerns that its procedures for obtaining consent from donors of blood and tissue samples fall short of "new ethic rules" for genetic research in the 1990s.[280] Karen Steinberg, chief of the molecular biology branch at CDC's National Center for Environmental Health, stated that the consent form in use was sufficient during the 1980s but is inadequate for DNA research in the 1990s.[281]

In a law review article entitled *Drug Testing in the Workplace*, authors Craig M. Cornish and Donald B. Louria expressed their views on the future of privacy after *Skinner* and *Von Raab*.[282] The authors feared that the trend toward an intrusion into employees' privacy will lead to a future in which employers have genetic databases on their employees.[283] The authors stated:

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[275] *Id.*

[276] John Ellement, *Employees Sue Over Hair Samples*, NAT'L L.J., Nov. 11, 1996, at B1.

[277] *Id.*

[278] *Workers Allege Hair Tests Invade Genetic Privacy; Employee Drug Testing, supra* note 8, at 6.

[279] Stipulation of Dismissal, Werner v. Vyvx Corp., No. 96-5912 (Mass. Dist. Ct. filed July 16, 1997).

[280] Eliot Marshall, *Policy on DNA Research Troubles Tissue Bankers*, SCIENCE, Jan. 26, 1996, at 440.

[281] *Id.*

[282] Cornish & Lauria, *supra* note 186, at 101.

[283] *Id.* at 110.

> One of the techniques now being rapidly explored is the isolation and identification of single genes that either promote or suppress disease. These technological advances could also be used for surveillance purposes. For example, an employer could advise a person who has a gene that promotes lung cancer not to augment that gene's activity by smoking or by exposing the gene to common lung carcinogens in the workplace. The employer could urge such individuals to get plenty of carotenes in their diets or in dietary supplements to attempt to reduce their increased risk of lung cancer.[284]

In addition, "[i]f the genome analysis enters a networked computer system, the consequences for the employee could be catastrophic. Such disclosures could affect employment opportunities, life insurance or health insurance premiums, or bank loans."[285]

An argument can also be made that hair analysis is more intrusive because as employer may obtain a "history" of an employee's drug use.[286] This analysis "extends far beyond determining whether an employee or prospective employee is fit to perform the job for which he or she is tested, but rather elicits off-the-job activity that may be stale or totally unrelated to the employment at issue."[287] This question along with questions regarding genetic privacy need to be answered by future courts.

VI. STATUTES

A. State Drug Testing Statutes

Several states have statutes authorizing employers to test employee hair samples for drugs. An Arizona drug testing statute permits employers to collect hair or other samples[288] from current or prospective employees.[289] An

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[284] *Id.* at 109. The authors also stated:

> [h]aving a group of employees with substantial health risks will increase health insurance premiums and reduce the profits of the employer. As genetic technology improves and gene therapy becomes available, individuals who have been subjected to a genetic test could be required to undergo treatment to modify those genes that create extraordinary risks to illness or disease. Having workers with healthy genomes could even result in insurance premium discounts.

Id.

[285] *Id.* at 110.

[286] Ann M. O'Neill, *Legal Issues Presented by Hair Follicle Testing*, EMPLOYMENT REL. TODAY, Winter 1991/1992, at 411.

[287] *Id.* at 411-12.

[288] ARIZ. REV. STAT. ANN. § 23-493(7) (West Supp. 1997) (defines "sample" as "urine, blood, breath, saliva, hair or other substances from the person being tested).

[289] ARIZ. REV. STAT. ANN. § 23-493.01 (West 1995). The Arizona Revised Statutes set forth circumstances in which an employer may drug-test an employee. ARIZ. REV. STAT.

employer under this statute "does not include the United States, this state and its agencies other than the department of public safety, any political subdivision of this state or any native American tribe."[290]

A Florida statute entitled the Drug Free Workplace Act authorizes any state government agency to test current or prospective employees' hair samples or other samples[291] for drugs.[292] The Act specifically addresses the standards and procedures required for RIAH. Hair cutoff levels are mandated for both initial testing and confirmational testing.[293] Additionally, the melanin fraction of hair must be removed before analysis to reduce the risk of hair-color bias.[294] It also requires specific standards to be met for hair specimen collection, collection

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ANN. § 23-493.04(B)-(C) (West 1995). The statute states as follows:

> B. Within the terms of the written policy, an employer may require the collection and testing of samples for any job-related purposes consistent with business necessity including:
> 1. Investigation of possible individual employee impairment.
> 2. Investigation of accidents in the workplace. Employees may be required to undergo drug testing or alcohol impairment testing for accidents if the test is taken as soon as practicable after an accident and the test is administered to employees who the employer reasonably believes may have contributed to the accident.
> 3. Maintenance of safety for employees, customers, clients or the public at large.
> 4. Maintenance of productivity, quality of products or services or security of property or information.
> 5. Reasonable suspicion that an employee may be affected by the use of drugs or alcohol and that the use may adversely affect the job performance or the work environment.
>
> C. In addition to the provisions of subsection B, employees or groups of employees may be required to undergo drug testing on a random or chance basis.

Id.

[290] ARIZ. REV. STAT. ANN. § 23-493(4) (West Supp. 1997).

[291] FLA. STAT. ANN. § 112.0455(5)(k) (West Supp. 1998) (defining "specimen" as "tissue, hair, or product of the human body capable of revealing the presence of drugs of their metabolites").

[292] FLA. STAT. ANN. § 112.0455(4) (West 1992). The Florida Statutes set forth circumstances in which employers may drug test an employee. FLA. STAT. ANN. § 112.0455(7) (West 1992). The statute states in part:

> (7) Types of testing.-An employer is authorized, but not required, to conduct the following types of drug tests:
> (a) Job applicant testing . . .
> (b) Reasonable suspicion . . .
> (c) Routine fitness for duty . . .
> (d) Follow up testing . . . .

Id.

[293] FLA. STAT. ANN. § 112.0455(13)(b) (West Supp. 1998).

[294] FLA. STAT. ANN. § 112.0455(13)(b)(2)(b) (West Supp. 1998). Some drugs are "thought to bind preferentially to melanin." Harkey, *supra* note 46, at 224.

controls, transportation of sample to testing facility, quality assurance, quality control, proficiency testing, and satisfactory performance.[295]

Bass, the only Florida court case to address RIAH drug testing, was decided in 1993 prior to the 1997 amendment to this Act which added hair analysis as a permissible drug testing method.[296] Since the *Bass* court held that RIAH test results are admissible,[297] it is likely that future Florida courts will also determine that the hair analysis tests pursuant to this statute are admissible as evidence in court.

A Louisiana drug testing statute authorizes public employers to test hair samples or other samples[298] of current or prospective employees.[299] This statute also states that under certain circumstances, public employers are required to drug test employees.[300]

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[295]FLA. STAT. ANN. § 112.0455(13)(b)(3)-(5) (West Supp. 1998).

[296]FLA. STAT ANN. § 112.0455 (West Supp. 1998).

[297]Bass v. Florida Dep't of Law Enforcement, 627 So. 2d 1321 (Fla. Dist. Ct. App. 1993).

[298]LA. REV. STAT. ANN. § 49:1001 (West Supp. 1998) (defines "sample" as "urine, blood, saliva, or hair").

[299]LA. REV. STAT. ANN. § 49:1015 (West Supp. 1998). The Louisiana Revised Statutes set forth circumstances in which a public employer may drug test an employee. LA. REV. STAT. ANN. § 49:1015 (A)-(C) (West Supp. 1998). The statute states as follows:

> A. A public employer may require, as a condition of continued employment, samples from his employees to test for the presence of drugs following an accident during the course and scope of his employment, under other circumstances which result in reasonable suspicion that drugs are being used or as a part of a monitoring program established by the employer to assure compliance with terms of a rehabilitation agreement.
> B. A public employer may require samples from prospective employees, as a condition of hiring, to test for the presence of drugs.
> C. A public employer may implement a program of random drug testing of those employees who occupy safety-sensitive or security-sensitive positions.

Id.

[300]LA. REV. STAT. ANN. § 49:1015(F)(1)(2) (West Supp. 1998). The Louisiana Revised Statute sets forth circumstances in which a public employer must drug test an employee. *Id.* The statute states as follows:

> (1) A public employer shall require samples to test for the presence of drugs, as a condition of hiring, from prospective employees whose principal responsibilities of employment include operating a public vehicle, performing maintenance on a public vehicle, or supervising any public employee who operates or maintains a public vehicle.
> (2) A public employer shall implement a program of random drug testing of those employees whose principal responsibility is to operate public vehicles, maintain public vehicles, or

A Maryland drug testing statute permits employers to test hair samples or other samples[301] for drugs.[302] In regards to drug testing through hair analysis, the statute limits the testing of hair to pre-employment purposes.[303] In addition, an employer who collects a hair sample may not "1. [u]se a specimen that is longer than one and one-half inches measured from the human body; or 2. [u]se the specimen for any purposes other than testing for controlled dangerous substances."[304]

Utah has separate statutes in regards to drug testing of private and public employees. The Utah statute dealing with private employers[305] authorizes employers to test hair along with other samples[306] for drugs of current and prospective employees.[307] The Utah statute dealing with public employers allows local government entities or state institutes of higher education to test

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supervise any public employee who drives or maintains public vehicles.

Id.

[301]MD. CODE ANN., Health-General, § 17-214(6) (1997) (defines "specimen" as "(i) [b]lood derived from the human body; (ii) [u]rine derived from the human body; or (iii) [h]air derived from the human body as provided in subsection (b) (2) of this section").

[302]MD. CODE ANN., Health-General, § 17-214 (1997). "Job-related" is defined as "any alcohol or controlled dangerous substance testing used by an employer for a legitimate business purpose." MD. CODE ANN., Health-General, § 17-214(a)(4).

[303]MD. CODE ANN., Health-General, § 17-214(b)(2)(ii) (1997).

[304]MD. CODE ANN., Health-General, § 17-214(b)(2)(iii) (1997).

[305]UTAH CODE ANN. § 34-38-2(3) (1997) (states in part that "'[e]mployer' does not include the federal or state government, or other local political subdivisions").

[306]UTAH CODE ANN. § 34-38-2(6) (1997) (defines "sample" as "urine, blood, breath, saliva, or hair").

[307]UTAH CODE ANN. § 34-38-3 (1997). The Utah Code sets forth circumstances in which a private employer may drug test and employee. UTAH CODE ANN. § 34-38-7(a)-(3) (1997). The statute states as follows:

(2) Within the terms of his written policy, an employer may require the collection and testing of samples for the following purposes:
(a) investigation or possible individual employee impairment;
(b) investigation of accidents in the workplace or incidents of workplace theft;
(c) maintenance of safety for employees or the general public; or
(d) maintenance of productivity, quality of products or services, or security of property or information.
(3) The collection and testing of samples shall be conducted in accordance with Sections 34-38-4, 34-38-5, and 34-38-6, and need not be limited to circumstances where there are indications of individual, job-related impairment of an employee or prospective employee.

Id.

hair samples or other samples[308] of current and prospective employees and volunteers.[309]

B. Discrimination Statutes

Under the Americans with Disabilities Act of 1990 (ADA)[310] a recovering addict who participates in a rehabilitation program is considered a "qualified individual with a disability."[311] Employers are prohibited from discriminating against such individuals.[312]

The Rehabilitation Act of 1973[313] provides further protection for recovering addicts who are employed by government programs which receive federal funds.[314] Moreover, many state statutes also protect against discrimination of recovering addicts.[315]

An employer who terminates an employee for testing positive on a hair analysis test may be violating a disability discrimination statute.[316] Because of hair analysis's longer window of detection, a recovering addict may test positive for drug use that occurred months before.[317] An employer may be able

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[308]UTAH CODE ANN. § 34-41-101(11) (1997) (defines "sample" as "urine, blood, breath, saliva, or hair").

[309]UTAH CODE ANN. § 34-41-104 (1997). The Utah Code sets forth circumstances in which a public employer may drug test an employee. UTAH CODE ANN. § 34-41-102(3) (1997). The statutes states in part:

> (3) A drug-fee workplace policy may include, but does not require, drug testing under the following circumstances:
> (a) preemployment hiring or volunteer selection procedures;
> (b) postaccident investigations;
> (c) reasonable suspicion situations;
> (d) preannounced periodic testing;
> (e) rehabilitation programs;
> (f) random testing in safety sensitive positions; or
> (g) to comply with the federal Drug Free Workplace Act of 1988, 41 U.S.C. 701 through 707, or other federally required drug policies.

Id.

[310]42 U.S.C.A. §§ 12101-12213 (West 1995).

[311]42 U.S.C.A. § 12114 (West 1995).

[312]42 U.S.C.A. § 12112 (West 1995).

[313]29 U.S.C.A. §§ 701-797(b) (West 1995).

[314]O'Neill, *supra* note 286, at 413.

[315]*Id. See e.g.*, Douglas L. Stanley, *Employee Drug Testing*, J. KAN. B. ASS'N, Jan. 1992, at 19, 25 (citing Doe v. Roe, Inc., 539 N.Y.S.2d 876 (Civ. Ct. 1989), in which the court held that an employer violated a New York disability discrimination statute by automatically disqualifying an employee who tested positive for drugs).

[316]O'Neill, *supra* note 286, at 413.

[317]*Id.*

to avoid liability by offering the employee an opportunity to explain a positive result.[318]

Title VII of the Civil Rights Act of 1964[319] prohibits discrimination in employment practices based on "race, color, religion, sex or national origin."[320] 42 U.S.C. § 1981 also prohibits discrimination as follows: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . as is enjoyed by white citizens . . . ."[321]

As stated previously, controversy surrounds whether individual differences in hair texture and type can affect drug outcomes.[322] Concerns exist as to whether an RIAH test could discriminate against minorities or females.[323] If these claims are proven to be correct, an employee terminated based on a positive hair analysis test result may have a discrimination claim against his/her employer.[324]

C. National Labors Relations Act

Collective bargaining between union members and their employers is governed by the National Labor Relations Act (NLRA).[325] The National Labor Relations Board (NLRB) has ruled that drug testing of current employees is subject to collective bargaining.[326] Since prospective employees are not employees within the meaning of the NLRA, drug testing of prospective employees is not subject to collective bargaining.[327]

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[318] *Id.*

[319] 42 U.S.C.A. § 2000(e) (West 1995).

[320] 42 U.S.C.A. § 2000(a)(2) (West 1995).

[321] 42 U.S.C.A. § 1981 (West 1994).

[322] *See supra* Part III.

[323] *Id.*

[324] Patricia A. Montgomery stated that:

> [a]lthough not prevalent, it is possible for an employee to assert race, sex or age discrimination related to termination based on a drug test result. This type of allegation could only be supported if a drug testing program has a disparate impact on a protected class of employees.

Patricia A. Montgomery, *Workplace Drug Testing: Are There Limits?*, TENN. B. J., Mar.-Apr. 1996, at 20, 21.

[325] 29 U.S.C.A. §§ 151-169 (West 1995).

[326] O'Neill, *supra* note 286, at 413.

[327] *Id.* at 413-14.

Employers who hire union workers cannot require drug testing of current employees without a collective bargaining agreement. This applies to hair analysis as well as to other methods of testing.[328]

VII. CONCLUSION

This note has attempted to familiarize the reader with an understanding of the legal implications that apply to employee drug testing through hair analysis. A small string of cases have found that RIAH test results are admissible.[329] These cases will be strong authority for future cases deciding the admissibility of RIAH.

Courts will undoubtedly apply the current case law on drug testing through urinalysis and blood analysis to this matter. Courts should be aware that an employer who uses RIAH gains access to genetic information[330] along with a "history" of drug use.[331] Because of this information, privacy issues associated with drug testing need to be more closely examined so as to protect employees' rights.

THERESA K. CASSERLY

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[328] *Id.* at 414.

[329] *See supra* Part IV.B.

[330] *Workers Allege Hair Tests Invade Genetic Privacy; Employee Drug Testing, supra* note 8, at 6.

[331] O'Neill, *supra* note 286, at 411.