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Phillip J. Griego

DO MANDATORY DRUG TESTS INVADE AN EMPLOYEE'S PRIVACY?

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INTRODUCTION: A QUESTION OF BALANCE

You are the plant manager for a Silicon Valley production facility. You employ about 1500 people. Your security department has just informed you that they have unconfirmed reports of heavy drug use in one of your quality control departments. They insist the only expeditious way to weed out the bad apples and maintain a low profile is to require every employee to undergo drug testing. Those who refuse will be subject to immediate termination. You call your legal counsel for an opinion. He is uneasy about the situation but tells you there is no California case law directly addressing the issue. A decision has to be made today. You are aware that the company has been threatened with a number of law suits involving employee privacy in the recent past. Does the testing program violate the employees' privacy? Is the company exposing itself to possible law suits if it terminates someone for refusing the test? Recent decisions in California indicate that the answer to both these questions is YES!

In the recent case *Long Beach City Employees Association v. City of Long Beach*,[1] Justice Broussard, writing for a majority of the California Supreme Court, decided that polygraph examinations "inherently intrude upon the constitutionally protected zone of individual privacy."[2] The reasoning of this decision makes it clear that if the court finds polygraphs to be inherently intrusive on the employees' right to privacy they will certainly find drug tests to be an even greater intrusion.

The court premised its argument on the ability of the poly-

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* Phillip J. Griego is an attorney emphasizing the law of Industrial Relations in San Jose, California. A native of St. Louis, Missouri and raised in the aerospace environment of the Mojave Desert, he moved to the Santa Clara Valley to complete his undergraduate work at San Jose State University. He undertook the study of Law at Santa Clara University and received his degree in 1977. Throughout his legal career he has studied the issues of employment relations in both the private and public sector. His industrial relations experience includes work in trade secret and commercial litigation, collective bargaining rights and the emerging right of due process in private employment.

1. 41 Cal. 3d 937 (1986).
2. *Id.* at 948.

graph to record emotional responses through physiological processes without any choice on the part of the employee. The key word here is physiological. The reasoning of the case suggests that the rule will not be limited to those tests which measure a person's physiological responses to questions and will extend to those more intrusive tests of a person's blood or urine.

> The Polygraph device measures the examinee's psychological response by monitoring physiological functions even when she has chosen not to respond verbally to an intrusive question. This method of interrogation robs the individual of her ability to choose which thoughts will be communicated to others and which will not.
>
> Perhaps the most troubling aspect of this type of interrogation is the coercive atmosphere that attends the administration of the test. In situations like the present case, employees must divulge private information or risk losing their jobs.[3]

Although the case concerns public employees, there is every reason to believe that private employees hold the same inalienable right to protection from the intrusive inquiries of their employers and that they cannot be discharged for exercising that right.[4]

In the case of *Virginia Rulon-Miller v. International Business Machines Corporation*,[5] for example, the court considered the termination of an employee for her decision to continue dating a man who worked for a competitor. The court noted the company's long standing policy guaranteeing the employees' privacy. IBM had violated that policy when it fired her for not arranging her private life according to the dictates of certain IBM managers. But more importantly, the court recognized that a private employer can run afoul of California's constitutional guarantee of privacy.[6]

> In this case, there is a close question of whether those rules or regulations permit IBM to inquire into the purely personal life of the employee. If so, an attendant question is whether such a policy was applied consistently, particularly as between men and women. The distinction is important because the *right of privacy, a constitutional right in California,* [citations omitted], could be

3. *Id.* at 958, (concurring opinion by Bird C.J.).

4. Garrett v. Los Angeles City Unified School Dist. 116 Cal. App. 3d 472, 473 (1981), held that the school district could require x-rays from prospective teachers as a precaution against tuberculosis. But a comparison between the two reveals that the opinion may no longer be good law in light of *Long Beach.*

5. 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

6. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); the California Constitution guarantees this right, as do those of Alaska, Arizona, Florida, Massachusetts, Montana and Rhode Island.

implicated by the IBM inquiry. [emphasis added].[7]

Apparently the "purely personal lives" of employees are off-limits to an employer's inquiry.[8] Any incursion into individual privacy must be justified by a "compelling interest."[9] California's constitutional provision creates a civil right to privacy enforceable by any aggrieved individual.[10] Thus, the right to privacy acts not only as a shield for an employee who wishes to avoid intrusions into his body but also as a sword subjecting the employer to an independent source of liability regardless of the decision on whether to terminate for refusing a test. For instance, a San Francisco Superior Court ruled in *Lueck v. Southern Pacific Transportation Co.*,[11] October 27, 1987, that Southern Pacific's drug testing program does not violate its employees' constitutional rights to privacy. But, it also ruled one former employee's rights were violated if testing her was not necessary to ensure the public's safety. The court ruled there is a compelling state interest to ensure public safety which takes precedence over any right to privacy. "But there is a question of whether a person with the duties of the plaintiff should be tested to serve those compelling interests." The plaintiff was a computer programmer. The court held that this was a question for the jury, which awarded plaintiff $485,042 in damages.

Drug or alcohol use, whether on or off duty, can, although will not necessarily, affect the way an employee performs at work. If the employee's work is affected then the drug use is not "purely personal."[12] Drug testing is the most problematic area of privacy rights because it requires consideration and balancing of two important interests: the right to be let alone and the right to a safe and productive work environment. The issue arises because it is almost universally recognized that drug testing, by its nature, is a form of surveillance as intrusive as placing an agent of the employer in the employees home. Testing reveals details about the employees' pri-

7. 162 Cal. App. 3d 241, 248, 208 Cal. Rptr. 524, 530 (1984) (*citing* City and County of San Francisco v. Superior Court, 125 Cal. App. 3d 879, 883, 178 Cal. Rptr. 435.

8. *See* Adams & Remmers, 2 S. C. COMP. & H. TECH L. J. 305, 322 n.71 (1986).

9. White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 232, 120 Cal. Rptr. 94, 104 (1975).

10. Porten v. University of San Francisco, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 843 (1976).

11. Lueck v. Southern Pacific Transportation Co., (S.F. Superior Ct. Case No. 843220).

12. It should be noted that even a single marijuana cigarette has seriously impairing effects on airline pilots for up to twenty-four hours after ingestion, even when the subject has no subjective feeling of intoxication. Yesavage, Leirer, Denari & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, AM. J. PSYCHIATRY, 1325, (1985).

vate lives which they cannot choose to withhold. It is presumed that the right of privacy is sufficiently important to be protected absent compelling reasons for the intrusion. The arguments surrounding drug testing center on the circumstances and reasons compelling the particular testing scenario.

Courts in New York and New Orleans recently held that drug tests without probable suspicion were an unconstitutional violation of the Fourth Amendment. Similarly, a labor arbitrator ruled that requiring a test without probable cause was an invasion of privacy, and reinstated a union employee fired for refusing the test.[13] These cases follow *Jones v. McKenzie*;[14] *Capua v. City of Plainfield*;[15] and *Patchogue-Medford Congress of Teachers v. Board of Education*,[16] all of which favor the rights of employees. California Appellate decisions already suggest looking to arbitration decisions as an aid to courts who are called upon to define the growing area of private employee rights.[17]

The testing issue is most likely to arise in three ways: at pre-employment physical examinations, at regular annual physical examinations, and at random testing. Examination of the cases which have dealt with this issue so far reveal a predictable trend which managers can use as a guide to evaluate any testing program they may be asked to consider.

Both pre-employment and routine annual physicals will be governed by a rule similar to that in *Jones v. McKenzie*:[18] (1) The employee's duties must have a direct impact upon public safety; (2) the medical examination must be routine and across the board; and (3) the test must actually test for drug use, possession or intoxication at the time of the test or at the time the employee would be at work.

Random sampling simply will not be tolerated unless the *Jones v. McKenzie* tests are met. Individual testing will have to be based upon individualized suspicion due to a reasonable belief that a person is so impaired by drugs or alcohol that his condition directly affects his job performance or he presents a clear and present danger to himself, his co-workers or members of the public.

Although there is no privacy right to ingest illegal drugs in the

13. Teamsters Local 957 v. Gem City Chemicals, Inc. FMCS, 86 K/03576 (March 26, 1986).

14. 628 F. Supp. 1500 (D. D.C. 1986).

15. 643 F. Supp. 1507 (D. N.J. 1986).

16. 119 A.D.2d 35, 505 N.Y.S.2d 888 (Sup Ct. App. Div. 1986).

17. Pugh v. See's Candies Inc., 116 Cal. App. 3d 311, n.26, 171 Cal. Rptr. 917 (1981).

18. 2 IER 1121 (CA DC 1987).

privacy of your own home,[19] the right to be secure in your "purely personal life" must, of necessity, include the right to engage in some criminal activity without regulation by your employer. Lest this be misconstrued as a blanket approval of off-duty illegal activity, we should be reminded that our concern is not with the issue of whether illegal activity has taken place at all. Rather, we are concerned with the question of whether employers will be allowed to gather evidence of such wrongdoing and what means they will be allowed to use. Criminal activity should not be condoned. However, it is neither politically nor socially desirable that random searches of individuals be allowed on the theory that it would deter crime. The lose of liberty would far outweigh the benefit acheived in reducing criminal activity or obtaining safer workplaces.

In some cases employees will have observable signs of intoxication or drug abuse which would provide probable cause for discipline without the use of drug testing. Likewise, where drug or alcohol use lead to poor performance on the job, drug testing is unnecessary to provide a reason for termination even in those environments where the employee is protected from arbitrary discharge by contract, company policy or statute. This less intrusive means of protecting the private employers' interests may be mandated by the very nature of the individual privacy interests at stake. Cases in other jurisdictions already follow the " legitimate interest test" to balance the rights of the individual against the interests of the employer in drug testing cases.[20] The analysis roughly follows the "compelling state interest test" familiar to constitutional lawyers.

Some courts have upheld mandatory drug testing in the public employment sector where the danger to public safety is seen as sufficiently compelling to restrict the expectation of privacy of individual employees. Private employers will no doubt direct the courts' attention to those cases as legal support for their own drug testing programs. The range of responses include three basic tests: 1) the compelling interest test, 2) the probable cause test and 3) the reasonable suspicion test.

The District of Columbia Court of Appeals, for instance, in applying the compelling interest test ruled that a police department drug testing program which required police officers to submit to urinalysis if suspected of drug use did not violate the Fourth

19. People v. Davis, 92 Cal. App. 3d 250, 260-61, 154 Cal. Rptr. 817, 823 (1979).

20. *See* Caruso v. Ward, 133 Misc. 2d 544, 506 N.Y.S.2d 789 (1986); Treasury Employees v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986).

Amendment's ban on *unreasonable* searches and seizures.[21] The police department's program provided that an employee who refused to undergo testing, or whose test results were positive, was subject to termination. The court decided that police officers have less of a "reasonable expectation of privacy" with respect to drug testing than ordinary citizens because the police department is a para-military organization and there is a paramount public interest in assuring that police officers are fit to perform their duties. Further, the court determined that because of the nature of police work and the fact that not only the employee's life but the lives of the public rest upon the employee's alertness, the department's program was justified.

The fundamental issue raised by all the discussion over drug testing is who has the burden of proof? Will employers have to justify the intrusion by some compelling interest or will the test be presumed legitimate unless the employee demonstrates some reason to doubt the test's reliability. In other words, will the employer be able to test first and ask questions later? The answer to that question depends upon one's philosophy of the dignity of man and one's definition of liberty.

We could resolve the privacy issue simply by lowering the expectations of privacy. It has been suggested,[22] that posting a rule that employees will be subject to random searches would remove any subjective expectation of privacy. Imagine the outcry if the police announced that they would hereafter search any house at random. This would certainly lower our expectation of privacy but it would hardly be an acceptable social answer because we believe our privacy is entitled to protection regardless of any particular individual's subjective expectations. Our responses to the privacy issues inherent in drug testing depend in large part on our formulation of the question concerning privacy and our notions of the nature of privacy. In other words, the right to privacy has not been, nor can it ever be, completely and fully defined. In the process of answering the question about drug testing, we are, in a very fundamental sense, creating and defining it on an ad hoc basis. Seen in this way, the question is not so much whether privacy rights protect employees from random drug tests as it is whether we wish to tolerate such intrusion.

This work is a survey of the various approaches used by public and private laws systems, including arbitration decisions, to address

21. Turner v. Fraternal Order of Police, 500 A.2d 1005 (1985).

22. Adams & Remmers, *supra* note 8, at 327.

the problem of balancing the interests of individual privacy against the interests of the employer and the public in a safe and efficient work place. It will also examine the approaches taken in those local, state and federal jurisdictions that have, or are about to have, legislation in the area. It will only briefly examine those areas so highly regulated that they are considered subject to administrative searches with little or no cause other than a legitimate and reasonable regulatory scheme. This examination will provide some guidance to those managers who have to make the day-to-day decisions that may affect so many lives.

II. PUBLIC EMPLOYEES, PUBLIC INTEREST AND PROBABLE CAUSE

The decisions in these areas seem to require some probable cause before the intrusion is allowed. However, one should consider whether there are positions which so affect the public interest that we cannot afford to wait until objective signs of drug or alcohol abuse surface in order to take action. Positions such as airline pilots or nuclear waste handlers immediately come to mind.

The Federal District Court for the District of Columbia for example dismissed claims of employees of the Washington Metropolitan Transit Area Authority who were fired when blood and urine tests disclosed the presence of drugs or alcohol. The court rejected the plaintiff's argument that the testing violated their rights under the Fourteenth Amendment to the Constitution, their right of privacy, the 1973 Rehabilitation Act and the Civil Rights Act of 1871 holding that the Authority's actions were clearly in the public's interest.

The recent decision by the Ninth Circuit in *Railway Labor Executives' Association v. Burnley*[23] adds to the trend of decisions which requires some probable cause before an intrusion is allowed. Various railway labor organizations challenged the constitutionality of the Federal Railroad Administration (FRA) regulations mandating blood and urine tests after certain train accidents and fatal incidents and authorizing breath and urine tests of all employees involved, after certain incidents, accidents and rule violations.[24]

The court noted that drug and alcohol tests of railway employees are searches.[25] It then declared that a railway employee has a reasonable expectation of privacy in the personal information con-

23. — F.2d — (9th Cir. 1988), 88 C.D.O.S. 983 (9th Cir., Feb. 11, 1988.)
24. 49 C.F.R. SS219 (1986).
25. Schmerber v. California 384 U.S. 757 (1966).

tained in his blood, urine or breath. The majority therefore concluded that the tests mandated by 49 C.F.R. § 219.203 are searches within the meaning of the fourth amendment. The court held that the government's action in authorizing the testing provisions was sufficient government action for the purposes of a constitutional challenge to the law.[26]

The court held that drug and alcohol testing could be conducted without a warrant but, it specifically distinguished this case from the class of cases falling under the administrative search exception. This exception holds that warrant and probable cause requirements which fulfill the traditional Fourth Amendment standard of reasonableness have a lessened application in the context of a closely regulated industry because the owner or operator of commercial premises in such an industry has a reduced expectation of privacy.[27] The majority distinguished those cases on the grounds that they have authorized warrantless searches of property not of persons.[28] Despite the fact railroad industry has experienced a long history of close regulation, the court held this regulation has only diminished the owners' and managers' expectations of privacy in railroad premises but it did not diminish the railroad employee's expectation of privacy in his person or his body fluids.[29]

The court emphasized the point to distinguish *Shoemaker v. Handel*,[30] in which the third circuit held the administrative search exception applies to warrantless breath and urine testing of jockeys in the heavily regulated horse-racing industry. Critical to the *Shoemaker* decision analysis was the fact that jockeys, as the persons engaged in the regulated activity, are the principle regulatory concern.[31] In contrast, the extensive regulation of the railroad industry is designed to guarantee the safety of employees and the public and to that end has always been geared to assuring the safety and proper maintenance of equipment and facilities.

Accordingly, the court addressed what standard governs the

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26. The court relied upon United States v. Davis, 482 F.2d 893 (1987), which involved airport security searches by private airline employees. The Davis court stated the test for whether there was government action "is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence . . . ." After reviewing the development of a nationwide anti-hijacking program conceived and implemented by federal officials in cooperation with air carriers, the court concluded the government's role in the search program had been a dominant one. Burnley at 985.

27. New York v. Burger 107 S. Ct. 2636 (1987).

28. Burnley at 986.

29. *Id.* at 986.

30. 795 F.2d 1136 (3rd Cir.), *cert. denied*, 107 S. Ct. 577 (1986).

31. Burnley at 986.

inquiry into the reasonableness of the drug testing regulations aimed at railway employees. The majority took a two-step approach. To be reasonable the court must first determine that the search was justified at the inception, and second, that it reasonably related in scope to the circumstances which justified the interference in the first place.

In the first prong of the test the court held that particularized suspicion is essential to finding toxicological tests of railroad employees justified at its inception. The court explained this standard requires reasonable grounds for suspecting the search will turn up evidence that the employee has violated the industry rule and federal regulation prohibiting possession of alcohol and controlled substances.[32] The majority concluded that "accidents, incidents or rule violations by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment . . . in any one railroad employee, much less an entire train crew."[33] In order to meet the standard set out, the court stated the government should incorporate a requirement of individual suspicion into the mandatory test provision set out in 49 C.F.R. §§ 219.301 (b)(1) and (c)(2), in order to comport with the great weight of authority holding a warrantless search of a person unconstitutional without a degree of suspicion.[34]

In the second prong of its analysis the court found the regulations were not sufficiently related in scope to the circumstances which justified the interference in the first place. It declared that blood and urine tests intended to establish drug use other than alcohol are not reasonably related to the stated purpose of the regulations because these tests cannot measure current drug intoxication or the degree of impairment.[35] Thus by requiring individual suspicion, the majority stated it would help alleviate some of the harsh consequences of exclusive reliance on test results.

The court distinguished some conflicting authority relied on by the FRA. *National Treasury Employees Union v. Von Raab*[36] approved a plan for testing custom officials seeking job transfers with the Drug Enforcement Agency. The *Railway* majority did not express any opinion as to the constitutionality of the program in

32. *Id.* at 987.

33. *Id.*

34. *Id.* at 988; 49 C.F.R. §§ 219.301(b)(1), (c)(2).

35. *Id.*, citing Joseph, *4th Amendment Implications of Public Sector Work Place Drug Testing*, 11 NOVA L. REV. 605, 632 (1987).

36. 816 F.2d 170 (5th Cir. 1987).

Von Raab,[37] rather it stated it did not find the case relevant because the court failed to make the threshold determination whether the search was justified at the inception. The court gave the same justification to distinguish *McDonell v. Hunter*,[38] and *Amalgamated Transit Union v. Suscy*.[39] *McDonell* upheld as reasonable the uniform or systematic drug testing of prison guards. *Suscy* held that bus operators have no reasonable expectation of privacy and that even if they did, the tests given were reasonable because they were given only to operating employees directly involved in serious accidents or suspected by two supervisory employees of being under the influence.

The dissent in *Burnley* disagreed with the majority's distinction of *Shoemaker*, pointing out that the government has a long history of regulating the conduct of railroad employees to promote public safety.[40] Relying on the administrative search exception, the opinion argues further that the requirement of a warrant and probable cause is not necessary to uphold the government's regulations requiring drug testing. The dissent would hold that blood and urine tests required by the regulations are justified at the inception. Despite the intrusion into an employee's privacy, the dissent argues that the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests.[41]

The rule developed in the majority opinion in *Burnley* adopts the appropriate approach to the drug testing issue. The Ninth Circuit decision brings the area of employment drug testing into conjunction with general search and seizure law. Rather than focusing on how the government or company's compelling interests serve in a vacuum, or carving out special privacy rules in the labor context, the court applies the same analysis found in search and seizure cases. Certainly this approach better serves the interest of public safety than allowing random tests. By requiring particularized suspicion, the tests will be aimed directly at those most likely to harm the public safety. Particularized suspicion provides objective indicators for determining whether the testing program addresses a compelling interest. Restricting intrusion to areas where there is a strong likelihood of uncovering something, is similar to requiring a

37. — F.2d — (9th Cir. 1988).
38. 809 F.2d 1302 (8th Cir. 1987).
39. 538 F.2d 64 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).
40. Burnley, at 990.
41. *Id.* at 992.

reasonable suspicion that a crime has been committed in stop searches. Our system of justice requires that no one be subject to a warrantless search without reason and the same standard should apply in the employment arena.

Random searching or drug testing after an accident or rule violation does not necessarily serve the purpose of the search, for the search is intended to turn up information that the employee has violated industry and federal prohibitions against possession or use of alcohol and controlled substances on the job. For example, random testing of an entire train crew after an accident is completely beyond the scope of the regulation and only serves to invade the privacy of many innocent employees in the interest of perhaps finding one person who has worked under the influence of drugs or alcohol.

Without objective indicators the court finds itself discussing compelling interests in a vacuum. One could speculate how the individual's privacy could ever survive against such a broad compelling interest as the protection of the public from the unsafe operation of the railways. Particularized suspicion provides the least restrictive means of serving the legitimate interest of providing safe railways. In a broader context the particularized suspicion requirement for testing may carry over into other work environment issues such as AIDS testing for restaurant employees.

In *American Federation of Government Employees v. Weinberger*,[42] however, a Georgia district court held that Defense Department employees tests are an invasion of privacy and an unreasonable search. According to the court:

> [T]hese tests enable the individual or organization administering them to monitor the off-duty conduct of employees, and represent a technological advance that must be cautiously examined and which, if overzealously implemented, could threaten much of the privacy most citizens now take for granted.
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> . . .
>
> [T]he very taking of the sample makes for a quite substantial intrusion that could not be negated even if an employee were allowed to produce his urine sample in the privacy of an executive washroom, with no observation whatsover."[43]

The government argued that the testing program was justified because drug use, on or off duty, was incompatible with government employment. Said the court,

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42. 651 F. Supp 726 (S.D. Ga. 1986).
43. *Id.* at 732, 734.

> [t]he government has cited a great many cases supporting this position, and the Court does not take issue with it. The question here, however, is not whether drug use, off-duty or on-duty is incompatible with federal employment. Rather the question is by what means is it permissible to come by evidence of such drug use.[44]

In other words the testing program itself was more deplorable than the use of drugs by government employees.

President Reagan signed Executive Order 12,564[45] which requires all federal agencies to develop a program for the detection and rehabilitation of alcohol and drug abusers employed by the federal government. The agencies are required, as part of the program, to establish a test for the the use of illegal drugs, the criteria to be determined by each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her duty. Since there are no specifics, the legality of the individual testing schemes will have to be tested.

The Alcohol, Drug Abuse and Mental Health Administration of the Department of Health and Human Services issued Scientific and Technical Guidelines for Drug Testing Programs on February 13, 1987. The guidelines cover the types of drugs to be tested and the methods to be used, qualifications of testing and records keeping personnel, and quality assurance procedures.

There is some doubt as to whether the California Supreme Court would even follow the reasoning of other jurisdictions in light of their ruling in *Long Beach*, a public employment case. While public employment cases may help delineate the constitutional issues involved, they are not directly applicable to private employment precisely because the private employee, as an "ordinary citizen," does have a heightened expectation of privacy. Maryland's Attorney General seemed to follow the California reasoning regarding public employees, when it issued an opinion that mandatory testing of

> most categories of State employees would violate the Fourth Amendment prohibition against unreasonable searches and seizures. The testing of such an employee is permissible only if based upon particularized probable cause, the traditional prerequisite to a search or seizure. In addition, termination of an em-

44. *Id.* at 735.
45. 51 Fed. Reg. 32,889 (1986).

ployee solely because the testing indicates current drug abuse would violate the Federal Rehabilitation Act of 1973.[46]

The attorney general would allow testing of employees whose jobs are directly related to public safety where circumstances give the employer a reasonable objective basis to suspect illicit drug use. Applicants could only be tested if drug abuse would present a danger to the public or to property.[47]

III. STATE AND LOCAL REGULATION OF PRIVATE EMPLOYMENT: PROBABLE CAUSE OR REASONABLE SUSPICION?

Connecticut allows testing only if the employer "has reasonable suspicion to believe an employee's faculties are being impaired on the job, and that his impairment presents a "clear and present danger" to physical safety in the workplace. Any aggreived person may sue for damages, attorney's fees and injunctive relief.[48]

In Iowa, employers may not test employees unless the employer has probable cause to believe the employee's faculties are impaired on the job and the employee holds a position that could present a danger to public safety, the safety of himself, or another employee, the safety of the employer's property, or where impairment violates a known rule. The employer must provide substance abuse treatment if recommended and may not discipline an employee for a first offense. He may, however, discipline an employee who fails or refuses to complete a drug abuse program or tests positive a second time during the program period. A drug test may be part of pre-employment screening if the application for employment clearly gives the prospective employee notice that a test may be required.[49]

The Minnesota Legislature has approved a drug testing program limiting random testing to workers in "safety-sensitive" positions, which is a job, "including any supervisory or management position in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person." Employees may be tested if there is a reasonable suspicion that the employee is under the influence of drugs or alcohol, or if the employee violated a written work rule on drugs on the job or has caused an accident or injury, during annual physicals provided they are given two-weeks'

46. 71 Op. Att'y Gen No. 86-055 (Oct. 22, 1986).
47. *Id.*
48. Act of July 6, 1987, P.A. 551, § 6,1987 Conn. Legis. Serv. 500, 502 (West).
49. Act of June 5, 1987, H.F. 469, §§ 3, 7, 1987 Iowa Legis. Serv. 132, 133-135 (West).

notice. The employer may take no disciplinary action against an employee without offering the employee an opportunity to participate in a drug or alcohol rehabilitation program. However, he may do so if the employee has refused to undertake or failed such a program. Any employee may bring an action for damages and attorneys fees against any employer who violates the act.[50]

The City of Raleigh, North Carolina, will screen applicants for health and safety positions, and those who test positive will not be considered. Those employees who refuse the test will be discharged. However, the city will not randomly test for other positions.[51] In South Carolina, aircraft crew members can be tested at any time and will violate the state's drug testing law if they work under the influence of alcohol or drugs.[52]

The San Francisco drug testing ordinance, effective December 1985, prohibits employers from requiring employees to take blood, urine or encephalographic tests as a condition of continued employment unless there are reasonable grounds to believe an employee's faculties are impaired and that "such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public."[53] Employers are further required to give the employee tested the opportunity to have samples re-tested, at the employer's expense, at state licensed independent laboratories and to rebut the findings. Random sampling is expressly prohibited.[54] An employer who violates the ordinance may be sued and have its testing program enjoined by the court. The aggrieved party is entitled to attorney's fees and the burden is on the employer to prove that the testing complies with the ordinance.[55]

At the other extreme, however, is Utah's statute, which allows drug testing by employers and is rather broad in its terms: "It is not unlawful for an employer to test employees or prospective employees for the presence of drugs or alcohol, in accordance with the provisions of this chapter, as a condition of hiring or continued employment."[56] Under the Utah Code an employer may require any employee to identify himself and give a sample; the employer may

50. MINN. STAT. ANN. §§ 181.950-181, 957 (West Supp. 1985).

51. INDIV. EMPL. RTS. MAN. (BNA) 540:6 (Jan. 6, 1987).

52. *Id.* at 540:7.

53. San Francisco, Cal., Ordinance 527-85, art. 33A, s 3300A.5 *amending* pt. II, ch. VIII POLICE CODE (1985).

54. *Id.*

55. *Id.* at §§ 3300A.5, 3300A.8.

56. UTAH CODE ANN. § 34-38-3 (Supp. 1987).

chose the type of sample to be used.[57]

The Utah employer in these instances does not need probable cause to conduct a test or request a sample. Positive test results or refusal to take the test allows an employer to terminate the employee, require that the employee enroll in a drug rehabilitation program, or engage any other disciplinary action consistent with the employer's general policy.[58] There is a rebuttable presumption that the test is valid if the statute is complied with, and no cause of action for defamation arises unless the test results are false AND the results are disclosed, with malice to a person other than the employer or agent of the employer.[59]

In a 1987 opinion, Virginia's Attorney General stated that "[i]t is clear that the balance of interests in most work situations requires that drug testing be conducted only on the basis of at least 'reasonable suspicion.' [citations omitted]. Therefore, it is my opinion that random drug testing is not permissible in most work settings, including public safety occupations."[60] The opinion notes that the only cases where the testing has been upheld have been under the administrative search doctrine for a highly regulated industry, like horseracing, where the regulation gives the employee a reasonable expectation that he will be subject to a search at any time. This, notes the opinion, is different from most employment situations.[61]

Washington D.C. passed HB 1063 which allows testing only when there are "reasonable grounds" set forth in writing to believe the employee's job performance has been affected by drugs. It passed the Labor Committee on March 6, 1987.

The California Senate's Industrial Relations Committee recently stalled a bill to allow employers to conduct drug testing of employees based on "reasonable suspicion" of drug or alcohol impairment. The bill will be reconsidered in 1988, according to a spokesperson for the sponsor, state Senator John Seymour (R). The bill defines "reasonable suspicion" as "a belief based on facts sufficient to lead a reasonable person to suspect that the employee is under the influence of drugs or alcohol."[62] The bill does not provide specific examples of what might be considered sufficient evidence and leaves that question up to employers and, ultimately, the courts. However, it is well-established that intoxication is within

57. *Id.* at § 34-38-4.
58. *Id.* at § 34-38-8.
59. *Id.* at §§ 34-38-10, 34-38-11.
60. *Reprinted in,* [Vol. B] Indiv. Empl. Rts. Man. (BNA) 589:3, 4 (Feb. 27, 1987).
61. *Id.* at 589:3.
62. SB 1611, — Leg., — Sess., 1987 Cal. Stat. —.

the common experience of most citizens so that a lay person's opinion is credible evidence on this point. Such characteristics as bloodshot or watery eyes, odor of alcoholic beverage on the breath, instability in the walk or stance, swaying, slurred or slowed speech, or any other characteristic which exhibits a change in the person's ordinary demeanor, could be interpreted as signs of intoxication. The bill provides for confidentiality of test results, independent confirmation of the tests and guidelines for assuring the quality of the testing procedure. Seymour's bill would supersede all local drug testing laws such as the San Francisco Ordinance noted earlier. A second Seymour bill will consider random sampling of safety-sensitive jobs.

A similar bill introduced by Assemblyman Johan Klehs (AB 330) cleared the Assembly Labor and Employment Committee on May 20, 1987. The bill establishes state licensing procedures for laboratories that analyze drug test samples for employers. The Ways and Means Committee considers the bill next. In 1986 Governor George Deukmejian vetoed a similar bill. The bill would have provided for confidentiality of test results, the right to copies of test results, voluntary participation in rehabilitation programs, and the retention of samples for ninety days.

IV. ARBITRATION CASES

Arbitrators apply a variety of tests drawing upon civil and criminal standards of privacy law. Some even recognize that the employee's interest in privacy is worthy of at least some protection as part of the "common law" of the workplace, independent of any strict statutory or constitutional enactment.

Arbitrators do not uniformally adopt public law standards for deciding search and test cases. This is because the interests of the employer in a safe work place are not the same as the interests of society in defining and controlling criminal behavior. Among the employer's considerations is the

> practical necessity of maintaining the safety and productivity of the workplace. Viewed in this light, the issue is not whether there is enough evidence to punish an individual but whether there is a reasonable basis for taking preventive or protective measures to maintain safety and productivity when these are threatened by drugs. [I]n any event, in disciplinary arbitrations, including those involving alcohol and drugs, what is generally at issue is not employee 'fault' or 'innocence' but whether the employer had 'just cause.' The ultimate criterion remains: is the arbitrator, who is presumed to be a rational and fair-minded

decisionmaker, convinced that just cause existed under all the facts and circumstances? If applied consistently, there is no reason why that criterion should be insufficient to protect the grievant, regardless of the odiousness of the alleged offense.[63]

A. *Validity and Reasonableness of Workplace Searches*

According to one arbitrator, "[e]mployees must be accorded their right of privacy and there is no absolute right of an employer to search personal effects."[64] However, Denenberg asserts that the doctrine gives way to a counterveiling principle: the legitimate need of the employer to fully investigate allegations of breaches of the rules. Many arbitrators have affirmed an employer's authority to invade an employee's privacy by searching his person, personal posessions or locker for contraband substances when an infraction of plant rules is reported.[65]

Some arbitrators believe that if a police officer is justified in searching a suspect [i.e., where probable cause exists], then an employer is justified in searching an employee for drugs or alcohol. In one case a fifteen-day suspension was upheld for an employee who refused to reveal whether he was carrying a liquor bottle. A witness said he had seen the grievant drink from the bottle, stuff the bottle under his sweater, and that he had alcohol on his breath. The union claimed that the federal and state constitutions protect an individual in his privacy and such searches are not a condition of employment. The arbitrator held:

> In criminal cases, an officer who has probable cause to believe a felony has been committed and probable cause to believe that a specific individual committed such a felony may arrest the individual and search him in connection with the arrest. There is *no* constitutional protection against such a search.
>
> It is quite inappropriate to attempt to establish an exact parallel between rights of citizens on the street and employees in the plant. When employees take an employment, they do so subject to normal restrictions inherent in a crowded industrial setting. The right of Management to fairly operate its business without undue impediment must be balanced against the right of the employees to continue to enjoy their civil rights to the fullest. However the two will clash and in the factual setting of this case, it is

63. T. DENENBERG & R. DENENBERG, ALCOHOL AND DRUGS: ISSUES IN THE WORKPLACE, 56-57 (1983) [hereinafter DENENBERG].

64. Comco Metal Products, Ltd. v. UAW Local 386, 58 Lab.Arb. (BNA) 279, 281 (1972) (Brown, Arb.).

65. DENENBERG, *supra* note 63, at 59.

not inappropriate to treat a supervisor by analogy to a peace officer in the plant setting.

In this situation [the supervisor's] observations of Grievant and detection of alcohol on his breath, are entirely credible . . . . Therefore [the supervisor] had probable cause to believe that a serious plant rule violation (here use of alcoholic beverage can be viewed as the equivalent of an industrial felony) was being committed . . . . [A]n order to Grievant to unbutton his sweater . . . was entirely supportable and within Management's prerogative to maintain plant discipline.[66]

In a similar case:

The Union argue[d] with conviction that the Employer has attempted in this case to place the burden on the employee of proving his innocence, and that this is contrary to the traditions of our society. Of course, in criminal proceedings the burden is on the state to prove guilt beyond a reasonable doubt, and the accused is entitled to a presumption of innocence. But the limitations imposed upon the state with respect to criminal punishment are not applicable in any wholesale manner to disciplinary action taken by an employer. The Fourth and Fourteenth Amendments do prevent a state from conducting unreasonable searches and seizures, but this prohibition would not have direct application to a private employer's demand that an employee give an explanation of suspicious conduct occurring during working hours and on company property . . . . Moreover, the facts . . . suggest that if [the supervisor] were a police officer he would have been entitled to search [the grievant] without a warrant.

Constitutional protections, therefore, do not shelter [the grievant] from appropriate Employer discipline . . . .

In any event, this is not a case in which the Employer has placed the original burden of proving innocence upon an accused employee. This is instead a case in which the events observed by [a supervisor] established a prima facie case that the employee had engaged in conduct which justified discipline. In such a case it is appropriate to place the burden upon the employee to rebut the prima facie case by giving an explanation of his conduct and demonstrating the fallacy or at least a weakness in the prima facie case. [The grievant] refused to do this, and the prima facie case remained against him . . . .[67]

66. Champion Spark Plug Co. v. UAW Local 272, 68 Lab. Arb. (BNA) 702, 705 (1977) (Casselman, Arb.).

67. Issacson Structural Co.v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 506, 72 Lab. Arb. (BNA) 1075, 1078-1079 (1979) (Peck, Arb.).

There are lessons to be drawn from these decisions. Arbitrators were not considering situations where the right to privacy applied directly to employees as citizens of the state as would be the case in California and several other states. The union was arguing by analogy federal and state protections against intrusions from the state, not from a private employer. Those situations are not directly applicable here because, as we have already seen, the right to privacy in California applies directly to citizens and includes protection from intrusion from government and private entities such as businesses and employers. Therefore, the analysis provided by these decisions cannot be adopted wholecloth.

On the other hand they do recognize some interest in privacy for they engage in a balancing act to justify the search or intrusion in some way. They balance the interest in privacy against the interest in the plant maintaining security, by the adoption of probable cause and the burden of proof arising out of the managment establishing a prima facie case of possession or influence. The burden of proof shifts to the employee to rebut the inferences legitimately drawn by the evidence and the management has the right to make the investigation. Refusal is insubordination.

However, again, none of these cases deal with situations of consumption off duty, not affecting the work place, or wholesale random samplings. The employee's increased expectation of privacy off the employment premises, lacks the implied permission to submit to bodily intrusions that exists on the employment premises. Can the employer reduce expectations of privacy by prior notice, by developing a custom and practice, through a consistent pattern of searches, by incrementally increasing that portion of the employees' private lives that is open to employer scrutiny? In at least one case, searches without the employees' permission were upheld.[68]

B. *The Validity of Collective Bargaining Agreements with Provisions for Employee Drug Testing*

Where the collective bargaining agreement provides for a blood test, many arbitrators have construed that as a waiver of the employee's right to object to a search. As one arbitrator remarked, "asking an employee to take a blood test is clearly as much for his

68. Smith's Food King v. Retail Clerks Union Local 770, 66 Lab. Arb. (BNA) 619, 625 (1976) (Ross, Arb.). Here the employer suspected that his employee was under the influence of drugs, handcuffed him, and searched his person. While some might find this type of search acceptable, what about a forced blood test, physically restraining the employee in order to obtain it?

protection as for the Company's."[69] However, other arbitrators have concluded that, even though a bargaining agreement or company policy mandates testing, no admission of guilt can be implied from an employee's refusal to take a test.[70]

Nor do arbitrators uphold dismissals if there is any doubt as to the integrity of the sample. This means that strict chain of custody has to be established. Failure to follow the chain of custody procedures in a collective bargaining agreement was sufficient to overturn a five day suspension for being under the influence.[71] Other arbitrators have rejected this contention and presumed good faith unless there is some evidence to suggest tampering.[72]

C. *Objective Workplace Observations: Necessity and Potential for Abuse*

There are cases relying on the observations of lay witnesses to establish intoxication in alcohol cases.[73] This is not a universally accepted principle among arbitrators.[74] Some require blood tests, while others rely on *both* blood tests and eye witness testimony.[75] A great body of arbitration decisions rely on both observable signs and test results.[76]

Discipline has been upheld relying entirely on subjective observations identifying marijuana by its odor and the ritualistic passing of what appeared to be a "joint."[77] However, two of the cases gave diametrically opposed descriptions of what the smell was like. In one case it was described as sweet and in the other it was described as bitter.

Observations are not completely trustworthy. A survey of lab-

69. Tennessee River Pulp & Paper Co. v. United Paperworkers Int'l Union, Local 993, 68 Lab. Arb. (BNA) 421, 426 (1976) (Simon, Arb.).

70. *See* Bi-State Dev. Agency v. Amalgamated Transit Union, Div. 788, 72 Lab. Arb. (BNA) 198 (1979) (Newmark, Arb.); Blue Diamond Co.v. International Bhd. of Teamsters, Local 557, 66 Lab. Arb. (BNA) 1136 (1976) (Summers, Arb.); Capital Area Transit Authority v. Amalgamated Transit Union, Div. 1039, 69 Lab. Arb. (BNA) 811, (1977) (Ellmann, Arb.).

71. Holliston Mills, Inc. v. International Bhd. of Teamsters, Local 549, 60 Lab. Arb. (BNA) 1030 (1973) (Simon, Arb.).

72. *See* Cessna Aircraft Co. v. International Ass'n of Machinists, Lodge 1992, 52 Lab Arb. (BNA) 764 (1979) (Altrock, Arb).

73. *See* DENENBERG, *supra* note 63, at 68.

74. *Id.* at 69.

75. *See* Tennessee River Pulp & Paper Co. v. United Paperworkers Int'l Union, Local 993, 68 Lab. Arb. (BNA) 421 (1976) (Simon, Arb.).

76. DENENBERG, *supra* note 63, at 70-73; *see also*, Capital Area Transit Auth. v. Amalgamated Transit Union, Div. 1039, 69 Lab. Arb. (BNA) 811, 815 (1977) (Ellmann, Arb.).

77. DENENBERG, *supra* note 63, at 87-89.

oratory analyses of street drugs, published in 1977, revealed that only about half of the more than 6,000 samples tested contained precisely the substance suspected; in some instances, the sample revealed a different drug, the right drug plus other drugs, or no drug at all.[78]

Is the employee impaired? What about over-the-counter drugs that can be taken and are just as deleterious to a person's health as controlled substances? Is the employee to be tested for all kinds of medicine regardless of its legality? And if so how will impairment be determined? If impairment can be determined by observable signs then why do you need a drug test? Seventy-five percent of all deaths attributed to drugs by medical examiners in 1980 were linked to prescription drugs.[79]

Arbitrators who have considered the issue conclude that it makes no difference whether the intoxicants are prescribed by a doctor or bought on the street if being intoxicated at work violates plant rules. One case considered the appearance of an employee being in an intoxicated condition, speech slurred and thick-tongued. He was sent home and ultimately discharged for violation of a plant rule against "reporting to work under influence of intoxicants or drugs." The Union defended the employee by attributing his condition to taking tranquilizers and a sleeping pill; both medications prescribed for him by a doctor. The arbitrator upheld the discharge, reasoning that no matter how the condition had been produced, the testimony established a violation of the rule inasmuch as the grievant was clearly unfit to work.[80]

The difficulty with cases where there is no medical or scientific evidence is illustrated by the case of the airline flight attendant fired for being intoxicated on the job. The arbitrator upheld the termination on the basis of witnesses' observations of her behavior:

> Although, their words were not the same, the cumulative impact of [the witnesses'] direct observations is overwhelming. The grievant's eyes were described as droopy, glassy, blurry, watery, wandering unfocussed and vacant. Her speech was characterized as slurred, confused, disjointed and incoherent. Her motor functions were depicted as uncoordinated, unbalanced, slow, wobbly, unsteady, unstable, stumbling and swaying . . . .

78. Perry, *Street Drug Analysis and Drug Use Trends 1969—1975 (Part I)*, PHARMCHEM NEWSLETTER (1977).

79. *Abuse of Legal Drugs is Cited*, N.Y. Times, Nov. 18, 1982, at —, col. —.

80. Stokley-Van Camp, Inc. v. United Steelworkers Union, Local 6515, 64 Lab. Arb. (BNA) 859, 860-61 (1975) (Foster, Arb.). *See also, United Parcel Serv.* v. International Bhd. of Teamsters, Local 988, 72 Lab. Arb. (BNA) 1069, 1072-73 (1979) (White, Arb.).

> Although I agree with the union that each of the incidents of the grievant's work performance is insignificant, if viewed singly and in isolation, taken together they provide cumulative evidence that the grievant's conduct was indeed unusual and abnormal, and could fairly be characterized as that of a drug-intoxicated person. . . . I do not find that the company's case must fail because of the absence of medical evidence in light of the overwhelming nature of its proof, but I suggest that an effort to obtain such evidence might be desirable in a case in which the testimony of the disinterested lay witnesses is less convincing and conclusive . . . . [The grievant] could not offer any credible evidence to show that her condition was caused by any factor other than intoxication. Her excuses concerning her fatigue, anxiety and semi-comatose condition are simply insufficient to explain her behavior and conduct.[81]

D. *Reasonableness: The Proper Standard for Application or an Ambiguous Standard Incapable of Objective Determination.*

The reasonableness of any rule mandating testing in part depends upon the potential for danger or the possibility of impairment which would have catastrophic effects on public safety, national security or the industry mission. Arbitrators are more likely to uphold a termination for a refusal to test where any impairment has great potential for harm to life or property. For example, one arbitrator concluded that "in view of the fact that the facility . . . is owned by the U.S. Government and engaged in making live ammunition it must be concluded that the rule is reasonable if for no other reason than the nature of the product."[82]

A similar conclusion was reached by an arbitrator upholding a five-day suspension of a civilian employee for possession of marijuana at an Air Force base because "[t]he possibility of job impairment and the increased risk to the safety of others is so readily apparent in a situation where the Employer is servicing jet aircraft. . . . [83]

Arbitrators also weigh the possibility that a grievant's drug involvement may be harmful to the reputation or integrity of the em-

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81. United Airlines, Inc. and Ass'n of Flight Attendants, Board No. ORD 56-80 (Mckelvey, 1981).

82. Day & Zimmermann, Inc. v. Interntional Chem. Workers Union, Local 526, 75 Lab. Arb. (BNA) 699, 701 (1980) (Sisk, Arb.).

83. Department of Air Force v. American Fed. of Gov't Employees, Local 1592, 72 Lab. Arb.(BNA) 1107, 1109 (1979) (Culley, Arb.).

ployer. The discharge of a maintenance worker at a state university who had been arrested for selling amphetamines to an undercover detective on campus was upheld by an arbitrator who took note of the sensitive position of a public institution of higher education:

> In determining penalty, I cannot ignore the special responsibility the State University has to its students and their parents. The State is obligated to see that its campuses are not sanctuaries for the drug trade. It is no secret that drugs are a problem on the nation's campuses and on this one, in particular. . . .
>
> Allowing grievant's return to duty would have a negative impact on the orderly operation of the university. It would send the wrong message to the rest of its employees. [citation omitted][84]

Not all arbitrators are so willing to uphold discharges unless the case for effect on the employer is compelling. A public utility worker who sold amphetamines shortly before beginning his employment was discharged when he pleaded guilty to drug charges. He was reinstated by an arbitrator, who reasoned:

> [The grievant's] arrest and conviction carried over to the period of his employment but those occurrences do not create a sufficient link or connection between the illegal conduct and grievant's job or the employer-employee relation. The employer's evidence was less than substantial in showing a direct, damaging impact on the manner in which [the grievant] did his work or on the image or legitimate business interests of the company.
>
> There is no question but that grievant's offense was both legally and morally wrong but that was a concern for the civil authorities. In the absence of evidence of a more direct, adverse impact on grievant's job performance or damage to the company's image or reputation for public service and integrity, or even the existence of a general drug problem among its employees, the discharge cannot be sustained. In sum, the company's understandable fears remained inchoate.[85]

E. *The Inquiry into the Off-Duty Private Life of an Employee: Employer Necessity vs. Employee Rights*

Arbitrators are not inclined to uphold discipline for off-duty

84. State Univ. of New York v. Civil Svc. Employees Ass'n, Inc., 74 Lab. Arb.(BNA) 299, 301 (1980) (Babisun, Arb.).

85. Missouri Public Service Co. v. International Bhd. of Elec. Workers, Local 814, 70 Lab. Arb. (BNA) 1208, 1210 (1978) (Yarowsky, Arb.).

conduct unless there is clear notice in the contract.[86] Consider the case in which an employee was in an accident while driving under the influence. At the time of his arrest the grievant was driving his own vehicle, was on his own time and was not engaged in any business of his employer. The arbitrator held:

> [E]xceptions and extension of the employer's disciplinary rights beyond the immediate employment relationship should be expressly set forth in the contract and may not be deemed to exist by implication. The conclusion is required that under the contract language, the right to discipline for intoxication, neglect of work or the violation of any acceptable *factory* rule is applicable to an employee's conduct during his hours of work. It does not seem reasonable that the parties intended that a factory rule should extend so as to govern acts of intoxication while within the privacy of the employee's home. (emphasis in original). [87]

The doctrine against off-site regulation was best delineated in this case:

> While it is true that the employer does not [by virtue of the employment relationship] become the guardian of the employee's every personal action and does not exercise parental control, it is equally true that in those areas having to do with the employer's business, the employer has the right to terminate the relationship if the employee's wrongful actions injuriously affect the business.
>
> The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. Each case must be measured on its own merits.[88]

In another case, however, an arbitrator upheld the discharge of an employee for having been convicted of driving a motor vehicle while under the influence of alcohol. The company rules did not mention off-duty drinking, but the arbitrator cited the rule against "violation of criminal law" as one of the offenses that may lead to dismissal:

> [T]he factor which is most important in this case is that a Company rule was violated by the Grievant's conviction. This rule states nothing about conduct on or off the premises but merely

86. General Tire Serv. v. General Truckdrivers, Local 980, 52 Lab. Arb. (BNA) 1279, 1281 (1969) (Todd, Arb.).

87. Lamb Glass Co. v. Glass Bottle Blowers Ass'n, Local 99, 32 Lab. Arb. (BNA) 420, 424 (1959) (Dworkin, Arb.).

88. Inland Container Corp. v. United Paperworkers of Am., Local Nos. 31, 114, 993, 1046, & 4658, 28 Lab. Arb. (BNA) 312, 314 (1957) (Fergusun, Arb.).

> says violation of criminal law may be grounds for dismissal. The Grievant's conduct came under this rule and the rule could be applied by the Company unless it was unreasonable. The mere fact that the rule was general and applied to conduct on and off the premises would not of itself make it unreasonable. [citations omitted][89]

An arbitrator upheld the discharge of an employee, on a temporary assignment away from his home plant, who was involved in two serious automobile accidents within a few days. In each instance he was off-duty but driving a car his company had authorized him to rent. In both cases, the state police reported that the grievant had been driving at an excessive speed and that his breath smelled of alcohol. In one of the accidents, a fellow employee was severely injured.

The arbitrator noted that the employer had posted a rule prohibiting conduct "adversely affecting the interests or reputation of the company." This prohibition applied to conduct "on company property and elsewhere." The arbitrator held:

> The Union is . . . correct when it asserts, as a general rule, that the Company has no right to regulate or control the private lives of its employees. However, this general rule is subject to an exception. Where the off-the-job conduct of an employee adversely affects the interests or reputation of the Company, such conduct may properly be prohibited. In the case of [the grievant], substantial evidence was produced by the Company demonstrating that notoriety resulted from the two accidents. Publicity such as this is particularly damaging to a Company attempting to establish a harmonious relationship within a rural area where it is the largest single employer. There is no doubt in the mind of the Arbitrator that the Company has a justifiable right in protecting itself against such damage to its reputation. . . . It may well be true that the Company has no prohibition against employees drinking on their own time. Nevertheless, all employees of the Company, if they intend to indulge themselves in this manner, must do so under circumstances that will not harm the reputation of the Company.[90]

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89. Cities Serv. Oil Co. v. International Ass'n of Machinists, 41 Lab. Arb. (BNA) 1091, 1094 (1963) (Oppenheim, Arb.).

90. Lockheed Aircraft Corp. v. International Ass'n of Machinists, Lodge 727, 37 Lab. Arb. (BNA) 906, 908 (1961) (Roberts, Arb.).

F. *Pre-employment Screening: A Viable Employer Method for Meeting Potential Workplace Problems?*

Disciplinary action taken on the basis of screening procedures such as questionnaires in job applications has come under arbitral scrutiny. In one case, the employee refused to answer this question: "In the past three years, have you ever knowingly used any narcotics, amphetamines or barbiturates, or any other controlled substances, other than those prescribed for you by a physician?" The employer discharged him partly because of his failure to respond. The discharge was upheld on other grounds but the arbitrator ruled that the failure to answer, by itself, would not have merited such a severe penalty. The arbitrator considered the fact that the employer's products are much sought after by criminal elements; therefore, it requires daily efforts to constrict access to those who would misuse them. With this concern in mind, the arbitrator further reasoned:

> The employer has a right to determine if an employee may try to use its drugs himself, or if his access to drugs may be dangerous to himself or his employer. So that seeking such information . . . is not an invasion of privacy.
>
> That being the case, an employee could refuse to answer such a question on the grounds that the answer might tend to incriminate him. However, this is not to say that the Company does not have the right to ask the question. It may. But it must take whatever answer is given-even a plea that the answer might be self-incriminating.[91]

Thus, the arbitrator held that since the grievant refused to answer the question, the employer was within its right to impose some form of discipline. However, refusal to answer a question would not alone justify discharge.

Some commentators believe that obtaining a consent form in advance of hiring "increases the likelihood that the testing will not be considered a violation of the applicant's privacy interests."[92] This is a questionable supposition. First of all, why should the rights of an applicant be less or different than the rights of an employee? There is no rational basis for making such a distinction; if there is a right of privacy, it is incident to the individual regardless of status. The public sector employee cannot be compelled to give up his rights in order to receive the benefit of public employment.

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91. Rexall Drug Co. v. Oil, Chem. & Atomic Workers International Union, Local 5-136, 65 Lab. Arb. (BNA) 1101, 1103-1104 (1975) (Cohen, Arb.).

92. Adams & Remmers, *supra* note 8, at 311.

Such a waiver is arguably obtained under threat of economic duress—the exclusion from the class of eligible applicants.

V. THE QUESTION OF ACCURACY

Again, the justification presented by the employer is the center of focus when a privacy challenge is asserted against the drug test. Throughout the debate it should be remembered that employers may still make relevant inquiries into the private activities of individuals which affect their performance on the job or which affect employee morale. An employer would most certainly be entitled to question employees about possible involvement in the use or sale of narcotics on the job site in order to assure a safe and crime-free work place. Such inquiries protect the employer from potential criminal or civil liability. They would certainly be allowed to inquire as to private drug use to the extent it affected the employee's job or endangered his or his co-workers' safety. However, these inquiries will probably be limited to verbal interrogation unless the company can demonstrate that no other means is available to protect a critical and compelling interest of the employer associated with a compelling public interest in safety or morals.

All this assumes that the testing procedure used by the employer presents accurate indications of drug use. An excellent article on this subject presents substantial evidence that some of the procedures report false indications of drug use in up to twenty percent of the cases.[93] One court went so far as to say that the drug testing plan at issue was so unreliable as to violate due process of law.[94] In this case a declaration filed by the plaintiff's expert illustrates scientific concern over the accuracy of testing methods and techniques:

> All drug testing procedures result in false positives. The reliability of all drug determinations, whether by immunoassay or GC/MS, depend on such factors as the certainty of specimen identification; specimen storage, handling, and preparation; preparation and storage of test reagents; proper cleaning and calibration of testing instruments and hardware; and the qualification and training of laboratory personnel performing the test and interpreting the results. The danger of carelessness in test performance and/or inadequately trained personnel may be a particular problem with immunoassays, which are popular for low-cost,

93. Rust, *The Legal Dilemma*, 72 A.B.A. J. 50, 51 (Nov. 1, 1986).

94. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 389 (E.D. La. 1986).

> large-scale screening of many specimens with readily available equipment and minimum personnel training. The problem, nonetheless, is also present when GC/MS is utilized.[95]

One method used in drug detoxification clinics, for testing parolees and prison inmates and other large-scale screening programs, is thin layer chromotography (TLC). TLC must be interpreted by a skilled technician and, if used alone, can produce false positives. [96] Some immunoassay tests for cannabinoid may be too sensitive in that they react positively to a sample from a person who has been passively exposed to marijuana smoke.[97] None of the procedures actually test for impairment—the one factor that makes the inquiry relevent for an employer mandated test.

Additionally, one commentator notes that as many as half of the positive results in urine tests can be false positives based on a manufacturer admitted five percent error factor. This does not consider the attendant factors of poorly trained personnel, miscalibrated instruments and faulty test procedures.[98]

One study reviewed urine toxicology from the College of American Pathologists from 1984, 1985, 1986. Hundreds of laboratories participated in the proficiency programs under study.

> Most disturbing of all, despite the fact that any positive result must be confirmed by a technically different method as has been standard operating procedure for many years for laboratory personnel, false-positive reports of drugs like morphine, codeine, cannibinoids, phencylidene, benzoylecgonine, secobarbital, and amphetamines continue to appear in distressingly large numbers.[99]

No doubt the most accurate way of establishing that an employee is under the influence of drugs would be to perform a chemical test. However, unlike alcohol, for which there are standard breath and urine tests, satisfactory tests for many drugs are not yet available. There are laboratory procedures for detecting the presence in urine of tetrahydrocannabinol (THC), the ingredient which

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95. *Id.* at 390.

96. SMITH & WESSON, SUBSTANCE ABUSE IN INDUSTRY; IDENTIFICATION, INTERVENTION, TREATMENT AND PREVENTION, IN SUBSTANCE ABUSE IN THE WORKPLACE, (Smith, Wesson, Zerkin, & Novey eds., 1985), at 14.

97. Sedgewick, *Cannibinoid Analysis: Problems and Interpretation*, 14 PHARMCHEM NEWSLETTER No. 1, (Jan/Feb, 1975).

98. Lyken, *The Validity of Tests: Caveat Emptor*, 27 JURIMETRICS J. 263, 265-266 (Spring 1987).

99. Lundberg, M.D., *Mandatory Unindicated Urine Drug Screening: Still Chemical McCarthyism*, 24 IN BRIEF 10, 11.

produces the effects associated with marijuana. But the test is too sensitive to furnish useful evidence. In some instances, persons who merely sat in the same vehicle as a marijuana smoker showed traces of THC. Moreover, marijuana smoked weeks earlier may produce a positive test result. Consequently, where an employee was alleged to have used marijuana at work, or just before coming to work, even a positive test result would be inconclusive.

Another complicating factor is the absence of an accepted scale, comparable to the blood alcohol content level, for measuring the effect of marijuana upon an individual. In a letter to the medical community in 1983, a group of toxicologists cautioned: "It is impossible, at present, to establish by urine testing methods that the person [who smoked marijuana] was adversely affected by the drug .... [A] correlation between blood concentrations and possible impairment has not yet been fully established."[100]

VI. THE SOCIAL POLICY ISSUE

Aside from the question of accuracy there is also the attendant issue of how much power employers will be given to regulate the private lives of their employees. The more difficult question is presented by the employer's rule that it will not tolerate any use of drugs or alcohol by its work force regardless of whether it demonstrably affects the employer's interests or not. The interests of society in declaring certain private conduct criminal and attaching criminal penalties to violations of those rules is a legitimate act protecting public health, safety and morals. However, those interests are not necessarily the same as the interest of the private employer nor do they derive from the same source. We ought not adopt a policy that would encourage a private business to subject its employees to its own parochial view of public safety and morality. In the one case the entire society acts through its legislature to accommodate the broader interests of society at large. No such democratic processes exist to temper the factional power of the employer who, in a sense, would be acting as a surrogate police force without the institutional safeguards that exist precisely to protect the individual from the abuse of power.

The following is this author's attempt to synchronize the wide variety of tests utilized across the land that have dealt with this problem. In order to balance the counterveiling interests worthy of protection, the following guidelines to aid the manager in deciding

100. Bray, *Urine Testing for Marijuana Use*, 249 J. A.M.A. 881 (Feb. 19, 1983).

whether or not to adopt a testing program for the workplace are proposed.

Random testing without evidence of specific impairment, because of its potential intrusion into the purely private lives of individuals, should not be conducted unless and until the employer can demonstrate a compelling interest for the test. That interest could be compelling where the risk of harm to life and property of the general public is so clearly and pursuasively demonstrated as to justify this intrusion. Risk of injury to the individual, his co-workers, or the reputation or property of the employer, is insufficient to justify random sampling because of the ease with which employers can fashion an argument that the individual job poses a risk of harm to others besides the offender. Furthermore, since the right to privacy is a public right, it makes sense to condition an intrusion upon that right with a demonstration of equally important public interests. Those interests will not be present in most employment situations.

Specific testing of individuals can only be justified by a compelling interest. In this context it could be presumed that the employer's interest in preventing drug use on the premises, is per se compelling. We may also presume that off-duty drug use which endangers the safety of the employee, his co-workers, or the employer's reputation or property, is also per se compelling. But specific testing of individuals should only be allowed where the employer has probable cause to believe the employee exhibits specific impairment directly affecting the work environment, and there is no other way to ascertain the violation. If the employee refuses the test, he can not be fired for asserting his rights to privacy. However, the employer is not hamstrung either. The employer can make a disciplinary decision on the basis of the observable signs of impairment. The employer does not need a test in order to uphold a termination for performance related problems.

I would not place any emphasis upon a preannounced intention of the employer to subject the employee to random testing. Notice of the potential for testing is not a sufficient waiver of the right to privacy since such a waiver conditioned upon the vibranting of a benefit, namely employment, would be acheived by duress and would violate public policy.

Granted, drug abuse in our society is a serious problem. How we choose to deal with that problem may have far-reaching effects on how we live as a people.

ARTICLES