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Survey of the Law on Employee Drug Testing

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SURVEY

Survey of the Law on Employee Drug Testing

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I. INTRODUCTION

On January 4, 1987, Conrail locomotives ran through a stop signal into the path of an oncoming Amtrak passenger train near Chase, Maryland.¹ In the collision that followed, what is now considered to be the worst train wreck in Amtrak history, sixteen people were killed and 175 others were injured.² Although the Conrail engineer claimed that a warning signal had malfunctioned, an investigation by the Federal Railroad Administration focused on the possibility of human error.³ The results of drug tests administered to the engineer and

1. McGinley, *Conrail Crewman Tested Positive for Marijuana*, Wall St. J., Jan. 15, 1987, at 2, col. 2.

2. N.Y. Times, May 5, 1987, at 1, col. 2.

3. McGinley, *supra* note 1, at 2, col. 2.

brakeman of the Conrail locomotives showed evidence of marijuana use by both men.⁴ A Baltimore grand jury subsequently indicted the Conrail engineer on sixteen counts of manslaughter.⁵

In San Francisco, on July 11, 1985, a computer programmer in her sixth year of employment with Southern Pacific Transport Company was sitting at her terminal when two supervisors demanded that she produce a urine sample.⁶ Barbara Luck was one of 486 employees at Southern Pacific who were asked to comply with the company's new mandatory drug-testing policy.⁷ Luck refused to submit to a drug test, and Southern Pacific subsequently fired her.⁸ Luck brought suit against her employer in San Francisco County Superior Court, alleging that she was wrongfully discharged for refusing to submit to a urine test.⁹ On November 6, 1987, in a verdict against Southern Pacific, a jury awarded Luck \$485,000 in compensatory and punitive damages.¹⁰ Luck's attorney claimed that the verdict was a message to employers that mass or random drug testing of employees in purely administrative positions is not acceptable.¹¹

The Conrail catastrophe and the saga of Barbara Luck illustrate the inherent tension between the interests of employers, the public, and employees that mandatory drug testing presents. Employers have an interest in maintaining a safe and secure working environment, particularly when the nature of their business implicates public safety or national security. The public shares in these interests, as do employees. Employees juxtapose their interests in privacy, in

4. *Id.* At the time of the disclosure of the drug-test results, the Federal Railroad Administration "cautioned that the drug test results 'represented only one element of the inquiry into human performance in the circumstances of . . . [the] accident . . . [and did] not constitute an allegation of fault or determination of probable cause.'" *Id.* (quoting statement of the Federal Railroad Administration).

5. The manslaughter indictments stated that the engineer and brakeman were operating the locomotives in a "grossly negligent manner" amounting to "wanton or reckless disregard for human life." *N.Y. Times*, May 5, 1987, at 8, col. 2. The engineer pleaded guilty to a single misdemeanor manslaughter count, and was sentenced to five years in prison. *Miami Herald*, Mar. 30, 1988, at 11A, col. 1.

6. Weinstein, *Drug Tests: Privacy vs. Job Rights*, *L.A. Times*, Oct. 26, 1986, at 1, col. 1.

7. *Id.*

8. *Id.*

9. Bishop, *Worker Drug Tests Resisted*, *N.Y. Times*, Nov. 27, 1985, at D1, col. 3.

10. *Luck v. Southern Pac. Transp. Co.*, No. 843,320 (Cal. Super. Ct. Nov. 6, 1987) (judgment on special verdict).

11. Morain, *Railroad Employee Wins \$485,000 in Southern Pacific Drug-Test Case*, *L.A. Times*, Oct. 31, 1987, at 33, col. 4; see also Cox, *Juries Sympathetic in Drug-Test Cases*, *Nat'l L.J.*, Dec. 7, 1987, at 3, col. 1 (reporting jurors' statements to the press that drug testing of a computer programmer is not appropriate, and that two of the jurors had wanted to double the punitive damage award).

preventing unwarranted intrusions into their personal lives, and in continued employment.

Mandatory drug testing of employees is the most recent attempt by employers to identify drug-impaired workers. Employees have responded to the increased use of drug testing in the workplace by taking legal action against their employers and lobbying their elected officials for statutes that place limits on the ability of employers to implementing drug-testing programs. This Survey examines the myriad legal issues surrounding employee drug testing. Section II of the Survey provides an overview of the prevalence of drug use in society, the increased use of drug testing in the workplace, and the accuracy and reliability of the various drug-testing methods. Section III discusses the federal constitutional protections that public employees have invoked to challenge mandatory drug testing. These protections include the prohibition against unreasonable searches and seizures in the fourth amendment, the privilege against self-incrimination in the fifth amendment, the penumbral right of privacy, and the guarantees of substantive and procedural due process in the fifth and fourteenth amendments.¹²

Section IV assesses the rights and duties implicated by the classi-

12. Employees have invoked other constitutional provisions to oppose drug-testing programs, with limited success. In *Rushton v. Nebraska Public Power District*, 653 F. Supp. 1510 (D. Neb. 1987), *aff'd*, No. 87-1441 (8th Cir. Apr. 14, 1988), employees of a nuclear power plant challenged alcohol- and drug-testing programs under the free exercise clause of the first amendment. The plaintiffs argued that the program incorporated by reference the literature of the employee assistance program characterizing alcoholism as an illness. *Id.* at 1516. The court reasoned that "[t]he plaintiffs believe[d] that calling alcoholism an illness means calling it a disease and that calling it a disease means that it is not a sin and that saying it is not a sin contradicts the Bible, the written source of their religious beliefs." *Id.* at 1519. In addition, "[o]ne of their precepts [was] that they must be separated from heretical materials, and they conclude[d] that participating in a program that offers a treatment that calls alcoholism a disease and not a sin would lash them to an heretical idea." *Id.* The court rejected the plaintiffs' free exercise claim, because although the programs burdened the plaintiffs' religious practices, they were the least restrictive alternatives for satisfying the state's compelling interests in protecting the health, safety, and welfare of the public and the employees of the nuclear power plant. *Id.* at 1516.

Similarly, courts have rejected equal protection challenges to employee drug testing. See *Copeland v. Philadelphia Police Dep't*, 2 IER Cas. (BNA) 1825 (3d Cir. 1988); *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987); *Burka v. New York City Transit Auth.*, 2 IER Cas. (BNA) 1625 (S.D.N.Y. 1988); *Schail v. Tippecanoe County School Corp.*, 679 F. Supp. 833 (N.D. Ind. 1988). In *Railway Labor Executives' Ass'n v. Burnley*, train crew members alleged that the drug-testing program was underinclusive and arbitrarily discriminated against similarly situated classes of persons in violation of the equal protection clause, because the regulatory scheme did not require drug testing of supervisors. 839 F.2d 575 (9th Cir. 1988). The court held that the program was valid under the equal protection clause, because the objective of railway safety was legitimate, and the regulatory scheme was reasonably related to this goal in that supervisors responsible for the safe operation of trains were subject to drug testing at the discretion of the railroad. *Id.* at 592.

fication of drug testing as a mandatory subject of collective bargaining under the National Labor Relations Act.¹³ Section V presents the protections available under Title VII of the Civil Rights Act of 1964¹⁴ and the Rehabilitation Act of 1973.¹⁵ Title VII prohibits an employer from instituting a drug-testing program if drug use does not affect job performance and safety, and the effect of the program is to discriminate against members of a minority group. The Rehabilitation Act prohibits employers from taking adverse action against employees who are qualified drug abusers.

Section VI discusses the safeguards that state constitutions and statutes may provide to employees during mandatory drug testing. Section VII presents the common law theories most commonly invoked by employees to challenge drug testing, including wrongful discharge, invasion of privacy, defamation, and negligent and intentional infliction of emotional distress. Section VIII suggests that, paradoxically, in certain circumstances, employers may have a duty to test employees for illicit drug use and to take reasonable action to protect third parties from the hazards associated with drug-impaired employees.

The legal issues discussed in this Survey arise at particular stages of a drug-testing program. Thus, Section IX provides a temporal framework to reconcile the legal issues surrounding mandatory drug testing. Finally, the Survey concludes in Section X that the validity of a drug-testing program will depend on the nature of the position, and the sector of society in which the work is performed, as well as the privacy and employment interests of the employees.

II. THE MAGNITUDE OF THE DRUG PROBLEM AND DRUG TESTING AS A RESPONSE

Illicit drug use is a grave problem in American society.¹⁶ The

13. 29 U.S.C. §§ 151-159 (1982).

14. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

15. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C. (1982 & Supp. II 1984)).

16. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 5 (1986). The Commission estimated that drug trafficking generates income for organized crime in amounts as high as \$110 billion per year. *Id.* (citing *House Select Comm. on Narcotics and Drug Abuse and Control, Annual Report for the Year 1984*, H.R. REP. NO. 1199, 98th Cong., 2d Sess. 9 (1985)). Other authorities have estimated that income from illicit drugs ranges "from \$100 billion, a rather conservative estimate these days, to \$500 billion. If we used a figure of \$100 billion, this would place drug trafficking just behind Exxon and General Motors in the 'Fortune 500' companies." *OSHA Oversight Hearing on the Impact of Alcohol and Drug Abuse on Worker Health and Safety: Hearings of the House Subcomm. on Health and Safety of the Comm. on Education and Labor*, 99th Cong., 1st Sess. 5 (1985) (statement of Robert L. DuPont, M.D., Vice President,

National Institute on Drug Abuse has reported that twenty million Americans use marijuana and four million Americans use cocaine.¹⁷ In fact, it is estimated that one out of every six working-age Americans uses some form of illicit drugs.¹⁸ The House Subcommittee on Health and Safety of the Committee on Education and Labor has estimated that illicit drug use by employees costs industry \$26 billion per year in lost productivity and employment.¹⁹ An employee who uses illicit drugs is 3.6 times more likely than an unimpaired worker to be involved in an accident while working, 2.5 times more likely to have absences from work lasting eight days or longer, and five times more likely to file a worker's compensation claim.²⁰ In addition, an illicit drug user receives three times the average health benefits, and functions at 67 percent of the work potential of an unimpaired worker.²¹ The negative effect of illicit drug use on industrial safety is well illustrated by statistics in the transportation industry. The Federal Rail-

Bensinger, DuPont & Associates, and President, Center for Behavioral Medicine) [hereinafter *OSHA Oversight Hearings*].

It has been suggested that ten million out of the 106 million workers in America have a drug or alcohol abuse problem. *OSHA Oversight Hearings, supra*, at 10 (statement of Robert L. DuPont, M.D., Vice President, Bensinger, DuPont & Associates, and President, Center for Behavioral Medicine); see also Quayle, *American Productivity: The Devastating Effect of Alcoholism and Drug Abuse*, 38 AM. PSYCHOLOGIST 454, 455 (1983) (illicit drug use has resulted in decreased productivity).

17. *OSHA Oversight Hearings, supra* note 16, at 24 (statement of Elaine M. Johnson, Acting Deputy Director, National Institute on Drug Abuse). A National Institute on Drug Abuse survey revealed:

[Two] million Americans are currently using stimulants; over 1 million Americans are using sedatives without a prescription Among America's young adults, between the ages of 18 and 25, which is the segment of the population generally thought to use drugs most extensively, 65 percent have experience with illicit substances; 41 percent have tried marijuana; roughly 20 percent used marijuana daily for at least 1 month during their adolescence; 20 percent had tried cocaine; and 84 percent used alcohol. This is the population now entering the workforce. Clearly, with this history of prior drug use, there is cause for serious concern.

Id.

18. Commentary by John Chancellor (NBC Nightly News, Mar. 2, 1988). There was no mention of the frequency of usage in the commentary.

19. *OSHA Oversight Hearings, supra* note 16, at 6. A National Institute on Drug Abuse study estimated that workplace alcohol and drug use resulted in productivity losses of \$50.6 billion and \$25.9 billion respectively, and lost employment costs of \$44 billion and \$312 million respectively. *Id.* (statement of Robert L. DuPont, M.D., Vice President, Bensinger, DuPont & Associates, and President, Center for Behavioral Medicine); see also Stille, *Drug Testing: The Scene Is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, Nat'l L.J., Apr. 7, 1986, at 1, col. 2 (estimating that drug abuse costs businesses \$33 billion in lost productivity, employee theft, absenteeism, health care costs, and below standard workmanship).

20. *OSHA Oversight Hearings, supra* note 16, at 39 (statement of J. Ronald Blount, Associated General Contractors of America).

21. *Id.*

road Administration reported that between 1975 and 1984, illicit drug use by employees caused forty-eight accidents resulting in thirty-seven fatalities, eighty nonfatal injuries, and more than \$34 million in property damage.²²

A. *The Prevalence of Drug Testing*

In response to the demonstrable decrease in productivity and safety that accompanies illicit drug use, employers have implemented drug-testing programs designed to detect the presence of illicit drugs in employees' systems.²³ In the public sector, President Reagan has

22. *OSHA Oversight Hearings*, *supra* note 16, at 13. John H. Riley, Administrator of the Federal Railroad Administration, has noted:

[O]ver the seven year period of 136 cases in which an autopsy was performed on a railroad employee who died in a fatal accident, in 16 percent of those cases, the autopsy revealed significant levels of alcohol or drug[s] present in the bloodstream, and we have reached a point today where alcohol and drug use on the railroad is a principal, if not the principal cause of employee fatality.

Id.; see also Quayle, *supra* note 16, at 455 (illicit drug use may increase workplace accidents); Daily Lab. Rep. (BNA) No. 174, at A-3 (Sept. 10, 1987) (reporting that a Southeastern Pennsylvania Transportation Authority trolley driver under the influence of cocaine ran a yellow caution light and a red stop light, rammed into the back of another trolley, and injured seventeen passengers).

23. Hanson, *Drug Abuse Testing Programs Gaining Acceptance in Workplace*, CHEMICAL & ENGINEERING NEWS, June 2, 1986, at 7. Employers have instituted drug-testing programs for the same reasons that they have instituted alcohol-abuse programs: "[T]he health and safety of their employees, and the expense of having someone who is simply not doing his or her job." *Id.* Employees also recognize the dilemma. A national survey of employee attitudes, conducted in 1986, reported that two-thirds of workers surveyed supported drug testing, and that one in five workers believed that drug abuse is a workplace problem. Daily Lab. Rep. (BNA) No. 129, at A-13 (July 8, 1987). Moreover, 47 percent of the adults surveyed in a Gallup poll agreed that workers should be tested for drugs. Steiger, *The Public Says "Yes" to Mandatory Drug Testing*, HOSPITALS, Sept. 5, 1986, at 100.

Urinalysis is by far the most popular method of testing. Denenberg & Denenberg, *Employee Drug Testing and the Arbitrator: What Are the Issues?*, ARB. J., June 1987, at 19, 27. Urinalysis is the preferred test, but many other methods of detection are available. Blood tests are considered to be more invasive than urine tests, but they can be tailored to detect recent drug use, unlike urinalysis tests, which can only measure metabolites in urine. *Id.* An American Management Association survey indicated that training supervisors to detect signs of drug abuse and to confront employees may be more effective than urinalysis in curtailing substance abuse. Daily Lab. Rep. (BNA) No. 1, at A-3 (Jan. 2, 1987). The United States Postal Service and the Office of Personnel Management recently heard testimony about the use of hair analysis as an alternative to urinalysis. Daily Lab. Rep. (BNA) No. 98, at A-2 (May 22, 1987). Hair analysis would be less intrusive than urine tests, measure a longer drug history, be less susceptible to cheating, and cost \$50 per test. *Id.* General Motors employs undercover detectives who pose as plant workers to spot drug abuse. Wall St. J., Feb. 27, 1986, at 1, col. 6. The Coors Company abandoned polygraph testing for preemployment screening, and replaced it with a program encompassing urine testing for illegal drug use, a Stanton Survey to test for theft proclivity and honesty, and a reference check by an outside firm. Daily Lab. Rep. (BNA) No. 28, at C-1 (Feb. 12, 1987). For a discussion of the accuracy and reliability of polygraph testing and urine testing, see Lykken, *The Validity of Tests: Caveat Emptor*, 27 JURIMETRICS J. 263, 263 (1987).

issued an Executive order mandating a "drug-free federal workplace" and authorizing drug testing of employees to achieve that goal,²⁴ and Congress has established guidelines to implement this Executive order.²⁵ The Department of Transportation has adopted regulations concerning drug testing in railroad operations²⁶ for employees in "sensitive and critical" positions.²⁷ This plan for ensuring safety in the public sector transportation industry may be mirrored in the private sector transportation industry.²⁸

24. Exec. Order No. 12,564, 3 C.F.R. 224 (1987), *reprinted in* 5 U.S.C.A. § 7301 app. at 133-35 (West Supp. I 1987). On March 3, 1986, the President's Commission on Organized Crime issued a report to President Reagan and Attorney General Meese recommending various methods of reducing consumer demand for drugs in the United States. *See* PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *supra* note 16, at 482-86. The Commission recommended thirteen methods of reducing the demand for drugs, including more rigorous law enforcement, and review of budgetary allotments for drug enforcement. *Id.* It further recommended that both government and private employers consider drug testing of employees and applicants for employment. *Id.* at 485. Many businesses depend heavily upon the revenues derived from government contracts for their livelihoods. To encourage employers to follow the Commission's recommendations, the Commission also recommended that the government withhold contracts from companies that fail to implement drug-testing programs. *Id.* at 483. Awarding government contracts on the basis of drug-testing programs would almost certainly promote immediate and large-scale drug testing in the workplace. Thus, the government can influence conduct in the private sector by threatening to withhold such contracts. *Id.*

25. Supplemental Appropriations Act, Pub. L. No. 100-71, § 503, 101 Stat. 468, 469-471 (1987). The *New York Times* has reported that a cabinet level position was suggested to consolidate and orchestrate federal efforts in drug testing. *See* N.Y. Times, Apr. 14, 1987, at A18, col. 1; N.Y. Times, Apr. 2, 1987, at A31, col. 1.

26. Control of Alcohol and Drug Use, 49 C.F.R. § 219 (1987).

27. Daily Lab. Rep. (BNA) No. 173, at A-8 (Sept. 9, 1987). The random drug-testing plan affects 30,000 employees at the Department of Transportation in sensitive positions. *Id.* The Department has defined sensitive positions as those that "affect public safety and security," including "air traffic controllers, test pilots, firefighters, railroad safety inspectors, Coast Guard drug enforcement officers, motor vehicle operators, and employees with security clearances." *Id.* In addition, the Federal Railroad Administration has issued regulations authorizing employers to drug test when a supervisor suspects that a railroad employee is under the influence of drugs. *See* 49 C.F.R. § 219.301(b)(1), (c)(2) (1987).

28. *See id.* at A-9 (reporting that then Secretary of Transportation Dole considered random drug testing of employees in the private sector transportation industry). The Federal Aviation Administration has promulgated regulations requiring crew members of civil aircraft to submit to drug testing based on a reasonable belief that the crew member is using drugs that affect his faculties, and therefore threaten safety interests. 14 C.F.R. § 91.11(d) (1987); *see also* Control of Drug and Alcohol Use for Personnel Engaged in Commercial and General Aviation Activities, 51 Fed. Reg. 44,432, 44,434 (1986) (specific drug-testing provisions). In a statement concerning the right of passengers to safe transportation, Senator Ernest F. Hollings said:

Individual passengers have absolutely no means of ensuring their own safety for the duration of an airline flight or train ride. They have no option other than to trust those responsible for the safe operation of the train or plane . . . [and consequently] there is absolutely no question as to where our priorities must lie.

Preble, *Air Traffic Controllers Sue to Block FAA Drug Testing*, AVIATION WEEK & SPACE TECH., Mar. 2, 1987, at 32, 33.

In the private sector, nearly 50 percent of the Fortune 500 companies conduct drug testing.²⁹ Corporations have even considered creating a coalition to promote a "drug-free environment in the private sector," and to campaign against the passage of bills in state legislatures that would restrict corporate power to drug test.³⁰ The media has also responded to the drug problem by donating \$500 million worth of advertising for a "drug-free America."³¹ Indeed, the *Wall Street Journal* has reported that the "Partnership for a Drug-Free America" was the eighteenth most popular television commercial of 1987.³²

In conjunction with drug-testing programs, employers have initiated employee assistance programs (EAP's) to counsel and rehabilitate employees who have tested positive for illicit drug use.³³ Companies that have EAP's have recorded successful rehabilitation rates as high as 80 percent.³⁴ Moreover, under a cost-benefit analy-

29. Hanson, *supra* note 23, at 14 (as many as 50 percent of the Fortune 500 companies may be testing employees for drugs); *see also* Chapman, *The Ruckus over Medical Testing*, FORTUNE, Aug. 19, 1985, at 58 (estimating that 25 percent of Fortune 500 companies may be testing employees for drugs). In a recent survey of companies and government agencies, nearly 30 percent reported that they conduct some form of drug testing. *See* Daily Lab Rep. (BNA) No. 179, at A-1 (Sept. 17, 1987). Of the respondents to the survey, 94.5 percent tested job applicants, while 73 percent tested current employees on a "for cause" basis. *Id.* Programs were more likely to be found in companies with more than \$500,000 in annual sales. *Id.* A survey of the top thirty-five Fortune 500 companies showed that 29 percent screen applicants for employment and 26 percent test some employees under certain conditions. Gampel & Zeese, *Are Employers Overdosing on Drug Testing?*, BUS. & SOC'Y REV., Fall 1985, at 34, 36. Among the employers who have instituted mandatory urinalysis programs are International Business Machines, The New York Times, the United States Postal Service, The Boeing Co., General Motors Corp., Ford Motor Co., Aluminum Co. of America, Boise Cascade Corp., Toyota Motor Sales, The Greyhound Corp., and American Airlines Inc. *Employee Drug Testing: Intrusive, Degrading*, PRIVACY J., May 1985, at 1, 1. Interviews with officials of corporations, government entities, and unions revealed that tens of thousands of job applicants have been rejected, and hundreds, or even thousands, of employees have been fired because of positive drug-test results. *See* Weinstein, *supra* note 6, at 1, col. 2.

30. Daily Lab. Rep. (BNA) No. 167, at A-3 (Aug. 31, 1987). Corporate representatives met in Washington, D.C., on August 24, 1987, to plan strategy for the coalition. If corporate commitment is high, the organization will be given official status. *Id.*; *see* Henry, *Reporting the Drug Problem*, TIME, Oct. 6, 1986, at 73 (reporting that the media may be collectively inflating the drug-abuse problem).

31. N.Y. Times, Mar. 4, 1987, § 4, at 15, col. 3.

32. Wall St. J., Mar. 3, 1988, § II, at 19, col. 4 (ranking popularity of television commercials according to viewer preference).

33. Masi, *Company Responses to Drug Abuse from AMA's Nationwide Survey*, PERSONNEL, Mar., 1987, at 40, 45. In an American Management Association survey, it was reported that companies have been offering EAP counseling and rehabilitation in response to employee drug abuse. *Id.* EAP's appear to be the "resource of choice" for employers surveyed. *Id.*

34. "The success of EAP's is indicated by the estimated recovery rates of 65 to 80 percent among employees who accept a referral for help This means that at least 65 percent of all employees receiving EAP services will be returned to 'full' productivity within one year." W. SCANLON, ALCOHOLISM AND DRUG ABUSE IN THE WORKPLACE, EMPLOYEE ASSISTANCE

sis, EAP's have proven to be worthwhile to business by improving productivity and safety.³⁵ Although EAP's can effectively combat many of the consequences of illicit drug use by employees, they are limited in scope because they depend on the willingness of employees who need assistance to come forward.³⁶ Most employees who use illicit drugs deny their drug problems and are not motivated to seek help from an EAP.³⁷ A drug-testing program can identify employees who have used illicit drugs,³⁸ and thus provide the hard evidence necessary to confront the denial system, thereby contributing to worker safety and productivity.

Employers in the public and private sectors have recorded increases in safety and productivity after instituting drug-testing programs.³⁹ The United States Navy has reported that positive drug-test results decreased from 47 percent in 1981 to 4 percent in 1984, with a concomitant decrease in drug-related accidents.⁴⁰ Similarly, the Southern Pacific Railroad Company has calculated that accidents caused by human error declined 66 percent from August 1984, when it initiated a drug-testing program, to January 1986.⁴¹

B. *The Methods of Drug Testing*

An employer who has decided to test employees for drugs can select from several analytical methods to achieve the goals of its drug-testing program. The reliability and accuracy of the analytical meth-

PROGRAMS 96 (1986); see also *Alcohol and Drug Abuse: Hearing before the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 2d Sess. 21 (1986) (reporting that a program rehabilitating commercial aviation pilots who have alcohol problems has met with a 91 percent success rate) (statement of Mr. Jones, Deputy Administrator of the Federal Aviation Administration) [hereinafter *Alcohol and Drug Abuse Hearings*].

35. W. SCANLON, *supra* note 34, at 99. In discussing the cost-effectiveness of EAP's, Scanlon noted:

The New York Transit Authority computed a savings of \$1 million per year in paid sick leave benefits alone; General Motors boasts a 72 percent reduction in the dollar amount paid for accident and sickness disability benefits; and the Oldsmobile program showed similar reductions in costly alcohol- and drug-related job-performance problems.

Id. (quoting W. DUNCAN, *THE EAP MANUAL* 6 (1982)).

36. Daily Lab. Rep. (BNA) No. 170, at A-1 (Sept. 3, 1987); see also W. SCANLON, *supra* note 34, at 40, 41, 45, 46.

37. Daily Lab Rep. (BNA) No. 170, at A-1 (Sept. 3, 1987).

38. *Id.*

39. See *infra* notes 40-41 and accompanying text.

40. See Hanson, *supra* note 23, at 8; see also O'Connor & Miller, *The Military Says "No"*, NEWSWEEK, Nov. 10, 1986, at 26 (reporting that the Navy has initiated drug testing to enhance operational safety).

41. See *Alcohol and Drug Abuse Hearings*, *supra* note 34, at 34 (statement of William H. Dempsey, President, Association of American Railroads).

ods that the employer selects are critical aspects of the program⁴² because employers will ordinarily take adverse action against employees who have tested positive for illicit drug use.⁴³ In addition, although drug tests detect the presence of illicit drugs in employees' systems, they cannot measure levels of intoxication.⁴⁴ This limitation of drug testing further accentuates the importance of the reliability and accuracy of the analytical methods selected.

The most widely used analytical method is the enzyme multiplied immunoassay technique (EMIT).⁴⁵ The EMIT is popular because it is inexpensive, requires little formal training for operators, has a short analysis time, and can detect a wide range of drugs.⁴⁶ Experts, however, regard the EMIT as suitable only for preliminary

42. See Engle, *Who's Hired and Who's Fired*, STUDENT LAW., April 1986, at 20, 23; Gampel & Zeese, *supra* note 29, at 34-35; Stille, *supra* note 19, at 23. For a discussion of an employer's liability based on unreliable testing methods or procedures, see *infra* notes 695-700 and accompanying text. See also Hanson, *supra* note 23, at 8 ("The accuracy and reliability of drug testing procedures are probably the most frequently attacked part of any drug testing program."); cf. Lykken, *supra* note 23, at 263, 264 ("*reliability* and *accuracy* are different, though related, concepts . . . [Reliability means] the consistency with which the test produces the same result in the same circumstances, and [validity means] the probability that the test result is accurate or true.").

43. See, e.g., *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (bus driver discharged based on positive drug test); cf. *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987) (teachers who refused to submit to drug testing were not recommended for tenure).

44. *Jones v. McKenzie*, 833 F.2d 335, 339 (D.C. Cir. 1987). The analytical methods used by most laboratories for the detection of drugs in bodily fluids are classified into two main categories: immunoassays and chromatography. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL INSTITUTE ON DRUG ABUSE RESEARCH MONOGRAPH 73, at 30 (1986) [hereinafter NIDA RESEARCH MONOGRAPH]. Immunoassays add a substance to the urine sample that produces a reaction indicating the presence or absence of drugs. *Id.* "Chromatography is a method of analysis in which the various components in a biological specimen can be separated [for identification] by a partitioning process." *Id.* at 32.

45. The EMIT was developed by the Syva Company in 1980, and is classified as an immunoassay test. The scientific principals underlying the EMIT are the following:

[A] reagent is prepared by combining an antibody with an antigen, which serves as the indicator. The antibody and the indicator undergo a chemical reaction in which the indicator binds itself to the antibody. After the reagent is prepared, urine is introduced into it. If a [drug] metabolite is present in the urine, it will displace the indicator and bind itself to the antibody. Displacement of the indicator occurs because the metabolite's competitive displacement and binding properties are stronger than those of the indicator. The indicator, which has been separated from the antibody, is then measured and compared to the reagent to determine the concentration of the [drug] metabolite in the specimen.

Bible, *Screening Workers for Drugs: The Constitutional Implications of Urine Testing in Public Employment*, 24 AM. BUS. L.J., 309, 311-12 (1986).

46. See NIDA RESEARCH MONOGRAPH, *supra* note 44, at 31. The cost of a single EMIT test ranges from five to twenty-five dollars. See Chapman, *supra* note 29, at 60; Rust, *The Legal Dilemma*, A.B.A. J., Nov. 1, 1986, at 51, 51.

screening, because of its propensity for error.⁴⁷ The EMIT has been criticized on two grounds. First, some experts have stated that the EMIT registers a positive test result after an individual has "passively" inhaled marijuana smoke.⁴⁸ Passive inhalation occurs when an individual inhales air containing marijuana smoke exhaled by others who have smoked the drug in a confined space, such as a small room or a car.⁴⁹ An employee who has passively inhaled marijuana but has not actually smoked it may be subjected to disciplinary measures based upon a misleading test result. Second, experts have criticized the tendency of the EMIT to yield false positive test results⁵⁰ based on cross-reactivity with legitimate drugs and certain foods.⁵¹

47. See Hanson, *supra* note 23, at 9-10. For all federal testing programs, gas chromatography/mass spectrometry is the only authorized confirmation method. See Mandatory Guidelines on Federal Employee Drug Testing Programs, Daily Lab. Rep. (BNA) No. 70, at E-14 (Apr. 12, 1988). For a discussion of the due process implications of unconfirmed initial screening, see *infra* notes 302-23 and accompanying text.

48. See Zeese, *Marijuana Urinalysis Tests*, 1 DRUG L. REP. 25, 28 (1983) (reporting a study, conducted by the *American Journal of Psychiatry* in 1977, that found positive test results after passive inhalation of marijuana). The controversy over the passive inhalation issue is probably due to "differences in the type and quality of marijuana smoked, the environment in which the marijuana is smoked, the method of smoking, and the metabolism of each individual." *Id.* at 28. Richard L. Hawks, an expert from the research technology branch of the National Institute of Drug Abuse, has stated that passive inhalation can only occur under extreme circumstances. Hanson, *supra* note 23, at 11.

49. See Hanson, *supra* note 23, at 11.

50. The existence of a false positive test result depends upon the sensitivity limit and cutoff level of a drug test. NIDA has defined these terms as follows:

The concentration of drug in the urine below which the assay can no longer be considered reliable is the "sensitivity" limit [of the test]. . . . The "cutoff" point is the concentration limit that will actually be used to assay samples. It is a value serving as an administrative breakpoint for labelling a urine result positive or negative. . . . Setting screening cutoffs too low would allow for longer detection time after drug administration, but the results might be difficult to confirm reliably. If the confirmatory procedures are not sensitive enough, the screened positive may not be confirmed and the result would appear as a false positive. . . . On the other hand, setting high cutoff levels for the screening procedures will generate false negatives because drugs may be present in significant concentration but below the designated cutoff and would therefore be reported negatives.

NIDA RESEARCH MONOGRAPH, *supra* note 44, at 36-37. The cutoff level in a particular drug-testing program may reflect the employer's judgment as to the permissible degree of drug levels in the workplace.

51. See Budiansky, *Busting the Drug Testers*, U.S. NEWS & WORLD REPORT, Oct. 20, 1986, at 70 (reporting that chemical traces remaining after digesting a poppyseed bagel triggered a positive test result for cocaine); Zeese, *supra* note 48, at 26 (Syva Company, the manufacturer of the EMIT, has reported that aspirin, amphetamine, amitriptyline, benzocyclogonine, diazepam, meperidine, methaqualone, morphine, phencyclidine, propoxyphene, and secobarbital, among other substances, may create false positive results.); O'Connor, *A Question of Privacy*, NEWSWEEK, Sept. 29, 1986, at 18 ("The presence of medicines such as cold remedies and allergy pills can cause a positive result for anything from marijuana to heroin."). Confirmation by another analytical method is essential because of the possibility of false positive results occurring with initial screening methods. Even if an initial EMIT result is

The manufacturer of the EMIT has claimed that the test is 95 percent accurate.⁵² Yet the company has also recommended that a positive test result be confirmed with another analytical method,⁵³ thereby essentially conceding that the EMIT is not reliable as a single testing method.⁵⁴

The analytical method that experts consider to be the most conclusive means of confirming positive screening results is gas chromatography/mass spectrometry (GC/MS).⁵⁵ A survey of twenty-five

confirmed by a subsequent EMIT test, a false positive result will always occur if there is a cross-reactive substance in the urine sample. Zeese, *supra* note 48, at 26. The probability of error from cross-reactivity, however, is an unknown factor in determining the accuracy of the EMIT because of normal variations in urine composition between individuals. Leal, *Admissibility of Biochemical Urinalysis Testing Results for the Purpose of Detecting Marijuana Use*, 20 WAKE FOREST L. REV. 391, 394 (1984). One expert has stated that false positive results caused by cross-reactivity do not constitute a deficiency in methodology, but rather a failure to utilize adequate confirmation methods. See NIDA RESEARCH MONOGRAPH, *supra* note 44, at 51.

52. Zeese, *supra* note 48, at 26.

53. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 205 (1986).

54. *But see* Peranzo v. Coughlin, 608 F. Supp. 1504, 1514 (S.D.N.Y. 1985) ("The inclusion of [the manufacturer's] recommendation, however, by no means renders the unconfirmed use of the EMIT test an unreliable procedure to follow."). Studies focusing on the accuracy of the EMIT have produced mixed results. One report concluded that the test is 87 percent accurate. Zeese, *supra* note 48, at 26. A study conducted in 1982 by the Department of Defense found that the test is 88.9 percent accurate. See *id.* at 26.

Another frequently used drug-screening technique, radioimmunoassay (RIA), is based on the same scientific principles as the EMIT. Hanson, *supra* note 23, at 7, 9. Among the advantages of RIA is high sensitivity, which means the ability to detect small concentrations of drugs, and the potential for high automation, which means its adaptability for large volume, multiple testing. See NIDA RESEARCH MONOGRAPH, *supra* note 44, at 31. The test's drawbacks include the long analysis time, and propensity to yield false positive results due to cross-reactivity. *Id.* Additionally, RIA is very expensive because it requires use of radioactive substances and special instrumentation. *Id.*; see Hanson, *supra* note 23, at 9.

Many laboratories use the thin-layer chromatography (TLC) test for preliminary screenings, although it is not as popular as the the EMIT or RIA. See NIDA RESEARCH MONOGRAPH, *supra* note 44, at 33. The TLC test is inexpensive to administer, can screen for a variety of drugs simultaneously, and has a short analysis time. *Id.* The chief shortcomings of the test are its inability to detect small amounts of drugs, unsuitability for automation, and dependency on the skill of technicians in interpreting the results. *Id.*

55. See NIDA RESEARCH MONOGRAPH, *supra* note 44, at 35. A sufficiently high concentration of the drug allows the mass spectrometric detection of GC/MS to give the most conclusive identification for each drug because the mass spectrum "represents a 'fingerprint' pattern that is unique for each drug . . ." *Id.* The gas chromatography (GC) technique is also widely used to confirm positive results of initial screening tests such as the EMIT. *Id.* at 33. The GC technique is used primarily as a confirming test because of its high cost and complexity. One of its strongest features is the ability to detect small quantities of drugs. *Id.* at 34. Nevertheless, the GC technique is a slow technique that requires highly skilled technicians. *Id.* Although many experts agree that the GC technique can provide acceptable results, it is not the preferred confirmation method. In a survey of twenty-five technical experts, the GC technique rated "somewhat defensible" against legal challenges, but scored

technical experts revealed that GC/MS is the only confirmation test that, when used in conjunction with the EMIT, is rated "fully defensible against legal challenge" for a wide range of drugs.⁵⁶ The federal government requires that all federal employers use GC/MS to confirm positive test results from initial screening methods.⁵⁷ The only disadvantages of the GC/MS are its high cost and complexity.⁵⁸

A drug-testing program includes more than the analytical methods used to detect illicit drugs in urine samples; it also includes the quality assurance procedures of drug-testing laboratories. Employers can maximize the accuracy and reliability of the analytical approaches of their drug-testing programs by selecting laboratories that follow strict quality assurance procedures.⁵⁹ The laboratory should use qualified personnel⁶⁰ who adhere to "chain-of-custody" procedures in handling samples.⁶¹ External quality control procedures also contribute to the accuracy and reliability of drug-testing programs.⁶² Thus, an employer should compare the performance of its laboratory with that of other laboratories.⁶³ The danger of using poor quality control procedures is illustrated by a challenge to the

below the GC/MS as a confirmation test. See Hoyt, Finnigan, Nee, Shults & Butler, *Drug Testing in the Workplace—Are Methods Legally Defensible?*, J. A.M.A., July 24, 1987, at 504, 506-07 [hereinafter Hoyt].

56. See Hoyt, *supra* note 55, at 506.

57. Mandatory Guidelines on Federal Employee Drug Testing Programs, Daily Lab. Rep. (BNA) No. 70, at E-14 (Apr. 12, 1988).

58. See NIDA RESEARCH MONOGRAPH, *supra* note 44, at 35. The cost of a single GC/MS test ranges from twenty to fifty dollars. See Chapman, *supra* note 29, at 60.

59. Quality assurance "involves all aspects of the testing laboratory. Specimen acquisition, processing, testing, and reporting of test results must all be as error free as possible in order to achieve the goals of urine drug testing." NIDA RESEARCH MONOGRAPH, *supra* note 44, at 46. For a discussion of drug-testing statutes, see *infra* notes 664-89 and accompanying text; see also McGovern, *Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1471-74, 1513-17 (1987) (discussing statutory guidelines for drug testing). The scientific and technical guidelines promulgated by the Department of Health and Human Services specify extensive procedures for laboratory analysis, and for reporting and review of test results for federal drug-testing programs. See Mandatory Guidelines on Federal Employee Drug Testing Programs, Daily Lab. Rep. (BNA) No. 70, at E-1 (Apr. 12, 1988). These guidelines and standards for drug testing of federal employees provide a model program for private employers who want to maximize the accuracy and reliability of their drug testing programs.

60. For a discussion of personnel requirements for federal testing programs, see Mandatory Guidelines on Federal Employee Drug Testing Programs, Daily Lab. Rep. (BNA) No. 70, at E1 (Apr. 12, 1988).

61. The laboratory must keep records of all individuals, both in and outside the laboratory, who have access to the specimen, and must also document and preserve these records for future reference. See NIDA RESEARCH MONOGRAPH, *supra* note 44, at 47.

62. *Id.* at 49-50.

63. *Id.*

accuracy of drug tests administered by the military in 1981.⁶⁴ Because the military used an inaccurate confirmatory technique and selected laboratories with poor quality assurance procedures, military tribunals ordered the reinstatement of thousands of servicemen.⁶⁵ Thus, even if an employer utilizes the most reliable and accurate analytical techniques available, a drug-testing program is only as defensible as the quality assurance procedures of the testing laboratory.

III. THE CONSTITUTION OF THE UNITED STATES

Constitutional rights restrict the actions of federal, state, and local governmental entities only, and thus the actions of private employers in drug-testing cases ordinarily escape constitutional scrutiny.⁶⁶ Courts may apply constitutional limitations to the actions of nongovernmental entities, in rare instances, however, if a sufficient nexus exists between the actions of the private employer and a governmental entity.⁶⁷ In these circumstances, the full range of constitu-

64. Budiansky, *supra* note 51, at 70. The Center for Disease Control and the National Institute on Drug Abuse have conducted a blind study evaluating the performance of thirteen laboratories. This study also illustrates the ramifications of poor quality control. See Hansen, Caudill & Boone, *Crisis in Drug Testing*, J. A.M.A., Apr. 26, 1985, at 2382. The study revealed that false positive rates were as high as 37 percent for amphetamines and 66 percent for methadone. *Id.* Error rates for false positive results on "samples containing barbiturates, amphetamines, methadone, cocaine, codeine, and morphine . . . ranged from 0 to 6 percent, 0 to 37 percent, 0 to 66 percent, 0 to 6 percent, 0 to 7 percent and 0 to 10 percent, respectively." *Id.* The high rate of error among the laboratories was attributed to "lack of uniformity in minimum reporting levels, minimum quality-control requirements, and reporting procedures for results." *Id.* at 2386.

65. See Budiansky, *supra* note 51, at 70.

66. See Civil Rights Cases, 109 U.S. 3, 13 (1883) ("[P]rohibitions of the [fourteenth] amendment are against State laws and acts done under State authority."). For an example of modern commentary on the limits of constitutional protections, see Bible, *supra* note 44, at 321-23; Bompey, *Drugs in the Workplace: From the Batter's Box to the Boardroom*, 28 J. OCCUPATIONAL MED. 825, 825-26 (1986); Silets, *Of Students' Rights and Honor: The Application of the Fourteenth Amendment's Due Process Strictures to Honor Code Proceedings at Private Colleges and Universities*, 64 DEN. U.L. REV. 47, 51 (1987); Spicer, *Drug Testing, Student Athletes, and the Constitution*, VA. B.A. J., Winter 1987, at 11, 12-13; Comment, *Unrestricted Private Employee Drug Testing Programs: An Invasion of the Worker's Right to Privacy*, 23 CAL. W.L. REV. 72, 88-90 (1986); Comment, *Random Urinalysis: Violating the Athlete's Individual Rights?*, 30 HOW. L.J. 93, 116-18 (1987); *Development in the Law—The Constitutional Issues of Drug Testing in the Workplace*, 23 WILLAMETTE L. REV. 553, 554-55 (1987) [hereinafter *Development in the Law*].

67. The Supreme Court has held that the Constitution forbids a state from assisting a private individual in abridging a constitutional right. See *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (judicial enforcement of racially restrictive private agreements constitutes state action that denies private citizens equal protection of the laws under the fourteenth amendment). Mere abstention by a governmental entity, however, which leaves private parties free to act in deprivation of constitutional rights, does not rise to the level of state action triggering constitutional protection. *Id.* at 19. Accordingly, a judicial determination that no constitutional violation occurred would not in itself constitute state action. *Id.* Thus, a court's

tional protections normally afforded to public employees may also apply to protect private employees confronted with mandatory drug testing. A sufficient nexus to state action may be found under any of three theories: the government function theory, the entanglement theory, and the coercive state action theory.

A. *State Action and Mandatory Drug Testing*

In *Rendell-Baker v. Kohn*,⁶⁸ the Supreme Court of the United States enunciated a four-factor test to determine whether the actions of private employers meet the state action requirement of the fourteenth amendment: (1) whether the income of the private employer is derived from government funding; (2) whether state regulation of the private employer is extensive and detailed; (3) whether the function performed by the private employer is traditionally the exclusive prerogative of the state; and (4) whether a symbiotic relationship between the private employer and the state exists.⁶⁹ No single factor is dispositive of the state action issue. Moreover, the *Rendell-Baker* test is not the exclusive measure of whether a nexus exists, and courts have proceeded under several theories to determine whether constitutional limitations should apply to the actions of private actors.

Under the government function theory, if a private actor exercises a power that is traditionally reserved to the government, a court may find that the actions of the private entity have a sufficient nexus

refusal to intervene to protect a private employee from mandatory drug testing would not constitute state action. Constitutional rights are protected only when the state intervenes in a manner that indicates approval of the private actor's conduct.

68. 457 U.S. 830 (1982).

69. *Id.* at 840-43. As expressed in this case, these factors are conducive to restrictive factual interpretations. The Court limited the notion that government funding constitutes state action, stating: "Acts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Id.* at 841. The second factor, state regulation of the private actor, should be construed in light of the parameters established in *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Beck v. Communications Workers of America*, 776 F.2d 1187 (4th Cir. 1985), *aff'd on rehearing en banc*, 800 F.2d 1280 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 2480 (1987), which held that the specific power exercised over employees must be influenced or compelled by federal law. The third factor, performing a public function, does not provide a sufficient nexus unless the function has been "traditionally the exclusive prerogative of the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974). The fourth factor of the test, a symbiotic relationship between the private actor and the government, is not met when a contractor merely performs services for the government in a fiscal relationship. *Cf. Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (The relationship between the state and a private restaurant located on public property, wherein rent from the restaurant contributed to the support of a public parking garage, met the requirement of state action). As the factors expressed in *Rendell-Baker* imply, *Burton* may be anomalous, because the mere existence of a financial relationship with the government does not normally provide a sufficient nexus to state action.

with a governmental entity to satisfy the requirement of state action.⁷⁰ “[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and [are] subject to its constitutional limitations.”⁷¹ Although the government function theory would appear to be well suited for use against private entities undertaking traditional government functions such as education, the Supreme Court has implicitly rejected expansive analogies based on the government function theory, thereby reducing the practical utility of this theory as a means for private employees to avail themselves of constitutional protections.⁷²

Under the entanglement theory, the Constitution limits the conduct of private parties only if a governmental entity has been involved “to some significant extent” with the intrusive private conduct.⁷³ The Supreme Court has not quantified state action in this

70. *Evans v. Newton*, 382 U.S. 296, 301 (1966) (holding that the public services of a private park were subject to the equal protection clause of the fourteenth amendment because they were municipal in nature).

71. *Id.* at 299.

72. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). In *Flagg Brothers*, the Court distinguished the holding in *Evans* as hinging on extraordinary facts, and held that the government function at issue must be one that ordinarily is reserved exclusively to the sovereign. *Id.* at 159 n.8. The Court expressed no view regarding the extent to which a state may delegate the performance of a function such as education and thereby avoid the limits of the fourteenth amendment. *Id.* at 163-64; see also *Silets*, *supra* note 66, at 54 (illustrating that courts have rejected the public function theory as a basis for finding state action in almost all cases involving private colleges); *Spicer*, *supra* note 66, at 13 (asserting that *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982), indicate that the Court continues to take a restrictive view of the conduct by a private party that may constitute state action for purposes of the fourteenth amendment).

73. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (“[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.”). In *Burton*, the Court found that the city’s lease of space to individuals for a privately owned restaurant in a state-owned parking building constituted state action. In reaching this conclusion, the Court opined: “[T]he peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits.” *Id.* at 724.

The *Burton* Court’s benefits analysis may be extended to the relationship created by government contracts when, in conjunction with contract awards, the government encourages private employers to violate the rights of their employees. Private employers who have lucrative contracts with the government may be considered to be primary beneficiaries of a contractual relationship with the government. Not only do government contractors glean incidental benefits from their relationship with the government, as in *Burton*, but they also receive direct financial support for services rendered. Under this analysis, the recommendation of the President’s Commission on Organized Crime, that contracts be withheld from private employers who do not drug test their employees, may bring the actions of government contractors within the limits of the Constitution. If leasing parking spaces from the government is sufficient involvement with private conduct to constitute state action, then overt governmental policies coercing private employers into initiating compulsory drug-testing

context, preferring instead to make the determination on a case-by-case basis.⁷⁴ The Court has stated that if an employer's operation is so intertwined with a governmental body that the government has the power to hire, promote, or terminate the subject employees, the employer may be an arm of the government under the entanglement theory.⁷⁵

Under the coercive state action theory, private employees may invoke constitutional protections when the government has commanded or encouraged a private employer to engage in an activity that infringes on the rights of the private employees.⁷⁶ Employees in heavily regulated private industries may also attempt to use the coercive state action theory to gain access to the same constitutional rights that protect public sector employees. Note, however, that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment."⁷⁷

The government function theory of state action may apply in the drug-testing context, for instance, when a volunteer fire department institutes mandatory drug testing of its firefighters, because courts may find that fire protection is a traditional government function.⁷⁸ Additionally, private employees who can show that the government has encouraged private employers to establish compulsory drug-testing policies may establish a sufficient nexus of state action between the deprivation of employees' constitutional rights and the overt governmental encouragement of such a policy.⁷⁹ The drug-testing pol-

programs should also suffice. The state action nexus for an employee aggrieved by such a drug-testing policy on these facts is even clearer than in *Burton*.

74. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.* at 722.

75. See Bible, *supra* note 45, at 321-22.

76. *Development in the Law, supra* note 66, at 554-55.

77. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). In *Jackson*, the Supreme Court found that even extensive and detailed regulation, as in the case of most public utilities, does not by itself constitute state action. *Id.* at 350-51. The Court emphasized the fact that the inquiry should proceed on a case-by-case basis and that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351.

78. Municipal firefighters are a frequent target of mandatory drug testing. See, e.g., *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 876 (E.D. Tenn. 1986) (firefighters); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1511 (D.N.J. 1986) (firefighters and police department employees). The same safety considerations that led municipalities to begin drug testing of firefighters may lead private actors to test volunteer firefighters for drugs in the future.

79. Overt state encouragement of the deprivation of constitutional rights has been referred to as the coercion test. Spicer, *supra* note 66, at 13; see *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has

icy would then be brought within the ambit of the Constitution. For example, the report of the President's Commission on Organized Crime, which calls on government and private sector employers to consider mandatory drug testing, constitutes governmental encouragement of private employers to initiate compulsory drug-testing programs of the kind currently being challenged in the courts by private employees.⁸⁰ If enacted into law, the Commission's recommendation that the government withhold contracts from private entities that do not test their employees for drug use approaches the level of a governmental mandate for such companies to test. Such a relationship probably would not constitute a sufficient nexus to state action, however, unless the contours of the contractual relationship between a private entity and the government required drug testing.

In *Railway Labor Executives' Association v. Burnley*⁸¹ (*R.L.E.A.*), the United States Court of Appeals for the Ninth Circuit held that mandatory drug testing of employees of a private railroad pursuant to regulations promulgated by the Federal Railroad Administration was sufficient governmental action to bring the drug-testing program within the limits of the fourth amendment.⁸² Although the court did not identify the nexus theory it was applying, the court's analysis of the relationship between the government and the drug-testing program is most consistent with the entanglement theory. The court found that the government's role in promulgating the drug-testing scheme and in regulating its implementation was significant governmental involvement for purposes of the fourth amendment.⁸³ Considering the incidence of government regulation of industry, courts applying *R.L.E.A.* and the entanglement theory may find, in

exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." In *Beck v. Communications Workers of America*, 776 F.2d 1187 (4th Cir. 1985), *aff'd on rehearing en banc*, 800 F.2d 1280 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 2480 (1987), nonunion employees brought suit against the union in their shop, challenging the union's practice of expending part of agency fees for purposes unrelated to collective bargaining as a violation of their first amendment rights of free speech and association. The court found that state action existed because the powers of the collective bargaining representative were conferred by federal statute. *Id.* at 1209.

80. Private employees have challenged compulsory drug-testing programs under a variety of state constitutional provisions and common law tort theories. For a discussion of state constitutional challenges to compulsory drug-testing programs, see *infra* notes 649-63 and accompanying text. For a discussion of common law tort challenges to compulsory drug-testing programs, see *infra* notes 690-823 and accompanying text.

81. 839 F.2d 575 (9th Cir. 1988).

82. *Id.* at 582. The court stated that "the government's role in the railroad drug testing program has been a dominant one, sufficiently significant for fourth amendment purposes." *Id.*

83. *Id.* at 581.

many cases that drug testing of private employees is subject to constitutional limitations.

B. *The Fourth Amendment*

The fourth amendment's prohibition against unreasonable searches and seizures⁸⁴ is perhaps the most frequently invoked and most controversial ground for challenging drug testing of public employees, and as such has been termed "the privacy issue of the decade."⁸⁵ Determining whether drug testing of public employees constitutes an unreasonable search and seizure requires two inquiries: whether drug testing is a search, and if so, whether it is unreasonable. The lower courts have held without exception that drug testing is a search, but they have adopted two conflicting standards in determining the reasonableness of drug testing as a search under the fourth amendment. Some courts have held that an employer must have reasonable suspicion that a particular employee is drug-impaired before requiring that employee to undergo drug testing. Other courts consider that a government employer need not have individualized suspicion of drug use before testing employees who are responsible either for national security matters, or for the safety of others. Until the Supreme Court of the United States confronts the fourth amendment issue,⁸⁶ it remains unclear whether individualized suspicion is a prerequisite to drug testing of public employees, or whether courts may simply consider the totality of the circumstances in determining the reasonableness of drug testing as a search.

1. DRUG TESTING AS A SEARCH

The courts expressed doubts in early decisions as to whether requiring a public employee to provide a urine sample for analysis constituted a "search" within the meaning of the fourth amend-

84. The fourth amendment to the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

U.S. CONST. amend. IV.

85. Cox, *supra* note 11, at 3.

86. The Supreme Court will have the opportunity to provide a fourth amendment standard for drug testing of employees next term when it reviews *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

ment.⁸⁷ The Supreme Court has stated that the fundamental purpose of the fourth amendment is to protect the privacy and security of individuals against the state:⁸⁸

It is not the breaking of [a person's] . . . doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his infeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction or some public offense⁸⁹

Consistent with this approach, in *Katz v. United States*,⁹⁰ the Supreme Court articulated a two-part test to determine whether challenged action constitutes a search within the meaning of the fourth amendment. First, a person must actually have exhibited a subjective expectation of privacy.⁹¹ Second, that expectation of privacy must be one that society is prepared to recognize as reasonable.⁹² Although this formulation captured the privacy underpinnings of the fourth amendment, it is more descriptive than directive, and therefore did not provide much guidance in determining whether drug testing is a search.

The courts resolved the issue by analogizing urinalysis to the blood testing at issue in *Schmerber v. California*,⁹³ in which the Supreme Court held that extracting blood for alcohol testing constitutes a fourth amendment search.⁹⁴ *Schmerber* provides a striking parallel to the facts of drug-testing cases because it involved interference with bodily integrity, rather than with property interests. The *Schmerber* Court's emphasis on a blood test's physical intrusion within the body's surface⁹⁵ weakened the analogy, however, because "urine, unlike blood, is routinely discharged from the body so that no actual [physical] intrusion is required for its collection"⁹⁶ Nonetheless, the courts found two compelling reasons for concluding that the taking of a urine sample for drug testing constitutes a search. First, urine is "normally discharged and disposed of under circumstances that merit protection from arbitrary interfer-

87. See, e.g., *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266-67 (7th Cir.), cert. denied, 429 U.S. 1029 (1976).

88. See *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

89. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

90. 389 U.S. 347 (1967).

91. *Id.* at 361 (Harlan, J., concurring).

92. *Id.*

93. 384 U.S. 757 (1966).

94. *Id.* at 768.

95. *Id.* at 769.

96. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

ence”⁹⁷ Second, urine, like blood, is a bodily fluid that can be “analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came.”⁹⁸ Reasoning that every individual has a reasonable expectation of privacy in the personal information that bodily fluids contain, the courts have concluded that compulsory urinalysis testing of public employees constitutes a search within the meaning of the fourth amendment.⁹⁹

2. ASSESSING THE REASONABLENESS OF DRUG TESTING AS A SEARCH

The rule that compulsory urinalysis constitutes a search does not end the fourth amendment inquiry.¹⁰⁰ Rather, a search is invalid under the fourth amendment only if it is found to be unreasonable.¹⁰¹ Traditionally, for a search to be considered reasonable, it must have been carried out pursuant to a warrant “issued by a neutral and detached magistrate”¹⁰² upon a finding of probable cause.¹⁰³ Over time, however, the Supreme Court has articulated numerous exceptions to the traditional warrant and probable cause requirements in situations in which reasonable expectations of privacy are diminished,

97. *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 580 (9th Cir. 1988) (quoting *Capua*, 643 F. Supp. at 1513).

98. *Capua*, 643 F. Supp. at 1508.

99. *See, e.g.*, *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 580 (9th Cir. 1988); *Everett v. Napper*, 833 F.2d 1507, 1511 (11th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335, 338 (D.C. Cir. 1987); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560, 1566 (C.D. Cal. 1987); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 586 (N.D. Ohio 1987); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986); *Allen v. City of Marietta*, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984); *Smith v. City of East Point*, 183 Ga.App. 659, 660, 359 S.E.2d 692, 693-94 (1987), *rev'd on other grounds*, 365 S.E.2d 432 (Ga. 1988).

100. *New Jersey v. TLO*, 469 U.S. 325, 337 (1985) (A court's determination that a search occurred “only . . . begin[s] the inquiry into the standards governing such searches.”).

101. *O'Connor v. Ortega*, 107 S. Ct. 1492, 1499 (1987).

102. *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971); *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968). In determining whether sufficient grounds exist to support a warrant, a magistrate must consider the warrant's description of the particular premises to be searched, and of the items to be seized. *Berger v. New York*, 388 U.S. 41, 55 (1967); *see Stanford v. Texas*, 379 U.S. 476, 485-86 (1965). At a suppression hearing, if the individual shows that the search was conducted in violation of the fourth amendment, then evidence which was obtained as a result of the search will be inadmissible at trial. *See Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961).

103. *See, e.g.*, *United States v. Harris*, 403 U.S. 573, 577 (1971); *Spinelli v. United States*, 393 U.S. 410, 412 (1969); *Aguilar v. Texas*, 378 U.S. 108, 115 (1964).

or exigent circumstances exist.¹⁰⁴ In assessing the reasonableness of a particular search, courts weigh the degree to which the search violates an individual's reasonable expectation of privacy against the government's need to search.¹⁰⁵ In *Bell v. Wolfish*,¹⁰⁶ the Supreme Court explained that this balancing test considers both the purpose of the search, and whether the scope, place, and manner of the search are reasonably related to that purpose.¹⁰⁷

In *O'Connor v. Ortega*,¹⁰⁸ the Supreme Court determined that the warrant and probable cause requirements do not apply to a public employer who conducts an administrative search of an employee's

104. See, e.g., *New York v. Burger*, 107 S. Ct. 2636 (1987) (administrative search of closely regulated industry); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (border searches); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of school children's belongings); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (inventory search); *Donovan v. Dewey*, 452 U.S. 594 (1981) (administrative search of closely regulated industry); *United States v. Mendenhall*, 446 U.S. 544 (1980) (consent); *United States v. Biswell*, 406 U.S. 311 (1972) (regulatory inspection pursuant to statutory authority); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plain view); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (administrative search); *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit); *Carroll v. United States*, 267 U.S. 132 (1925) (automobile exception); *Weeks v. United States*, 232 U.S. 383 (1914) (search incident to arrest).

In cases in which government officials have conducted a warrantless search with probable cause, the Supreme Court has created various exceptions to the warrant requirement. See *New York v. Belton*, 453 U.S. 454, 462-63 (1981) (upholding validity of search of passenger compartment of automobile, including closed containers found in the car, because the search was made incident to a valid arrest of a person in or near the car). In addition, exigent circumstances may justify dispensing with the warrant requirement. These circumstances include preventing the imminent destruction of evidence, preventing harm to persons, and searching in hot pursuit for a suspect. See *United States v. Ross*, 456 U.S. 798, 800 (1982) (holding that police officers legitimately stopped an automobile because the officers had probable cause to believe that contraband was in the car); see also *Cupp v. Murphy*, 412 U.S. 291 (1973) (upholding seizure of flesh scrapings from fingernails of suspect to prevent destruction of evidence). The rule of hot pursuit allows police to enter and search a private place while they are immediately and continuously chasing a fleeing criminal. See *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967). A police officer can detain and frisk a suspicious person briefly if the officer has observed unusual conduct and has concluded, in light of his experience, that criminal activity may be underway. Under this limited search exception, the officer is entitled to conduct a limited search of the outer clothing of a dangerous person to discover weapons that might be used to assault the officer. See *Ybarra v. Illinois*, 444 U.S. 85, 95, 96 (1979) (suspicion must be individualized to conduct a limited search); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (requiring articulable suspicion that the suspect is armed and dangerous in order to conduct a limited search).

105. *Winston v. Lee*, 470 U.S. 753, 755 (1985).

106. 441 U.S. 520 (1979).

107. *Id.* at 559; see, e.g., *United States v. Ramsey*, 431 U.S. 606, 624 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975); *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Katz v. United States*, 389 U.S. 347, 357-59 (1967); *Schmerber v. California*, 384 U.S. 757, 771-72 (1966); see also *O'Connor v. Ortega*, 107 S. Ct. 1492, 1499 (1987) (acknowledging that each particular search has its own appropriate standard of reasonableness).

108. 107 S. Ct. 1492 (1987).

desk and files.¹⁰⁹ The Court reasoned that requiring employers to obtain a warrant before conducting a search for a noninvestigatory work-related matter, such as retrieving a file, would “seriously disrupt the routine conduct of business and would be unduly burdensome.”¹¹⁰ Similarly, for an “investigatory search for evidence of suspected work-related employee misfeasance,”¹¹¹ the Court found that a probable cause requirement would unduly undermine the employer’s interest in the “efficient and proper operation of the workplace.”¹¹² Therefore, the Court replaced the warrant and probable cause requirements with a standard of reasonableness under the circumstances, meaning that both the inception and scope of the intrusion must be reasonable under the *Bell* balancing test.¹¹³

Because the Court expressly declined to “address the proper Fourth Amendment analysis for drug and alcohol testing of employees,”¹¹⁴ it is unclear whether the *O’Connor* standard of reasonableness under the circumstances applies to drug testing of public employees. Two additional statements that the Court made in *O’Connor* further cloud the issue. First, the Court repeatedly noted that assessing the reasonableness of a search is a particularized fact-sensitive inquiry.¹¹⁵ Second, because the employer in *O’Connor* had “individualized suspicion” of work-related misconduct,¹¹⁶ the Court emphasized that it did not need to determine whether individualized suspicion is an “essential element of the standard of reasonableness.”¹¹⁷

a. The Individualized Suspicion Standard

Although individualized suspicion is not an “irreducible requirement” of the fourth amendment,¹¹⁸ the Supreme Court has stated that exceptions “are generally appropriate only where the privacy interests implicated by a search are minimal.”¹¹⁹ In addition, the Court has

109. *Id.* at 1503.

110. *Id.* at 1500.

111. *Id.* at 1501.

112. *Id.*

113. *Id.* at 1502-03. The Court stated that the inception of the search will ordinarily be justified if the employer has “reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct.” *Id.* at 1503.

114. *Id.* at 1504 n.**.

115. *See id.* at 1497, 1499, 1501, 1504; *see also id.* at 1506-07 n.2 (Blackmun, J., dissenting).

116. *Id.* at 1503.

117. *Id.*

118. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

119. *New Jersey v. TLO*, 469 U.S. 325, 342 n.8 (1985). Thus, in *United States v. Martinez-Fuerte*, the Court held that questioning occupants of a vehicle at a permanent border checkpoint did not constitute an invalid search even though the border agents had “no reason to believe” that the vehicle contained illegal aliens. 428 U.S. 543, 545 (1976). The Court

implied that when the government has a means of generating individualized suspicion, that requirement should not be discarded.¹²⁰ As such, even when employee drug use presents a danger to the public, or threatens national security, many courts have held that drug testing constitutes an unreasonable search and seizure in the absence of individualized suspicion.¹²¹ In *Railway Labor Executives' Association v. Burnley (R.L.E.A.)*, the Ninth Circuit invalidated Federal Railroad Administration regulations mandating drug testing of all members of a train crew involved in an accident or fatal incident, and authorizing railroads to require drug testing of employees who have violated railroad operating rules.¹²² Applying *O'Connor*, the court noted that the inception of a drug test is justified only if the employer has reasonable

weighed the government's interest in conducting the search without individualized suspicion against the fourth amendment interest of the individual. *Id.* at 554-64. The Court explained in a subsequent case that "[t]he crucial distinction was the lesser intrusion upon the motorist's Fourth Amendment interests . . ." *Delaware v. Prouse*, 440 U.S. 648, 656 (1979); *see also* *McMorris v. Alioto*, 767 F.2d 897 (9th Cir. 1985) (upholding metal detector and pat-down searches of attorneys entering a courthouse); *United States v. Davis*, 482 F.2d 893, 910-11 (9th Cir. 1973) (upholding metal detector searches of airline passengers before boarding).

120. *See* *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975) (refusing to discard individualized suspicion requirement for roving border check based in part on the fact that "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators.").

121. *See* *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560, 1566-67 (C.D. Cal. 1987) (bus drivers); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 586 (N.D. Ohio 1987) (police officers); *Taylor v. O'Grady*, 669 F. Supp. 1422, 1434-36 (N.D. Ill. 1987) (correctional employees); *Policemen's Benevolent Ass'n of N.J., Local 318 v. Township of Washington*, 672 F. Supp. 779 (D.N.J. 1987) (police officers); *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 733-36 (S.D. Ga. 1986) (federal police officers); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 881-83 (E.D. Tenn. 1986) (firefighters); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1516-17 (D.N.J. 1986) (police and firefighters); *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985) (high voltage electricity workers); *Bostic v. McClendon*, 650 F. Supp. 245, 249-50 (N.D. Ga. 1986) (city court clerk); *Penny v. Kennedy*, 648 F. Supp. 815, 817 (E.D. Tenn. 1986) (firefighters and police officers); *Patchogue-Medford Congress of Teachers v. Board of Educ.*, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 460, 510 N.E.2d 325, 330-31 (1987) (school teachers).

The Third and Eleventh Circuits have upheld drug testing of employees based on individualized suspicion, without deciding whether individualized suspicion is a necessary element of a constitutional search. *See* *Copeland v. Philadelphia Police Dep't*, 2 IER Cas. (BNA) 1825 (3d Cir. 1988) (police officers); *Everett v. Napper*, 833 F.2d 1507, 1511-12 (11th Cir. 1987) (firefighter). In *Everett*, the Eleventh Circuit implied that, in some cases, individualized suspicion might be unnecessary. The court noted:

Future development by case law will undoubtedly clarify what, if any, basis is needed to order a search depending upon such factors as: the nature of the work involved; the danger to others, including the public; any governmental interest, legitimate business concerns by employers and the totality of the surrounding circumstances including the intrusiveness and reliability of the tests or examinations under consideration.

Everett, 833 F.2d 1507, 1511 n.5.

122. 49 C.F.R. § 219.201, .301(b)(2)-(3) (1987).

grounds for suspecting that the drug test will reveal that the employee has possessed or used controlled substances on the job.¹²³ Because drug testing threatens serious privacy interests, the court interpreted "reasonable grounds for suspecting" to mean that an employer must have individualized suspicion before requiring an employee to submit to drug testing.¹²⁴ The court concluded that the regulations were invalid because "[a]ccidents, 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."¹²⁵

Although the *R.L.E.A.* court invalidated the regulations because the requirement of individualized suspicion was not met, it proceeded to assess the reasonableness of the search as conducted. The court found that the drug test was reasonably related in scope to the purpose of the test, because although drug tests cannot detect current drug intoxication and impairment, they may deter drug use on the job.¹²⁶ In addition, the court found that the tests were not overly intrusive in scope, or unreasonable in manner, because they were performed in medical facilities by medical personnel.¹²⁷

Some courts have validated drug testing programs that are premised on individualized suspicion without reviewing other circumstances surrounding the search. In *Division 241 Amalgamated v. Suscy*,¹²⁸ the Seventh Circuit upheld drug testing of bus drivers after serious accidents, because the court considered that these accidents provided the basis for reasonable suspicion of misconduct.¹²⁹ The Seventh Circuit's definition of individualized suspicion directly conflicts with that of the Ninth Circuit in *R.L.E.A.*, which interpreted individualized suspicion to mean that the employer must actually have observed signs of drug impairment in the conduct of the particular employee.

b. The Totality of the Circumstances Approach

Under the totality of the circumstances approach, a court will not invalidate all drug tests absent individualized suspicion, but rather will consider all factors relating to the reasonableness of the test. The Fifth Circuit employed this approach in upholding drug testing of

123. *RLEA*, 839 F.2d at 587.

124. *Id.*

125. *Id.*

126. *Id.* at 588-89.

127. *Id.* at 589.

128. 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

129. *Id.* at 1267.

Customs Service workers in *National Treasury Employees Union v. Von Raab*.¹³⁰ In *National Treasury Employees*, the Customs Service mandated drug testing of employees tentatively approved for transfer to positions that “directly involve the interdiction of illicit drugs, require the carrying of a firearm, or involve access to classified information.”¹³¹ The program applied to transfers to all levels of positions, including the level of clerical workers, if one of the requisite elements was present.¹³² The court’s holding that the program did not violate the fourth amendment was based on the following series of conclusions that the court made about the circumstances surrounding the search. The scope, manner, and place of the search were reasonable because the program was minimally intrusive.¹³³ The Customs Service had demonstrated a strong need for the search based on the dangerousness of the positions and the risk of compromise.¹³⁴ The test was for administrative rather than criminal purposes.¹³⁵ In addition, the program was, “to some extent, consensual,”¹³⁶ in that it applied only to individuals who “voluntarily” sought to transfer to specific types of positions, and an applicant could avoid the drug test by withdrawing his application without any negative consequences, apart from the loss of the transfer.¹³⁷ Moreover, the government could reasonably require consent to drug testing as a condition of transferring to sensitive positions.¹³⁸ The court found that less intrusive measures were not available, because background checks and observation of job performance before the transfer request would not provide sufficient evidence of drug use or tendency toward drug use.¹³⁹ Finally, the court concluded that the deterrent effects of drug testing made the search reasonably effective, even though employees received five days notice, and the test usually fails to detect drugs used more than five days before testing.¹⁴⁰

Because the drug-testing program at issue in *National Treasury Employees* was so narrowly tailored, it was not difficult for the court

130. 816 F.2d 170, 182 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

131. *Id.* at 173.

132. *Id.*

133. *Id.* at 177.

134. *Id.* at 178.

135. The court stated that the “need for protection against governmental intrusion diminishes if the investigation is neither designed to enforce criminal laws nor likely to be used to bring criminal charges against the person investigated.” *Id.* at 179.

136. *Id.* at 178.

137. *Id.*

138. *Id.*

139. *Id.* at 180.

140. *Id.*

to find that the search was reasonable as conducted, once it had decided as a threshold matter that individualized suspicion was not an essential element of the program.¹⁴¹ Although the court did not separately explain its reason for dispensing with the requirement of individualized suspicion, it emphasized the consent element of the program.¹⁴² It is true that if the subject of a search gives his consent,

141. *Id.* at 178-79; *see also* American Fed'n of Gov't Employees v. Dole, 670 F. Supp. 445 (D.D.C. 1987) (upholding random drug testing of employees in "sensitive positions" in the Department of Transportation). Other courts have not required that government employers have individualized suspicion before drug testing employees who are directly responsible for the safety of others. *See* McDonell v. Hunter, 809 F.2d 1302, 1310 (8th Cir. 1987) (upholding urinalysis testing of prison guards). The *McDonell* court held that a uniform test could be applied constitutionally absent individualized suspicion, because the guards had regular contact with prisoners in medium or maximum security prisons. *Id.* at 1308-09 (citing *Spence v. Farrier*, 807 F.2d 753, 755 (8th Cir. 1986) (upholding random drug testing of prisoners because prisoners have "a limited expectation of privacy" in their prison cells)). *McDonell* was a radical extension of *Spence* in that the testing program in *McDonell* applied to guards, not prisoners. In *Jones v. McKenzie*, the District of Columbia Circuit upheld drug testing of a school bus attendant without individualized suspicion because attendants' duties brought them into direct contact with young school children and made them responsible for their physical safety, and the testing was conducted as a part of a routine employment-related medical examination. 833 F.2d 335, 339-41 (D.C. Cir. 1987); *cf.* O'Halloran v. University of Washington, 679 F. Supp. 997 (W.D. Wash. 1988) (upholding drug testing of university student athletes absent individualized suspicion).

In *Donovan v. Dewey*, 452 U.S. 594 (1981), the Supreme Court articulated the regulated industry exception to the warrant and probable cause requirements. The Court held that a warrant may not be required constitutionally when Congress reasonably has determined that warrantless searches are necessary to further a regulatory scheme, and the very existence of the federal regulatory program has diminished the privacy expectations of those in the industry. In such cases, the government may undertake inspections of the premises occupied by regulated industries without any degree of individualized suspicion. Applying *Donovan*, the Third Circuit upheld random urinalysis testing of jockeys in *Shoemaker v. Handel*, 795 F.2d 1136, 1142-43 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986). The *Shoemaker* court balanced the legitimate governmental interests in maintaining the integrity of the racing industry against the jockeys' expectations of privacy. *Id.* at 1142. The court found that the jockeys had a diminished expectation of privacy given the heavy regulation of the industry, and held that the drug-testing program was reasonable even absent individualized suspicion. *Id.* at 1143; *see also* *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1524-25 (D. Neb. 1987) (relying on *Shoemaker* in upholding random drug testing of personnel who had unescorted access to "protected areas" of a nuclear power plant), *aff'd*, No. 87-1441 (8th Cir. Apr. 14, 1988).

Similarly, military personnel have a reduced expectation of privacy, and are subject to searches without individualized suspicion. *Committee for G.I. Rights v. Callaway*, 518 F.2d 466, 477 (D.C. Cir. 1975). "Such searches are appropriate and necessary, for 'no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.'" *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 737 n.10 (S.D. Ga. 1986) (citing *Chappell v. Wallace*, 426 U.S. 296, 300 (1983)).

142. *National Treasury Employees*, 816 F.2d at 178. Other courts in drug-testing cases have held that the government cannot require consent to an otherwise unreasonable search as a condition of continued employment. *See* *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 589 (9th Cir. 1988) ("[W]hen a search has been determined to be constitutionally unreasonable, the consent feature cannot save it."); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987) ("[A] search otherwise unreasonable cannot

the warrant and probable cause requirements do not apply.¹⁴³ In one sense, the Customs employees in *National Treasury Employees* consented to the search in that they voluntarily placed themselves in a circumstance in which they knew the government would conduct a search. But the Customs workers consented to the search only because the government required consent to drug testing as a condition of the transfer. The validity of the employees' consent therefore hinges on whether the government was entitled to require consent as a condition of employment in this case.

Citizens do not give up all of their constitutional rights when they enter into an employment relationship with the government.¹⁴⁴ Yet the government can place reasonable conditions on public employment.¹⁴⁵ In determining whether the condition is reasonable, courts weigh the employee's interest in retaining the right, against the state's interest in conditioning employment on relinquishment of the right.¹⁴⁶ The court in *National Treasury Employees* found that the government could reasonably require consent to drug testing as a condition of transfer, because "[i]t is not unreasonable to set traps to keep foxes from entering hen houses even in the absence of evidence of prior vulpine intrusion or individualized suspicion that a particular fox has an appetite for chickens."¹⁴⁷ Of course, the inherent flaw in the court's metaphor is that although foxes commonly have an appetite for chickens, it cannot be said that Customs workers commonly have an appetite for drugs. Indeed, the drug tests at issue in *National Treasury Employees* did not detect drug use by *any* Customs worker,

be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment."); *Policemen's Benevolent Ass'n of N.J., Local 318 v. Township of Washington*, 672 F. Supp. 779, 789 (D.N.J. 1987) (A public employer cannot require consent to an unreasonable search as a condition of continued employment.); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 593-94 (N.D. Ohio 1987) (same); *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 736-37 (S.D. Ga. 1986) (consent was coerced rather than voluntary, because of the threat of termination); *Bostic v. McClendon*, 650 F. Supp. 245, 249 (N.D. Ga. 1986) (same).

143. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

144. *Kelley v. Johnson*, 425 U.S. 238, 245 (1976); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

145. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (a teacher may not constitutionally be compelled to relinquish right of free speech); *cf. Wyman v. James*, 400 U.S. 309 (1971) (the government may require recipients of welfare benefits to give up fourth amendment right to deny "home visits").

146. *See Pickering*, 391 U.S. at 568. In *Pickering*, the Supreme Court held that the state could not constitutionally compel a teacher to relinquish his right to speak on issues of public importance. *Id.* at 574. The court noted that a different result might be warranted for positions in which the state's need for confidentiality is great. *Id.* at 570 n.3.

147. *National Treasury Employees*, 816 F.2d at 179.

and even the Commissioner described the Customs Service as "largely drug free."¹⁴⁸

It is important to separate Customs' need for a drug-free workforce from Customs' choice of drug testing as a means toward this end. Customs has a legitimate interest in minimizing the risk that drug users will be placed in sensitive positions, but this does not necessarily legitimate a requirement of drug testing as a means of furthering that interest. Mandatory drug testing does not merely require transfer applicants to refrain from drug use; it also requires them to relinquish their fourth amendment interests in privacy and personal security. The Fifth Circuit concluded that reasonable alternatives to drug testing were not available because background investigations and observation on the job before transfer were not sufficiently informative. Other commentators have suggested that training supervisors to detect signs of drug impairment may actually be more effective than drug testing.¹⁴⁹ The federal government has recognized the viability of this alternative by authorizing railroads to drug test based on "specific, personal observations that the [trained] supervisory employee can articulate concerning the appearance, behavior, speech or body odors of the employee."¹⁵⁰ Ultimately, the reader's conclusion about the integrity of the holding in *National Treasury Employees* will rest on a judgment as to whether drug testing is an acceptable and necessary means of ensuring that employees in sensitive positions are not drug-impaired.

3. COMMENT

R.L.E.A. and *National Treasury Employees* are inconsistent because they applied different standards under the fourth amendment to determine the reasonableness of drug testing of government employees in sensitive positions. In *R.L.E.A.*, drug testing was a condition of continued employment, but in *National Treasury Employees*, drug testing was a condition of transfer. At first, this distinction appears to be a critical one in determining whether a government employer may require consent to drug testing as a condition of employment. It is not difficult for a court to find that applicants for sensitive positions have consented to drug testing as a condition of employment or transfer. Employees who submit to drug testing as a condition of continuing their employment, however, have not acted voluntarily if disciplinary action is the only alternative. For appli-

148. *Id.* at 173.

149. See Daily Lab. Rep. (BNA) No. 1, at A-3 (Jan. 2, 1987).

150. 49 C.F.R. § 219.301(c)(2) (1987).

cants, the validity of consent depends on whether the government employer was reasonable in requiring drug testing as a condition of employment. Of course, this final step only brings the analysis full circle, back to the questions of whether the drug test was reasonable in its inception, and as conducted. Thus, *R.L.E.A.* and *Von Raab* are irreconcilable, because they are divided as to whether individualized suspicion is an essential element of employee drug testing under the fourth amendment. As *National Treasury Employees* illustrates, a well tailored drug-testing program is likely to survive judicial scrutiny absent a requirement of individualized suspicion.

C. *The Fifth Amendment*

The fifth amendment to the Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."¹⁵¹ Despite the plain language of the amendment, the privilege is not confined to criminal cases, but may be invoked in any circumstance in which a government official seeks to compel a person to testify in a manner that might tend to subject that person to criminal responsibility in a subsequent prosecution.¹⁵² In *California v. Byers*,¹⁵³ the Supreme Court of the United States established that the person asserting the privilege must show "substantial hazards of self-incrimination" from the compelled disclosure.¹⁵⁴ This requirement has proved to be a significant hurdle for plaintiffs in drug testing cases. In *Burka v. New York City Transit Authority*,¹⁵⁵ the United States District Court for the Southern District of New York found that the fifth amendment was not applicable to drug testing of transportation workers, because the plaintiffs failed to allege that the results of the drug tests would be used in a criminal investigation.¹⁵⁶ Similarly, in *Amalgamated Transit Union v. Sunline Transit Agency*,¹⁵⁷ the United States District Court for the Central District of California considered another fifth amendment challenge to drug testing of transportation workers, and concluded that "a penalty for compel[ling] disclosure short of criminal sanction . . . does not implicate

151. U.S. CONST. amend. V. Although the fifth amendment applies only to the federal government, the privilege against self-incrimination may be asserted against the states because it is incorporated into the due process clause of the fourteenth amendment. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

152. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924).

153. 402 U.S. 424 (1971).

154. *Id.* at 429.

155. 2 IER Cas. (BNA) 1625 (S.D.N.Y. 1988).

156. *Id.* at 1641-42.

157. 663 F. Supp. 1560 (C.D. Cal. 1987).

the Self-Incrimination Clause."¹⁵⁸ In *National Treasury Employees Union v. Von Raab*,¹⁵⁹ the Fifth Circuit upheld a requirement that employees fill out forms detailing their use of medication as well as any legitimate contact with illicit drugs, because the fifth amendment prohibits compelled disclosure of incriminating information, and "not information that is merely private."¹⁶⁰ The court reasoned that in most cases the forms would not elicit incriminating information,¹⁶¹ but it reserved decision on whether an individual employee could invoke the privilege to refuse to fill out the forms.¹⁶²

A second barrier to a successful fifth amendment challenge in drug-testing cases is the distinction that the Supreme Court has made between testimonial and physical evidence.¹⁶³ The Court has reasoned that because the privilege against self-incrimination is testimonial in nature, it does not extend to physical evidence.¹⁶⁴ As such, the fifth amendment "is a prohibition of the use of physical or moral compulsion to extort communications from [the accused], not an exclusion of his body as evidence when it may be material."¹⁶⁵ Because of this distinction between physical and testimonial evidence, public employees have not succeeded in persuading the courts that testing urine for the presence of drugs violates the privilege against self-incrimination.¹⁶⁶

In *Schmerber v. California*,¹⁶⁷ the Supreme Court considered whether police officers who directed a physician to take a blood sample from a driver for alcohol testing violated the driver's privilege

158. *Id.* at 1571.

159. 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

160. *Id.* at 181.

161. *Id.*

162. *Id.*; *see also* *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1528 (D. Neb. 1987) (requiring employee to list medications taken did not violate the privilege against self-incrimination because no criminal sanction would result), *aff'd*, No. 87-1441 (8th Cir. Apr. 14, 1988).

163. *See* *Schmerber v. California*, 384 U.S. 757, 763-65 (1966).

164. *See, e.g., id.* at 764; (blood tests); *United States v. Dionisio*, 410 U.S. 1, 5-7 (1973) (voice exemplars); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (handwriting analysis); *United States v. Wade*, 388 U.S. 218, 221-23 (1967) (lineup identifications).

165. *Holt v. United States*, 218 U.S. 245, 252-53 (1910) (Holmes, J.).

166. *See* *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 181 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988); *Walters v. Secretary of Defense*, 725 F.2d 107, 108 n.1 (D.C. Cir. 1983); *Amalgamated Transit Union Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560, 1570-71 (C.D. Cal. 1987); *United States v. Nesmith*, 121 F. Supp. 758, 762 (D.D.C. 1954); *City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1324 (Fla. 5th DCA 1985); *Hampson v. Satran*, 319 N.W.2d 796, 800 (N.D. 1982); *City of Wahpeton v. Johnson*, 303 N.W.2d 565, 566 (N.D. 1981); *City of Wahpeton v. Skoog*, 300 N.W.2d 243, 244-45 (N.D. 1980).

167. 384 U.S. 757 (1966).

against self-incrimination.¹⁶⁸ The Court held that the result of the alcohol test was not testimonial evidence because it did not relate to some communicative act or writing of the accused.¹⁶⁹ Thus, the fact that the state had compelled the petitioner to submit to the blood test and that incriminating evidence resulted was not sufficient to support the petitioner's claim of a fifth amendment violation.¹⁷⁰ Because of the similarities between blood and urine testing, most courts have applied *Schmerber* to find that drug testing of urine does not violate public employees' privilege against self-incrimination.¹⁷¹ These courts have concluded that chemical analysis of urine samples, like blood samples, results in evidence of physiological rather than communicative facts.¹⁷² For example, in *National Treasury Employees Union v. Von Raab*,¹⁷³ the Fifth Circuit rejected a fifth amendment challenge to drug testing of Customs' workers, stating that urine samples merely reveal physical characteristics, rather than any knowledge the person tested might possess.¹⁷⁴

Schmerber may not dispose of the testimonial evidence issue in all drug testing cases, however, because the Court alluded to two possible limitations of its holding. First, in some circumstances, compelling a suspect to furnish physical evidence might produce testimonial byproducts.¹⁷⁵ For example, the Court stated that a person who was opposed to blood tests on religious grounds, or was terrified of the pain of the needle's intrusion, might make an incriminating statement or even choose to confess to the charge rather than submit.¹⁷⁶ The Court hypothesized, without resolving the question, that the fifth amendment might prohibit the government from relying on these testimonial byproducts.¹⁷⁷ Second, the Court implied that the privilege against self-incrimination may prohibit the government from using a mere refusal to submit to testing as evidence of alcohol intoxication.¹⁷⁸ Applying this reasoning to the drug-testing context, a court may find that the government may not rely on confessions or other

168. *Id.* at 760-61.

169. *Id.* at 765. The Court acknowledged that the line between testimonial and physical evidence is not always clear. "Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial." *Id.* at 764.

170. *Id.* at 764-65.

171. *See supra* note 166 (collecting cases).

172. *Id.*; *see Bible, supra* note 45, at 340-41.

173. 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

174. *Id.* at 181.

175. *Schmerber*, 384 U.S. 757, 765 n.9 (1966).

176. *Id.*

177. *Id.*

178. *Id.*

statements of employees that are byproducts of compulsory drug testing, and that the government cannot treat an employee's statement of refusal to submit to drug testing as itself evidence of drug use. Yet, in *Burka v. New York City Transit Authority*,¹⁷⁹ the United States District Court for the Southern District of New York held that a government employer could treat a refusal to submit to drug testing as an admission of drug use, because this refusal did not constitute testimonial evidence.¹⁸⁰ Although *Burka* appears to be inconsistent with the Supreme Court's discussion in *Schmerber* on this point, it may be explained by the fact that the employer in *Burka* did not rely on any statement or testimony of the employee, but rather on his action in refusing to submit to a drug test.

The requirement of proving criminal consequences, and the dichotomy between testimonial and physical evidence have insulated public employers from fifth amendment challenges to drug testing. At best, the fifth amendment may provide public employees with protection against an employer's adverse use of any testimonial byproducts of drug testing.

D. *The Penumbra Right of Privacy*

Public employees have challenged drug-testing programs under the constitutional right of privacy because most drug-testing programs reveal personal physiological information.¹⁸¹ Although the Constitution "does not explicitly mention any right of privacy,"¹⁸² it does extend protection to two types of privacy interests: The individual interest in autonomy in making certain important decisions, and the individual "interest in avoiding disclosure of personal matters."¹⁸³ The privacy interest associated with important decisionmaking exists in fundamental liberties that are "implicit in the concept of ordered liberty"¹⁸⁴ and "deeply rooted in this Nation's history and tradition."¹⁸⁵ To date, the Supreme Court has recognized a right of privacy in "matters relating to marriage, procreation, contraception,

179. 2 IER Cas. (BNA) 1625 (S.D.N.Y. 1988).

180. *Id.*

181. *See, e.g.*, *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175-76 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988). Similarly, blood tests may disclose whether an employee has venereal disease or schizophrenia. *See Chapman, supra* note 29, at 57, 58.

182. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

183. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

184. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2844 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

185. *Id.* at 2844 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

family relationships, and child rearing and education.”¹⁸⁶ Similarly, the privacy interest in limiting public disclosure of personal matters has been construed to apply to intimate facts of a personal nature such as patient prescription information¹⁸⁷ and employee medical information.¹⁸⁸

A public employee alleging that drug testing violated the fundamental right of privacy must show that the employer has invaded a fundamental liberty.¹⁸⁹ A public employee who sues under the theory of privacy interest in personal matters must show that the drug test disclosed personal physiological information other than the presence of illicit drug traces in the employee’s system.

1. THE FUNDAMENTAL RIGHT OF PRIVACY

The Supreme Court first recognized the fundamental right of privacy theory in *Griswold v. Connecticut*.¹⁹⁰ In *Griswold*, the Court held that a Connecticut statute forbidding the use of contraceptives violated the fundamental right of privacy of married persons.¹⁹¹ The Court found that certain amendments to the Constitution established penumbral “zone[s] of privacy,”¹⁹² which create a right of privacy in citizens to be free from government action that invades the “area of protected freedoms.”¹⁹³ The Court stated that because the marriage relationship was “intimate to the degree of being sacred,”¹⁹⁴ it fell within a protected zone of privacy as a fundamental liberty.¹⁹⁵ The Court concluded that the statute violated this fundamental liberty¹⁹⁶ because it sought to achieve its purpose of preventing extramarital

186. *Paul v. Davis*, 424 U.S. 693, 713 (1976).

187. *Whalen*, 429 U.S. at 593.

188. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

189. See *infra* notes 190-218 and accompanying text.

190. 381 U.S. 479 (1965).

191. *Id.* at 484-86.

192. *Id.* at 485.

193. *Id.*

194. *Id.* at 486.

195. *Id.* at 484-86. Justice Goldberg, concurring, emphasized the importance of the ninth amendment. *Id.* at 487. The ninth amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. Justice Goldberg stressed that the purpose of the ninth amendment was to indicate that the first eight amendments do not provide an exhaustive list of the individual rights protected under the Constitution. 381 U.S. at 490 (Goldberg, J., concurring). Justice Harlan, concurring, did not state a theory of fundamental liberties, but reasoned that the due process clause of the fourteenth amendment protects the marital relationship as one of the “basic values ‘implicit in the concept of ordered liberty.’” *Id.* at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

196. 381 U.S. at 485-86.

relations¹⁹⁷ by unnecessarily invading the privacy interests of married couples.¹⁹⁸

Relying on *Griswold*,¹⁹⁹ the Court held in *Roe v. Wade*²⁰⁰ that the fundamental right of privacy includes the right of a woman to terminate her pregnancy.²⁰¹ In *Roe*, the Court struck down as unconstitutional a Texas criminal abortion statute that excepted from criminality only a lifesaving procedure on behalf of the mother.²⁰² The Court reasoned that the concept of liberty in the fourteenth amendment and the reservation of rights to the people in the ninth amendment were "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."²⁰³ In reaching its decision, the Court applied a two-step analysis that considers, first, the privacy interests of the mother,²⁰⁴ and second, whether the state has a sufficiently compelling interest to invade the privacy interest at issue.²⁰⁵

In analyzing the mother's privacy interest in her decision to terminate her pregnancy, the Court in *Roe* found that the risk of harm to the mother from a complicated pregnancy, the mother's inability to care for a child born out of wedlock, and the physical and psychological distress that accompanies an unwanted pregnancy²⁰⁶ were sufficient reasons to establish a woman's interest in terminating her pregnancy as a fundamental liberty.²⁰⁷ In the second part of the analysis, the Court stated that this right is not absolute,²⁰⁸ because the state has an interest in protecting both the mother's health and the

197. *Id.* at 498 (Goldberg, J., concurring).

198. *Id.* at 485-86.

199. *Roe v. Wade*, 410 U.S. 113, 152 (1973). The Court remarked that in the past it had recognized that certain amendments protect privacy interests that are not expressly contained in the language of the amendments. *Id.*; see, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564-68 (1969) (the first amendment includes the right to possess obscene matter in one's home); *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (the fourth amendment limits stop and frisk action by police); *Katz v. United States*, 389 U.S. 347, 358-59 (1967) (the fourth amendment protects against electronic eavesdropping); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (the fourteenth amendment includes the right to teach a foreign language in school).

200. 410 U.S. 113 (1973).

201. *Id.* at 153.

202. *Id.* at 164.

203. *Id.* at 153.

204. *Id.* at 153-54. The *Griswold* Court engaged in the same type of analysis to determine whether a privacy interest rises to the level of a fundamental liberty. *Griswold*, 381 U.S. at 484-86.

205. *Roe*, 410 U.S. at 162-64.

206. *Id.* at 153.

207. *Id.*

208. *Id.*

potential for human life.²⁰⁹ At some point, the state's interest becomes "compelling" and can intrude upon the privacy interest of the mother in her decision to undergo an abortion.²¹⁰ This state interest, however, "must be narrowly drawn to express only the legitimate state interests at stake."²¹¹ The Court found that the point at which the state's interest becomes compelling is at the end of the first trimester, as the woman approaches term.²¹² The Court held that the statute was unconstitutional because it unnecessarily invaded an area of fundamental liberty, the mother's decision to terminate her pregnancy, by prohibiting abortion in the first trimester of pregnancy.²¹³

Because courts have limited the scope of fundamental liberties to family matters, a court is unlikely to find that the use of illicit drugs, even in the privacy of the home, constitutes a fundamental liberty. As such, it is doubtful that the fundamental right of privacy would provide a successful ground for challenging drug testing per se. In limited circumstances, however, a court may find that drug testing impermissibly infringes on a fundamental liberty when it reveals personal physiological information beyond the presence of illicit drugs.²¹⁴ As the Fifth Circuit noted in *National Treasury Employees Union v. Von Raab*:²¹⁵

Urine testing may disclose not only the presence of drug traces but much additional personal information about an employee—whether the employee is under treatment for depression or epilepsy, suffering from diabetes, or, in the case of a female, pregnant. Even tests limited to the detection of controlled substances will reveal the use of medications prescribed for relief of pain or other medical symptoms.²¹⁶

In the right of privacy context, drug tests that reveal information about pregnancy may interfere with a woman's decision to terminate her pregnancy. A woman who risks losing her job because of pregnancy may challenge drug testing on the ground that it impermissibly influences her to terminate the pregnancy. Moreover, if the woman is married, drug testing may violate the fundamental right of privacy surrounding the marital relationship,²¹⁷ in that the employer's knowledge of a woman's pregnancy may interfere with the married couple's

209. *Id.* at 162.

210. *Id.* at 162-63.

211. *Id.* at 155.

212. *Id.* at 162-63.

213. *Id.* at 164.

214. See *supra* notes 190-206 and accompanying text.

215. 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

216. *Id.* at 175-76.

217. See *Griswold*, 381 U.S. at 484-86.

decision of whether to have children.²¹⁸

2. THE RIGHT OF PRIVACY IN PERSONAL MATTERS

A drug test that reveals personal physiological information may also violate the right of privacy protecting against the disclosure of personal information. In *Whalen v. Roe*,²¹⁹ the Supreme Court considered the privacy implications of a New York statute requiring the collection of patient information.²²⁰ The statute required physicians to disclose a patient's name, address, age, and prescribed drug and dosage when prescribing certain classes of dangerous, but legitimate, drugs.²²¹ The purpose of the statute was to prevent stolen prescriptions, and to prevent doctors from improperly prescribing or over-prescribing dangerous drugs.²²² The state used safeguards that minimized the risk of subsequent public disclosure of patient information, thereby reducing the intrusion into the patient's privacy interest in the personal information.²²³ The Court held that this reduced risk of subsequent public disclosure, together with the state's interest in preventing the distribution of dangerous drugs, outweighed the patient's privacy interest in the personal information at issue.²²⁴

Similarly, in *United States v. Westinghouse Electric Corpora-*

218. The Court has recognized "that the decision of whether to undergo or forego an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious." *Planned Parenthood v. Danforth*, 428 U.S. 52, 70 (1976). In *Planned Parenthood* the Court further acknowledged the husband's interest in the issue by stating: "We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." *Id.* at 69. For a general discussion of the right of privacy, see *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986).

219. 429 U.S. 589 (1977).

220. *Id.* at 589, 590.

221. *Id.* at 593. The statute also required that the physician provide his name and the name of the dispensing pharmacy. *Id.* The dangerous but legitimate drugs to be recorded included opium and opium derivatives, cocaine, methadone, amphetamines, and methaqualone. "These drugs have accepted uses in the amelioration of pain and in the treatment of certain diseases such as epilepsy, narcolepsy, hyperkinesia, schizo-affective disorders, and migraine headaches." *Id.* at 593 n.8.

222. *Id.* at 592. The statute also sought to prevent drug users from obtaining more than one prescription. *Id.*

223. *Id.* at 594.

The receiving room is surrounded by a locked wire fence and protected by an alarm system. The computer tapes containing the prescription data are kept in a locked cabinet. When the tapes are used, the computer is run "off-line," which means that no terminal outside of the computer room can read or record any information.

Id.

224. *Id.* at 598.

tion,²²⁵ the Third Circuit balanced the state's interest in occupational health and safety against the employees' right of privacy in personal information contained in medical records.²²⁶ In *Westinghouse*, the National Institute for Occupational Safety and Health (NIOSH) subpoenaed employee medical records from Westinghouse to conduct a health hazard investigation in the Westinghouse plant.²²⁷ The court employed a balancing test to determine whether the intrusion into the employees' privacy interests was necessary.²²⁸ The court considered the following factors:

[T]he type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.²²⁹

In applying this test, the court emphasized that "information concerning one's body has a special character,"²³⁰ because it contains information about one's body and state of health that is not ordinarily made public.²³¹ Additionally, employee medical records usually contain far more personal information than the prescription records at issue in *Whalen*.²³² Although the court in *Westinghouse* conceded that the information revealed by x-rays, blood tests, pulmonary tests, and hearing and visual tests was private, it was not persuaded that the information could be "regarded as sensitive."²³³ Moreover, NIOSH provided certain security measures that were intended to minimize the risk of subsequent public disclosure of the information,²³⁴ thereby

225. 638 F.2d 570 (3d Cir. 1980).

226. *Id.* at 580.

227. *Id.* at 573.

228. *Id.* at 580.

229. *Id.* at 578.

230. *Id.* at 577.

231. *Id.*

232. *Id.*

233. *Id.* at 579.

234. The Court stated:

The excerpted data which is retained by NIOSH is maintained in locked cabinets, inside the Medical Section of the agency, in rooms locked during non-office hours. Material from small studies is not placed on computers NIOSH has represented that no outside contractors are used for small studies, such as the one in issue here, and when such contractors are used, they are bound to nondisclosure by their contract with NIOSH

Id. at 580.

reducing the intrusion into the privacy interest.²³⁵ Again, as in *Whalen*, the reduced risk of subsequent public disclosure, together with the public's interest in facilitating research to enhance occupational safety, outweighed the employee's privacy interests.²³⁶ For these reasons, the court ordered the release of the employee medical records to the agency.²³⁷

The factors considered in the *Whalen* and *Westinghouse* balancing test can be subsumed into three categories: The type of information revealed, the risk of subsequent public disclosure, and the state's reason for requesting access.²³⁸ This balancing test can be applied to determine the degree to which drug testing may intrude upon the privacy interests of employees.

Under the balancing test, a court would first consider the type of information revealed.²³⁹ The *Westinghouse* court held that employees have a privacy interest in the information contained in their medical records.²⁴⁰ Similarly, employees have a privacy interest in personal information contained in urine samples, beyond the presence of illicit drugs.²⁴¹ A drug test may reveal information that is not already contained in an employee's medical records. This information may not be posted in medical records because it relates to a new medical condition, or it may be of such a personal nature that the employee has not even informed his physician about it.²⁴² In this regard, drug testing may be more intrusive than the mere inspection of an employee's medical records.

The second factor in the balancing test is the risk of subsequent disclosure.²⁴³ The attendant safeguards associated with drug-testing

235. *Id.* at 579-80.

236. *Id.* at 578-80.

237. *Id.* at 580. The Court recognized that certain medical records may contain sensitive personal information unrelated to employment. *Id.* As such, it required NIOSH to notify employees that an inspection of their medical records was planned, in order to allow the employees to raise privacy claims to protect their interests in the sensitive information. *Id.* at 581.

238. The *Westinghouse* balancing test subsumes the balancing test of *Whalen*. *Whalen* balanced the state's public policy interest against the patient's privacy interest, and then applied the safeguard factor as the decisive element in the test. See *Whalen*, 429 U.S. at 598.

239. See *supra* note 238.

240. *Westinghouse*, 638 F.2d at 577.

241. *Von Raab*, 816 F.2d at 175.

242. Medical records may not reveal information on pregnancy or self-medication. These work-related medical records also may not reveal whether an employee is using marijuana for medical purposes, such as alleviating eye pressure from glaucoma or controlling vomiting from chemotherapy. Gampel, *Marijuana and Health Update*, 1 DRUG L. REP. 46, 47-48 (1983); see *supra* notes 225-40 and accompanying text. In addition, researchers have detected the AIDS virus in urine samples. Wall St. J., Apr. 11, 1988, at 16, col. 2.

243. See *supra* note 238.

programs vary, and therefore, so does the risk of subsequent disclosure of personal information.²⁴⁴ Tests that focus on identifying specific illicit drugs eliminate the possibility of subsequent public disclosure of personal information.²⁴⁵ Yet most drug tests are not so narrowly tailored, and all tests are subject to chain-of-custody errors.²⁴⁶

The third factor is the state's interest in gaining access to the information requested.²⁴⁷ The purpose of drug testing is to identify drug-impaired employees and deter illicit drug use by employees.²⁴⁸ Employers do not use drug tests to prevent the distribution of dangerous drugs²⁴⁹ or to address public health concerns.²⁵⁰ A strong public policy in favor of drug testing may be reflected by President Reagan's Executive order mandating a drug-free federal workplace and authorizing drug testing toward this end.²⁵¹ Yet at least seven states have enacted statutes that limit the right of public employers to drug test.²⁵²

Even if an articulated public policy in favor of drug testing exists, some drug-testing programs may violate the right of privacy in personal matters because of inadequate safeguards minimizing the risk of subsequent public disclosure of the information.²⁵³ Under the *Whalen* and *Westinghouse* balancing test, the employee's right of privacy in the personal information revealed by drug testing may outweigh the employer's need to test if the government employer lacks a

244. See *supra* notes 41-64.

245. *Id.*

246. *Id.*

247. See *supra* note 238.

248. Because drug tests cannot measure levels of intoxication, test results do not identify drug-impaired workers, but only those who have used illicit drugs. See *supra* notes 41-44 and accompanying text. Nonetheless, employers institute drug testing programs in order to identify employees who use drugs, and to deter illicit drug use by employees.

249. See *Whalen*, 429 U.S. at 589, 592. One authority, however, has related an instance of an employer discharging a union employee who was convicted of selling drugs, because "the return of the grievant to the work force could do serious damage to the new and needed [employee assistance] program." T. DENENBERG & R. DENENBERG, *ALCOHOL AND DRUGS: ISSUES IN THE WORKPLACE* 32 (1983) (citing *Joy Mfg. Co.*, 68 Lab. Arb. (BNA) 697 (1977) (Freeman, Arb.)).

250. See *Westinghouse*, 638 F.2d at 570, 579-82; see also *Rasmussen v. South Florida Blood Serv.*, 500 So. 2d 533 (Fla. 1987). In *Rasmussen*, an AIDS victim requested the names and addresses of blood donors in an attempt to identify the specific blood unit that transmitted the disease. *Id.* at 534. The Supreme Court of Florida held that the privacy interests of blood donors outweighed the interest of the AIDS victim in discovering this information. *Id.* at 538.

251. Exec. Order No. 12,564, 3 C.F.R. 224 (1987), reprinted in 5 U.S.C.A. § 7301 app. at 133-135 (West Supp. I 1987).

252. See *supra* notes 667-68 and accompanying text.

253. See *supra* notes 219-51 and accompanying text.

strong state interest and sufficient safeguards to minimize the risk of disclosure.

3. COMMENT

An allegation that drug testing violates the fundamental right of privacy would probably fail in most cases because it is difficult to link drug testing to a fundamental liberty.²⁵⁴ The right of privacy protecting against the disclosure of personal information may, however, provide a viable ground for challenging drug testing in some cases.²⁵⁵ As *Whalen* and *Westinghouse* illustrate,²⁵⁶ the determinative factor in the balancing of interests is likely to be the presence or absence of safeguards²⁵⁷ that minimize the risk of subsequent public disclosure of the personal information revealed.

E. *Due Process*

Mandatory drug testing of government employees implicates the constitutionally guaranteed protections of substantive and procedural due process. The due process rights of federal employees stem from the fifth amendment,²⁵⁸ and the due process rights of state and local government employees are derived from the fourteenth amendment.²⁵⁹ Both the fifth and fourteenth amendments to the Constitu-

254. The courts have been reluctant to expand the list of fundamental rights. *See, e.g., Bowers v. Hardwick*, 106 S. Ct. 2841, 2846, 2847 (1986) (refusing to expand the concept of fundamental rights to include consensual adult homosexual sodomy).

255. *See supra* notes 216-53 and accompanying text. The courts have not distinguished properly between the two privacy interests in drug testing cases. In *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, for example, the court appeared to merge the analysis of the fundamental right of privacy with the right of privacy in personal information. 663 F. Supp. 1560, 1571 (C.D. Cal. 1987). The plaintiff argued that the employer's disclosure of off-duty conduct that was unrelated to employment violated his right of privacy. *Id.* The court rejected this argument because the plaintiff failed to link the privacy invasion to a fundamental liberty. *Id.* at 1572. In *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, 591-92 (9th Cir. 1988), the Ninth Circuit held that a cause of action based on a violation of the right of privacy would not accrue until a breach of confidentiality actually had occurred. *Cf. Pepe, Employee Privacy Issues Involved in AIDS and Polygraph Testing in the Workplace*, in *LABOR LAW DEVELOPMENTS* 8-20 (1987) (public disclosure is a necessary element of a cause of action for invasion of privacy based on public disclosure of private facts).

256. *See supra* notes 219-53 and accompanying text.

257. For example, the scientific and technical guidelines for federal drug-testing programs of the Department of Health and Human Services mandate some form of protection for employee records. The guidelines state: "The contract and the Privacy Act System shall have specific provisions requiring that employee records are maintained and used with the highest regard for employee safety." 52 Fed. Reg. 30,638, 30,643 (1987).

258. The fifth amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V.

259. The due process language of the fourteenth amendment is substantially the same as that of the fifth amendment, but it is directed towards the states: "[N]or shall any State

tion explicitly prohibit the government from depriving persons of "life, liberty, or property without due process of law."²⁶⁰ The concepts of procedural and substantive due process are closely related.²⁶¹ Procedural due process acts as an institutional check on arbitrary governmental action by imposing procedural limitations on the government's power to deprive citizens of protected interests.²⁶² Substantive due process prohibits governmental officials from depriving individuals of protected interests through arbitrary and capricious governmental action.²⁶³

1. PROCEDURAL DUE PROCESS

Courts considering an employee's claim of denial of procedural due process apply a bifurcated test. The court must first determine whether a property or liberty interest is at stake.²⁶⁴ If a protected interest is found, the court must determine the process due when a government employer seeks to deprive an employee of that interest.²⁶⁵

Procedural due process is required only when the government seeks to deprive a person of a protected interest.²⁶⁶ When state law

deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV § 1.

260. See *supra* notes 258-59. Violations of substantive and procedural due process are actionable as civil rights violations under 42 U.S.C. § 1983. See *Bibbo v. Mulhern*, 621 F. Supp. 1018, 1023 (D. Mass. 1985); see also *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (Public officials are liable under section 1983 for deprivation of rights only if the plaintiff has been deprived of a constitutional right.). Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983 (1982).

261. Although procedural and substantive due process are closely related, they are distinct causes of action. In procedural due process claims, courts focus on "the adequacy of alternative state remedies. In substantive due process claims, courts focus on the nature of the injury." *Bibbo*, 621 F. Supp. at 1023 n.3.

262. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 667 (1988). "[D]ue process is such process as may be required to minimize 'substantially unfair or mistaken deprivations' of the entitlements conferred by law upon private individuals or groups." *Id.* (quoting *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972)).

263. *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1525 (D. Neb. 1987), *aff'd*, No. 97-1441 (8th Cir. Apr. 14, 1988).

264. The Supreme Court has distinguished between the task of identifying interests protected by the Constitution and assessing the process that is due. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 571-78 (1972) (analyzing the nature of the interest at stake prior to analyzing the due process requirements that may apply).

265. *Id.* at 576.

266. Due process protection does not extend to every interest that an individual may possess. "The requirements of procedural due process apply only to the deprivation of

creates an expectation of tenure in one's job, the constitutional guarantee of due process governs the manner in which tenure can be ended.²⁶⁷ Tenured government employees, therefore, possess a property interest in their jobs, and the Constitution protects this interest by requiring the government to provide procedural due process of law in case of deprivation. Employees testing positive for drug use are subject to a variety of employer actions that may impinge on this protected property interest in employment, ranging from mandatory enrollment in employee assistance programs to immediate termination.

a. Drug Testing and Protected Property Interests

Public employees who work in such areas as police and fire protection,²⁶⁸ public utilities,²⁶⁹ and public school transportation²⁷⁰ have

interests encompassed by the Fourteenth Amendment's protection of liberty and property. But the range of interests protected by procedural due process is not infinite." *Id.* at 569-70.

The Supreme Court's analysis of property interests worthy of due process protection has varied in recent years. Under the positivist view, protectable interests are only those that are independently based in substantive legal relationships found in federal or state law. *See, e.g.,* *Arnett v. Kennedy*, 416 U.S. 134, 152 (1974) ("[An] employee's statutorily defined right is [such] a guarantee against removal without cause . . . as enforced by the procedures which Congress has designated for the determination of cause."); *see also* *Bishop v. Wood*, 426 U.S. 341, 344 (1976) ("[T]he sufficiency of [a] claim of entitlement must be decided by reference to state law."). In *Bishop*, a police officer claimed that he had either an express or an implied right to continued employment based on the negative implication of a city ordinance prescribing dismissal for substandard work. *Id.* at 344-47. In rejecting this argument, the Court held that in the absence of a statute or ordinance conferring a liberty or property interest in continued public employment, no procedural protections were required under the due process clause. *Id.* at 350.

Under the constitutional test of procedural due process, the range of interests entitled to protection as property or liberty has been interpreted more expansively than under the positivist view. *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 260-63 (1969) (the statutory entitlement to welfare benefits is protected by procedural due process); *see also* *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972) (reliance on employment policy creating protected interest). In *Perry*, the state had employed a teacher for ten years under a series of one-year contracts. *Id.* at 594. No formal tenure system existed, and the state decided not to renew the teacher's contract after he became involved in a public controversy with the Board of Regents. *Id.* at 594-95. The Court stated: "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . ." *Id.* at 601. The Court held that the teacher had an entitlement in continued employment based on the policies and practices of the institution. *Id.* at 602-03.

267. *See* *Mazo, Yellow Rows of Test Tubes: Due Process Constraints on Discharges of Public Employees Based on Drug Urinalysis Testing*, 135 U. PA. L. REV. 1623, 1637 n.98 (1987) (citing *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Board of Regents v. Roth*, 408 U.S. 564 (1972)).

268. *See* *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 876 (E.D. Tenn. 1986) (firefighters); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1511 (D.N.J. 1986) (firefighters and police department employees).

challenged certain aspects²⁷¹ of mandatory drug-testing programs on procedural due process grounds. In analyzing these claims, courts have found protected property interests in public employment arising both from positive state law and from implied understandings between the government and the public employee. In *Capua v. City of Plainfield*,²⁷² a federal district court in New Jersey found that city firefighters possessed a cognizable property interest in public employment that their government employer could not abrogate without providing due process of law.²⁷³ In so finding, the court noted that under the New Jersey civil employment statute, public employees possessed a reasonable expectation of continued employment "unless and until just cause [was] established for their termination."²⁷⁴ The standard of just cause for dismissal thus created a protected property interest in public employment requiring procedural due process of law before the government could deprive the firefighters of that interest.²⁷⁵

In *Allen v. City of Marietta*,²⁷⁶ a federal district court in Georgia decided that employees who had been discharged after mandatory drug testing possessed a protected property interest in their jobs as

269. See *Allen v. City of Marietta*, 601 F. Supp. 482, 484 (N.D. Ga. 1985) (electric utility workers).

270. See *Jones v. McKenzie*, 628 F. Supp. 1500, 1503 (D.D.C. 1986), *rev'd and vacated in part on other grounds*, 833 F.2d 335 (D.C. Cir. 1987) (school bus attendant). In *Jones*, the allegations of drug use stemmed from one, unconfirmed positive EMIT drug test. *Id.* at 1503.

271. Although procedural due process challenges cannot eliminate mandatory drug testing of public employees, strict adherence to the requirements of procedural due process can help to control the discretion that governmental entities exercise when implementing drug-testing programs.

272. 643 F. Supp. 1507 (D.N.J. 1986).

273. *Id.* at 1520.

274. *Id.* at 1520 (quoting the "just cause" requirement for suspension, removal, fine, or reduction of rank in the New Jersey statute. N.J. STAT. ANN. § 40A:14-19 (West 1980)).

275. Similarly, in *Lovvorn v. City of Chattanooga*, a federal district court in Tennessee found that firefighters had a property right in their jobs which activated the constitutional requirement of due process of law. 647 F. Supp. 875, 883 (E.D. Tenn. 1986) (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972)). In *Roth*, the Court found a protectable property interest, and stated that these interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" *Roth*, 408 U.S. at 577.

The potential for adverse personnel action in connection with mandatory drug testing of public employees, which can deprive employees of a protected property interest, is analogous to the situation presented by mandatory polygraph examinations of public workers. The protection of procedural due process has been found to apply to polygraph examinations of public employees. In *Hester v. City of Milledgeville*, city firefighters and police officers were required to submit to polygraph examinations because of suspected drug use. 598 F. Supp. 1456, 1458-59 (M.D. Ga. 1984), *rev'd in part on other grounds*, 777 F.2d 1492 (11th Cir. 1985). The court found that the public employees had a property right in their jobs that was protected by the due process clause. *Id.* at 1472-73.

276. 601 F. Supp. 482 (N.D. Ga. 1985).

public utility workers.²⁷⁷ The court predicated its finding on an examination of the meaning behind the municipal rules regarding safety that were given to every employee, and concluded that these employees could only be dismissed for good cause.²⁷⁸ The court reasoned that the good cause requirement created a protectable property interest in employment for public utility workers.²⁷⁹ Similarly, in *Jones v. McKenzie*,²⁸⁰ a school bus attendant working under temporary employment status was terminated from her job on the basis of one, unconfirmed EMIT test that revealed signs of marijuana use.²⁸¹ Her employer, the District of Columbia school system, unsuccessfully argued that it had not intended to create a property interest in employment for temporary personnel.²⁸² Nonetheless, the employment rules prohibited "arbitrary or capricious" adverse action by the employer.²⁸³ The court equated the arbitrary or capricious standard with a for cause requirement for dismissal, which conferred temporary employees with a protected property interest requiring due process of law.²⁸⁴

b. Drug Testing and Protected Liberty Interests

Mandatory drug testing of public employees also raises procedural due process issues when a constitutionally protected liberty interest is found. The Supreme Court examined the concept of a constitutionally protected liberty interest in reputation in *Paul v. Davis*.²⁸⁵ In *Paul*, a newspaper reporter sued the chiefs of police in Louisville and Jefferson County, Kentucky, for representing to local merchants that he was a shoplifter.²⁸⁶ The reporter claimed that this representation caused injury to his reputation, thereby infringing upon his interests under the fourteenth amendment.²⁸⁷ The Court held that reputation alone did not rise to the level of a liberty interest within the meaning of the due process clause, but that it must be coupled with a

277. *Id.* at 494.

278. *Id.* at 492.

279. *Id.*

280. 628 F. Supp. 1500 (D.D.C. 1986), *rev'd and vacated in part on other grounds*, 833 F.2d 335 (D.C. Cir. 1987).

281. *Id.* at 1503.

282. *Id.* at 1504-05.

283. Although the temporary employee was classified under "Wages As Earned," the Board of Education's employment rules did not distinguish between employees in this category and full-time employees. *Id.*

284. *Id.*

285. 424 U.S. 693 (1976).

286. *Id.* at 694-96. The chiefs of police had distributed the newspaper reporter's name and photograph to local merchants, describing him as a shoplifter. *Id.*

287. *Id.* at 697.

more substantial interest such as employment.²⁸⁸ The Court reasoned that any harm to reputation was not sufficient to change the individual's status under state law; it could not be equated with loss of a specific job.²⁸⁹ In drug-testing cases, however, this holding is limited by the rule that public employees possess a liberty interest in their ability to secure future employment.²⁹⁰ This liberty interest is implicated when a termination is based on allegations of drug use, and may therefore support an action for denial of procedural due process when public employees are discharged in conjunction with mandatory drug testing.²⁹¹ Courts have found the constitutionally protected interest in liberty applicable to the drug-testing context. In both *Capua v. Plainfield* and *Lovvorn v. City of Chattanooga*, the courts identified liberty interests in reputation that could not be denied without due process of law.²⁹² Thus, for public employees who lack protectable property interests, a liberty interest in reputation may provide an alternative predicate for procedural due process protection in drug testing cases.

288. *Id.* at 708-12.

289. In order for the court to find that a liberty interest entitled to due process safeguards exists, a plaintiff must connect the injury of defamation with the state's alteration or extinguishment of a right previously protected by state law. *Id.* *Paul* requires that a person claiming violation of a liberty interest show defamation plus loss of status such as a specific job. *Id.*

290. Comment, *Discharge of Employees Within the State Personnel System: The Due Process Requirements for the Deprivation of Property and Liberty*, 20 WAKE FOREST L. REV. 413, 413 (1984).

291. See *Mazo*, *supra* note 267, at 1648. In *Doe v. Department of Justice*, an employee who had been discharged for allegedly unprofessional and dishonest conduct successfully claimed that she had been deprived of liberty without due process of law because the charges stigmatized her and effectively precluded her from future government employment. 753 F.2d 1092, 1096-1104 (D.C. Cir. 1985). A liberty interest requiring procedural due process protection may also be implicated when an employee is forced to choose between termination and enrollment in an employee assistance program (EAP) as a condition of continued employment. *Mazo*, *supra* note 267, at 1649-50.

292. See *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 876 (E.D. Tenn. 1986) (firefighters); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1511 (D.N.J. 1986) (firefighters and police officers). In *Hester v. City of Milledgeville*, a district court found a protectable liberty interest for a police officer and a firefighter who had been subjected to a polygraph examination to determine whether they had used and distributed illegal drugs. 598 F. Supp. 1456, 1472-73 (M.D. Ga. 1984), *rev'd in part on other grounds*, 777 F.2d 1492 (11th Cir. 1985). The court reasoned:

Disciplining or discharging any plaintiff employee in whole or in part on account of a polygraph examiner's opinion of deceptiveness, or on account of a refusal to submit to a polygraph examination, will impose a stigma or other disability on the disciplined employee that will affect his current employment with defendants, and possibly foreclose his ability to take advantage of other, prospective employment opportunities.

Id. at 1473.

c. Mandatory Drug Testing: Determining What Process Is Due

Once a court finds that an individual possesses a protectable property or liberty interest, it must determine whether the governmental action that effected a deprivation of that interest was consistent with the requisites of procedural due process.

i. The Constitutional Requirements

The governing principle of procedural due process is that notice and opportunity to respond must be given "at a meaningful time and in a meaningful manner."²⁹³ The Constitution generally governs the type and extent of procedures that must accompany the deprivation of a protected interest.²⁹⁴ In *Mathews v. Eldridge*,²⁹⁵ the Supreme Court formulated a balancing test that relies on constitutional principles in determining the procedures governing the deprivation of a protected interest.²⁹⁶ The constitutional analysis considers three interests:

293. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

294. The Supreme Court has, in the past, considered the positivist approach to procedural due process. Analysis of the positivist approach to determining what process is due provides a more exacting perspective of the constitutional approach to procedural due process. In *Arnett v. Kennedy*, the Supreme Court considered the process due a federal civil servant who was deprived of a property right in employment. 416 U.S. 134 (1974) (plurality opinion). In *Arnett*, a federal civil servant in the Office of Economic Opportunity was dismissed for allegedly making false and defamatory statements about his supervisor. The federal regulation governing dismissal provided for a full evidentiary post-termination hearing. See 5 C.F.R. § 752.202 (1973). The opportunity for a pretermination hearing was limited in scope to an informal proceeding. *Arnett*, 416 U.S. at 142-46. In his plurality opinion, Justice Rehnquist stated that the statute creating the protected interest also defined the extent of the process due. According to Justice Rehnquist, the protection to be accorded a liberty or property interest flowed from the positive law that initially created the protected interest, rather than from the Constitution. "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet." *Id.* at 153-54. In other words, the right provided was the right as limited by the grantor of the right.

Six Justices refused to accept Justice Rehnquist's due process analysis, finding instead that the Constitution, rather than state law, determines the process due by balancing the competing interests of the government and the individual. *Id.* at 167 (Powell & Blackmun, JJ., concurring); *id.* at 177-86 (White, J., concurring); *id.* at 209-11 (Marshall, Douglas & Brennan, JJ., dissenting). The Justices reasoned that the right to procedural due process "is conferred, not by legislative grace, but by constitutional guarantee." *Id.* at 167 (Powell & Blackmun, JJ., concurring). Chief Justice Burger and Justice Stewart joined Justice Rehnquist's plurality opinion. Six Justices agreed with the result that a pretermination hearing was not required in order to remove a nonprobationary employee from the federal civil service because post-termination hearing procedures adequately protected the liberty interests of the federal employees in avoiding wrongful stigma from administrative charges. *Id.* at 156-58 (Rehnquist, Burger & Stewart, JJ.) (plurality opinion); *id.* at 167-71 (Powell & Blackmun, JJ., concurring); *id.* at 186-96 (White, J., concurring).

295. 424 U.S. 319 (1976).

296. *Id.* at 334-35. In *Mathews*, a person whose social security disability benefits had been terminated challenged the constitutionality of the administrative procedures employed in

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁹⁷

In *Cleveland Board of Education v. Loudermill*,²⁹⁸ the Court reaffirmed the *Mathews* balancing test and defined the procedures due to discharged government employees.²⁹⁹ The procedures required under *Loudermill* are applicable when a government employer wishes to terminate an employee who has tested positive for drug use. In *Loudermill*, the Court stated obliquely that " 'something less than a full evidentiary hearing is sufficient prior to adverse administrative action.' "³⁰⁰ At a minimum, however, prior to termination, government employees must be given oral or written notice of the charges against them, an explanation of the employer's evidence, and an opportunity to present their position in person or in writing.³⁰¹

ii. Applying Procedural Due Process to Drug Testing

Mandatory drug testing of public employees implicates all three of the interests identified in the *Mathews* balancing test of procedural due process. The purpose of the *Mathews* test is to provide holders of protected interests with significant procedural protection. Assessing the interests of individual public employees requires an inquiry into the harshness of the consequences that follow from deprivation of the protected interest. For employees subjected to mandatory drug testing, these consequences may include mandatory enrollment in rehabilitation programs, suspension, termination, and limited ability to procure future employment.³⁰² The governmental interests to be con-

determining whether a continuing disability existed. The Court held that the termination of social security disability benefits without a prior evidentiary hearing did not violate procedural due process. *Id.* at 340-41.

297. *Id.* at 335. The *Mathews* balancing test is the standard judicial means for determining the requirements of procedural due process for the deprivation of a life, liberty, or property interest. Comment, *supra* note 290, at 429.

298. 470 U.S. 532 (1985).

299. *Id.* at 542-48.

300. *Id.* at 545 (quoting *Mathews*, 424 U.S. at 343).

301. *Id.* at 545-46. In balancing the competing interests, the *Loudermill* Court found that the employee had a significant interest in retaining employment, and providing the employee with notice and an opportunity to be heard could reduce the risk of erroneous action, but that the governmental interest in immediately terminating employees outweighed the interests of the individual. *Id.* at 543-45.

302. Mazo, *supra* note 267, at 1648-50.

sidered in determining the process due an employee discharged for alleged drug use are the speedy removal of drug-impaired employees and the cost of the proceedings. The interest in speedy removal is based on the government's concern as an employer in protecting the safety, efficiency, and security of the workplace from the threat of compromise by drug-impaired workers.³⁰³

Analysis of the risk of erroneous deprivation of property or liberty interests within mandatory drug testing centers on the accuracy and reliability of the drug testing methods and procedures.³⁰⁴ The court must therefore determine whether use of additional or alternative procedures would have yielded greater accuracy, and thereby reduced the risk of erroneous deprivation. One of the most widely used drug testing techniques, the EMIT, has encountered criticism for its tendency to yield false positive results of drug use.³⁰⁵ Given the harsh consequences of falsely labeling a public employee an illicit drug user, it has been argued that personnel actions based on urinalysis results should require a higher standard of proof than the EMIT can offer.³⁰⁶ This criticism can be met by confirming positive EMIT results with the GC/MS test, which is more accurate than the EMIT.³⁰⁷ The GC/MS test is, however, more expensive to administer, which diminishes its desirability to employers.³⁰⁸

In drug-testing cases, the courts have relied on *Loudermill*³⁰⁹ to determine the extent of procedures necessary to comport with due process and to determine whether procedures are required before or

303. *Id.* at 1641; see also Comment, *supra* note 290, at 433 (noting that the governmental interest in minimizing administrative costs has a limited weight in the due process balancing test); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (discounting the weight of the government's interest in low administrative expenses).

304. At least one court has held that a single, positive drug test using the EMIT is reliable enough to justify disciplining prison inmates. See *Spence v. Farrier*, 807 F.2d 753, 756 (8th Cir. 1986); cf. *Peranzo v. Coughlin*, 608 F. Supp. 1504 (S.D.N.Y. 1986) (double EMIT testing of prison inmates held sufficient to satisfy due process). The court in *Peranzo* applied the *Mathews* balancing test, stating:

[T]he risk that double EMIT testing will result in erroneous deprivations of inmates' liberty interests has not been shown to be so significant that additional testing procedures can be required at this stage of the proceedings as a matter of due process, regardless of the incremental benefits that additional procedures might yield or the burdens which such procedures may impose.

Peranzo, 608 F. Supp. at 1514.

305. See *supra* notes 45-54 and accompanying text.

306. *Mazo*, *supra* note 267, at 1645-46.

307. See *supra* note 55 and accompanying text.

308. See *supra* note 58 and accompanying text.

309. 470 U.S. 532 (1985).

after termination of the interests.³¹⁰ In *Capua v. Plainfield*,³¹¹ the lack of procedural safeguards contributed to a finding that mandatory drug testing denied firemen due process of law.³¹² The court found no evidence of any "regulation promulgated establishing the basis for such testing and prescribing appropriate standards and procedures for collecting, testing, and utilizing the information derived."³¹³ In addition, requiring the firemen to submit to drug testing under threat of immediate discharge was found to be a flagrant violation of due process rights.³¹⁴ Relying on *Loudermill*, the court in *Lovvorn v. City of Chattanooga*³¹⁵ upheld a drug-testing program because of the procedural framework for review of drug-testing results and the administration of discipline.³¹⁶ This framework included pretermination hearings and extensive post-termination hearings.³¹⁷ Further, state law created a right to appeal the result of the post-termination hearing in state court.³¹⁸ Similarly, in *Jones v. McKenzie*, the United States District Court for the District of Columbia relied on *Loudermill* to find that a school bus attendant who failed a drug test and was discharged without benefit of a pretermination hearing had not been provided procedural due process of law.³¹⁹ The court did recognize, however, that the governmental interest in the safety of school children might justify temporary reassignment or even suspension pending confirmation of a positive EMIT test and a hearing.³²⁰

310. See, e.g., *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 883 (E.D. Tenn. 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1521 (D.N.J. 1986).

311. 643 F. Supp. 1507 (D.N.J. 1986).

312. *Capua*, 643 F. Supp. at 1521. In *Capua*, the employees were not given advance notice of the plan to test them for drugs, and they did not have the opportunity to seek legal advice prior to testing. The governmental authority conducting the drug tests also failed to protect the confidentiality interests of the firefighter. *Id.*

313. *Id.* at 1512.

314. *Id.* at 1521.

315. 647 F. Supp. 875 (E.D. Tenn. 1986).

316. *Id.* at 883.

317. *Id.*

318. *Id.*; see *Bostic v. McClendon*, 650 F. Supp. 245, 248 (N.D. Ga. 1986). In *Bostic*, a federal district court in Georgia found that a former municipal court clerk and police officers who were discharged after testing positive for marijuana use had not been denied due process. *Id.* at 251. The public employees had continued to receive full pay pending an appellate hearing, and also had been given the opportunity to appear before the Personnel Board of Appeals before their employment was terminated. *Id.*

319. 628 F. Supp. 1500, 1507 (D.D.C. 1986), *rev'd and vacated in part on other grounds*, 833 F.2d 335 (D.C. Cir. 1987).

320. *Id.* An employer temporarily may reassign or suspend an employee who is suspected of drug use if a hearing is held promptly. *Id.* If a confirmatory test indicates that the initial test yielded a false positive result, the employee is entitled to fair compensation for losses attributable to the reassignment or suspension. *Id.* In *Allen v. City of Marietta*, however, the court found that utility workers who had not been given notice and an opportunity to be heard prior to their termination had not been deprived of procedural due process, because they had

At a minimum, public employees testing positive for drug use are entitled to a pretermination hearing in order to hear the charges against them and to present their arguments.³²¹ One commentator has proposed expanding the boundaries of the pretermination hearing to include the elements of a full evidentiary hearing.³²² This expansion would give the employee an opportunity to impeach the accuracy of test results.³²³ Because the risk of erroneous deprivations based on drug testing can be substantial, the expansion of the pretermination hearing could also serve the governmental interest in cost-effectiveness by identifying inaccurate test results at an early stage of the administrative process.

2. SUBSTANTIVE DUE PROCESS

Substantive due process is required only when the government seeks to deprive the plaintiff of a protected interest.³²⁴ When a governmental entity subjects its employees to mandatory drug testing, deprivation of individual property interests in employment may occur through disciplinary procedures. An individual who is deprived of a liberty or property interest as a result of arbitrary and capricious governmental actions may claim denial of the right to substantive due process.³²⁵

always been subject to immediate dismissal for certain kinds of conduct which threatened the health or safety of other employees or the general public. 601 F. Supp. 482, 493-94 (N.D. Ga. 1985); *cf.* *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987) (holding that suspension of a firefighter without pay prior to the benefit of a hearing violates procedural due process).

321. In *Loudermill*, the statute provided an opportunity for a full post-termination hearing with the attributes of a trial. This statutory provision was a strong factor in the Court's finding that notice and an opportunity to be heard prior to adverse administrative action were sufficient procedural safeguards. *See Loudermill*, 470 U.S. at 545-46; *see also* *Copeland v. Philadelphia Police Dep't*, 2 IER Cas. (BNA) 1825 (3d Cir. 1988) (holding that oral notice, followed by written notice only after dismissal, did not violate procedural due process).

322. Although a full evidentiary hearing prior to termination is not constitutionally required, the employee should be given the opportunity to present evidence, given the inherent unreliability of some testing methods, and the strong individual interests of subject employees. *Mazo*, *supra* note 267, at 1651.

323. Testing of a new specimen would not be sufficient to rebut the results of the original positive test result for drug use. In order for the employee to have the opportunity to impeach the accuracy of test results, original positive specimens should be uniformly preserved for retesting. Employees also should have the opportunity to produce evidence that they lack the character traits that typically accompany a drug problem, such as inefficient work habits, a tendency toward excessive absenteeism, and a tendency to create safety violations. *Id.* at 1649, 1651.

324. *Bibbo v. Mulhern*, 621 F. Supp. 1018, 1023 (D. Mass. 1985). For a discussion of the constitutionally protected property and liberty interests possessed by governmental employees, see *supra* notes 268-92 and accompanying text.

325. *See* L. TRIBE, *supra* note 262, at 566. As early as 1885, in *Barbier v. Connolly*, the Supreme Court warned that the due process clause of the fourteenth amendment prevented arbitrary deprivations of common law liberty. 113 U.S. 27, 31 (1885); *see also* *Rushton v.*

a. Arbitrary and Capricious Governmental Action

The constitutional protection of substantive due process shields individuals from arbitrary and capricious governmental action.³²⁶ Courts have refined the arbitrary and capricious standard within the context of adverse personnel actions.³²⁷ For the challenged action to survive scrutiny, a direct nexus must exist between the articulated grounds for adverse action and some legitimate interest of the government employer, such as ensuring that government employees are able to accomplish their duties satisfactorily.³²⁸ Absent this nexus, "the adverse action must be condemned as arbitrary and capricious for want of a discernible rational basis."³²⁹

Although the categories of legitimate governmental interests are not discrete, in deciding claims that drug testing violates substantive due process, courts have found that government employers possess legitimate interests in job performance,³³⁰ safety,³³¹ and security.³³² The legitimate governmental interest in job performance can serve "to minimize unjustified governmental intrusions into the private activities of federal employees."³³³ The nature of the employee's position and the conduct justifying the action are important factors in determining whether adverse governmental personnel actions are rational.³³⁴ An employer's safety and security needs typically preclude a successful claim based on allegations of arbitrary and capricious conduct.³³⁵ In *Everett v. Napper*,³³⁶ a federal district court in

Nebraska Pub. Power Dist., 653 F. Supp. 1510, 1525 (D. Neb. 1987) ("Substantive due process provides a shield against arbitrary and capricious deprivations of liberty" within the drug-testing context.), *aff'd*, No. 87-1441 (8th Cir. Apr. 14, 1988).

326. See L. TRIBE, *supra* note 262, at 566.

327. See, e.g., *Doe v. Hampton*, 566 F.2d 265, 272 (D.C. Cir. 1977).

328. *Id.* at 272 n.20.

329. *Id.* at 272.

330. *Id.* In *Doe v. Hampton*, the court rejected the plaintiff's claim based on a finding that the governmental interest in the job performance of a clerk/typist was sufficiently related to the employee's mental condition. *Id.* at 268-76. Mental examinations of the employee specifically had found that she was not fit for duty. *Id.*

331. See *Borsari v. FAA*, 699 F.2d 106, 110-11 (2d Cir.) (termination of air traffic controller convicted for sale and possession of illegal drugs), *cert. denied*, 464 U.S. 833 (1983).

332. See *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 178 (5th Cir. 1987) (Hill, J., dissenting), *cert. granted*, 108 S. Ct. 1072 (1988) ("Use of controlled substances by employees of the Customs Service may seriously frustrate the agency's efforts to enforce the drug laws," and "employees involved in field operations . . . endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use.").

333. *Doe v. Hampton*, 566 F.2d 265, 272 n.20 (D.C. Cir. 1977).

334. *Id.*

335. An employer generally will take adverse action against employees who either refuse to submit to drug testing or who test positive for drug use.

336. 632 F. Supp. 1481 (N.D. Ga. 1986), *rev'd in part on other grounds*, 833 F.2d 1507 (11th Cir. 1987).

Georgia held that the actions of the Bureau of Fire Services in suspending and ultimately terminating a city firefighter who refused to submit to mandatory drug testing did not constitute arbitrary and capricious governmental conduct.³³⁷ The Service was found to have a strong interest in protecting the public safety by ensuring that its employees were fit to perform their jobs as firefighters.³³⁸ Given the legitimate governmental interest in fire safety, suspected drug use by a fireman was a sufficiently rational justification for requiring him to submit to urinalysis.³³⁹

When a government employer lacks an interest in safety or security, substantive due process claims that focus on the interest in job performance in the context of mandatory drug testing may yield some success.³⁴⁰ Unlike alcohol tests, drug tests do not measure intoxication or impairment levels of employees testing positive for drug use,³⁴¹ and therefore they cannot relate the presence of drugs to employees' job performance.³⁴² As such, adverse personnel action following positive drug test results is based solely on the presence of drugs traces, rather than on any relationship to job performance. Moreover, it is difficult to prove that even the threat of drug testing will improve job performance by reducing drug use. In the absence of a nexus between the means of drug testing and the end of acceptable job performance, the governmental action may be condemned as arbitrary and capricious, thereby supporting a substantive due process claim.³⁴³

337. *Id.* at 1485-86.

338. *Id.* at 1485.

339. *Id.*

340. Courts generally have been quite sensitive to the governmental interests in safety and security. Adverse personnel action taken to preserve these interests ordinarily defeats a substantive due process claim regardless of job performance. *See, e.g., Borsari v. FAA*, 699 F.2d 106 (2d Cir. 1983) (finding dismissal of an air traffic controller reasonable based on possession and sale of marijuana and cocaine notwithstanding outstanding ratings for job performance), *cert. denied*, 464 U.S. 833 (1983).

341. Courts have validated drug testing of employees in sensitive positions even without evidence of job impairment. *See Borsari*, 699 F.2d at 110-11.

342. It is instructive to compare this situation with the events in *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977). In *Hampton*, the court found the employee to be mentally incompetent, and unable to perform her assigned duties prior to discharge. *Id.* at 268-69. Conversely, a positive drug test under current methods cannot be considered a specific finding of job impairment. *See supra* notes 42-65 and accompanying text.

343. *Cf. Borsari*, 699 F.2d at 110-11 (air traffic controller's conviction for drug sale and possession was incompatible with successful air traffic control). In *Borsari*, the Second Circuit held that the Civil Service Reform Act of 1978, which prohibits employment discrimination that is based on conduct not adversely affecting job performance, was not designed to alter the "efficiency of the service" standard for removal of employees. *Id.* at 111-12.

b. Substantive Due Process and the Reliability of Drug Testing

Employers who decide to implement mandatory drug testing can choose from several types of drug-testing techniques. Drug-testing techniques vary in their reliability and accuracy.³⁴⁴ If a drug test or program is so unreliable as to constitute arbitrary and capricious conduct, then the employer has violated substantive due process. Determining whether the employer's drug testing method is sufficiently accurate depends on a balancing of the statistical probability of accurate results and the strength of the individual interest at stake. Drug-testing programs that are found to be unreliable when measured against the strength of the individual interest at stake may constitute another form of arbitrary and capricious governmental action in violation of substantive due process.³⁴⁵

There are several ways for a plaintiff to prove that a drug-testing program is unreliable. The testing technique itself may be inherently unreliable because it tends to yield false positive results of drug use.³⁴⁶ The employer may use inadequate chain-of-custody procedures for collecting and handling samples or inadequately maintain quality control over independent drug testing laboratories. Substantive due process, however, does not require exactitude in drug testing.³⁴⁷ In *National Treasury Employees Union v. Von Raab*,³⁴⁸ the Fifth Circuit held that confirmation of EMIT drug tests of Customs Service employees using the GC/MS technique was "not so unreliable as to violate due process of law" even though some false positive test results might have occurred.³⁴⁹ The court based its conclusion that Cus-

344. The major criticism associated with the EMIT test concerns its propensity to yield false positive results. *See supra* notes 45-54. The GC/MS test is the most accurate of the tests used to confirm EMIT results. *See supra* note 55.

345. For a discussion of the reduced level of reliability required for drug testing of prison inmates, see *supra* notes 304-08 and accompanying text. For a discussion of substantive due process protection from arbitrary and capricious governmental action, see *supra* notes 324-43 and accompanying text.

346. The unreliability of a particular drug testing technique can be mitigated by confirming results with a more accurate test. Mazo, *supra* note 267, at 1645.

347. *See Spence v. Farrier*, 807 F.2d 753, 756 (8th Cir. 1986) ("The requirements of due process are flexible and depend on a balancing of interests affected by the relevant government action.").

348. 816 F.2d 170, 182 (5th Cir. 1987) (Hill, J., dissenting), *cert. granted*, 108 S. Ct. 1072 (1988).

349. *Id.* at 181-82. The requirements of due process vary with the relative weight of the interests. Lower accuracy rates are tolerated when prison inmates are the subjects of the governmental drug testing because their liberty interests are diminished. *Peranzo v. Coughlin*, 608 F. Supp. 1504, 1508 (S.D.N.Y. 1985). The use of the EMIT, followed by confirmation using a second EMIT test, is not so unreliable as to violate substantive due process of law when used as evidence of narcotics use at inmate disciplinary proceedings. *Spence v. Farrier*, 807 F.2d 753, 756 (8th Cir. 1986); *Peranzo*, 608 F. Supp. 1504, 1511-13 (S.D.N.Y. 1985) (inmates

toms Service workers had been afforded due process on several factors: (1) "elaborate chain-of-custody procedures" minimized the risk of false positive readings; (2) employees could resubmit a positive specimen to the laboratory of their choice for independent testing; and (3) "quality assurance features," including the use of control samples, were a regular part of the testing program.³⁵⁰

Even minor variations between otherwise similar drug-testing programs can markedly affect the reliability of drug testing. cursory analysis and blanket approval of drug testing programs are inappropriate in the context of substantive due process challenges given the constitutional interests at risk of deprivation. Courts deciding substantive due process claims should therefore scrutinize the procedures and safeguards that relate to the reliability of the drug testing program at issue.

3. COMMENT

Individuals employed in the private sector generally do not enjoy the constitutional protections afforded their governmental counterparts.³⁵¹ Yet courts may be "consciously or unconsciously swayed by constitutional considerations" when reviewing private employer drug-testing programs.³⁵² One commentator has therefore suggested that private employers design drug-testing programs that would meet the standards placed on government employers.³⁵³ Another commentator, however, has concluded that it is appropriate to impose higher standards on a government employer "when it deprives a citizen of a state-created interest."³⁵⁴

Courts have viewed drug-testing challenges based on procedural due process grounds with more favor than those based on substantive due process.³⁵⁵ In a sense, the reliability requirements of substantive

not entitled to preliminary injunctive relief). The strong governmental interests in institutional safety and correctional goals also may increase the margin of acceptable error.

350. *Von Raab*, 816 F.2d at 181-82.

351. For a discussion of the state action nexus theories under which constitutional limitations may be applied to private employers, see *supra* notes 68-83 and accompanying text.

352. Comment, *Employee Drug Testing—Issues Facing Private Sector Employers*, 65 N.C.L. REV. 832, 834 (1982).

353. *Id.*

354. The basis for requiring a higher standard for government employers who test employees for drugs is the special relationship between the government and individuals. Mazo, *supra* note 267, at 1652.

355. Drug-testing programs in the public sector that courts have found to violate due process of law generally have been predicated on procedural, rather than substantive, due process grounds. See, e.g., *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (rejecting substantive due process claim; finding procedural due process violation). Substantive due process has declined steadily as a viable cause of action since its peak in the

due process can be equated with the interest in reducing the risk of erroneous deprivation considered in the *Mathews* balancing test of procedural due process. As a result, the success of a claim that drug testing violates both substantive and procedural due process may turn on the interest balancing test of procedural due process, rather than the amorphous standards of substantive due process.

IV. THE RIGHTS AND DUTIES OF COLLECTIVE BARGAINING UNDER THE NATIONAL LABOR RELATIONS ACT

The economic and human costs associated with illicit drug use have caused employers in the unionized private sector to implement employee drug-testing programs.³⁵⁶ An employer's power to test unionized workers for drug use may be limited, however, by a collective bargaining agreement³⁵⁷ and the National Labor Relations Act (NLRA).³⁵⁸ On September 24, 1987, the general counsel³⁵⁹ to the National Labor Relations Board (NLRB) issued a memorandum clas-

1930's. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("The doctrine . . . that [substantive] due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded."); cf. Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293, 352 (1986) ("[S]ubstantive due process still lives, but . . . its continued life has not been adequately acknowledged or justified.").

356. Flannery, *Unilaterally Instituted Drug Screen Tests in the Unionized Private Industry: An Appropriate Response?*, 38 LABOR L.J. 756, 756 (1987); see *supra* notes 23 & 48 and accompanying text; see also *OSHA Oversight Hearings*, *supra* note 16, at 6. This section addresses unionized private sector employment and does not address the constitutional protections relied upon by unionized public sector employees.

357. Collective bargaining is the process of negotiation that affords both the union and the employer the opportunity to exchange promises and commitments to reach an agreement on employment matters. See T. COLOSI & A. BERKELEY, *COLLECTIVE BARGAINING: HOW IT WORKS AND WHY* 3 (1986); R. GORMAN, *BASIC TEXT ON LABOR LAW* 540 (1976). Collective bargaining produces a written agreement between the union and the employer governing the parties' relationship, ordinarily for a number of years, with a view "toward an indefinite period of continued dealing in the future." R. GORMAN, *supra*, at 540. The collective bargaining agreement commonly is read beyond the parameters of the "written and executed document" to include plant customs, industrial practices, and informal agreements and concessions that occurred at the bargaining table, but were not reduced to writing. *Id.*

358. National Labor Relations Act, 29 U.S.C. §§ 151-159 (1982).

The [National Labor Relations Act then defines the terms] it uses, including the terms "commerce" and "affecting commerce." It creates the National Labor Relations Board and prescribes its organization. It sets forth the right of employees to self-organization and to bargain collectively through representatives of their own choosing. It defines "unfair labor practices." It lays down rules as to the representation of employees for the purpose of collective bargaining.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 23-24 (1937) (citations omitted) (quoting 29 U.S.C. §§ 151-159 (1982)).

Congress enacted the National Labor Relations Act in 1935 to establish and maintain "industrial peace," and "to preserve the flow of interstate commerce." First Nat'l Mainte-

sifying drug testing as a mandatory subject of collective bargaining for both unionized employees and applicants for employment.³⁶⁰ The

nance Corp. v. NLRB, 452 U.S. 666, 674 (1981) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)). Section 1 of the Act states in pertinent part:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1982 & West Supp. 1987).

A central theme in maintaining industrial peace is the recognition, acceptance, and "promotion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First Nat'l Maintenance*, 452 U.S. at 674. The Court in *First National Maintenance* further stated:

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.

Id. at 674 n.11 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. at 42 (upholding the constitutionality of the Act)); see also *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498-99 (1979) ("The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.") (quoting *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970)).

Section 8(a)(5) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(5) (1982).

Section 8(b)(3) provides: "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(b)(3) (1982).

Section 159(a) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

29 U.S.C. § 159(a) (1982).

359. The general counsel's powers are described in section 153(d), which states that the general counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board . . ." 29 U.S.C. § 153(d) (1982).

360. The memorandum states the general counsel's position:

(1) [D]rug testing for current employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the Act; (2) in general, implementation of a drug testing program is a substantial change in working conditions, even where physical examinations previously have been given, and

memorandum further provides that if a union chooses to waive its right to bargain over drug testing, it must do so in clear and unmistakable terms.³⁶¹ Because the NLRB is an independent agency charged with promulgating and enforcing national labor policy,³⁶² the memorandum speaks with considerable force. The import of the memorandum is that it effectively prevents an employer from unilaterally³⁶³ implementing a drug-testing program for unionized employees by classifying drug testing as a mandatory subject of collective bargaining, thereby creating a statutory right to bargain over drug testing that is not available in permissive subjects of bargaining.³⁶⁴ This statutory right to bargain over drug testing cannot be relinquished without a clear and unmistakable waiver by the union. Employers and unions are now obligated under the NLRA to bargain over drug testing during contract negotiations,³⁶⁵ and during the term of an existing agreement.³⁶⁶ Moreover, the current NLRB policy of deferring contract disputes and unfair labor practice claims to arbitration³⁶⁷ forces the parties to address drug testing as it arises midterm,

even if established work rules preclude the use or possession of drugs in the plant; (3) the established Board policy that a union's waiver of its bargaining rights must be clear and unmistakable is to be applied to drug testing; (4) normal Board deferral policies under *Dubo* and *Collyer* will apply to these cases; however, if Section 10(j) relief is otherwise warranted, deferral will not be appropriate.

Daily Lab. Rep. (BNA) No. 184, at D-1 (Sept. 24, 1987) (citing *Dubo Mfg. Corp.*, 142 N.L.R.B. 431 (1963); *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971)).

361. *Id.*; see R. GORMAN, *supra* note 357, at 466-69.

362. Section 6 of the Act states: "The Board shall have authority from time to time to make, amend, and rescind in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter." 29 U.S.C. § 156 (1982).

363. The general counsel's classification of drug testing as a mandatory subject of bargaining does not prevent unilateral employer action with respect to drug testing in all circumstances. An employer can implement a drug-testing program unilaterally after reaching impasse with the union over the issue of drug testing. See R. GORMAN, *supra* note 357, at 445-50; see *infra* notes 417-21 and accompanying text.

364. For a discussion of permissive subjects of bargaining, see *infra* note 370.

365. For a discussion of the bargaining rights and obligations created during the negotiation stage with respect to drug testing, see *infra* notes 403-26 and accompanying text.

366. For a discussion of the bargaining rights and obligations created during the term of an existing agreement with respect to drug testing, see *infra* notes 427-50 and accompanying text.

367. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 840 (1971). The Board will defer to an arbitral award if all of the following conditions are met: First, "the contractual issue is factually parallel to the unfair labor practice issue." *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984). Second, "the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." *Id.* Third, the award is not "palpably wrong," or stated differently, is susceptible to an interpretation consistent with the NLRA. *Id.*

For a general discussion of the Board's deferral policy and union waiver of statutory rights, see Edwards, *Deferral to Arbitration and Waiver of the Duty to Bargain: A Possible Way Out of Everlasting Confusion at the NLRB*, 46 OHIO ST. L.J. 23, 28 (1985). The author, Harry T. Edwards, is a United States Circuit Judge in the District of Columbia Circuit.

or wait until the expiration of the existing agreement and address the issue during negotiations.³⁶⁸ Both choices mandate resolution of the drug testing issue through the collective bargaining process.³⁶⁹

Mandatory subjects of collective bargaining are defined under section 8(d) of the NLRA as "wages, hours, and other terms and conditions of employment."³⁷⁰ The phrase "other terms and conditions

368. See *infra* notes 402-50 and accompanying text.

369. See *supra* note 357. "A system of unfettered collective bargaining is essential for the continued economic well-being of this nation, and we will oppose any action that impedes or interferes with that process which is otherwise unnecessary to protect the national interest." FIRST ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE 187 (1985) (Address by Francis X. Lilly, Solicitor of Labor, United States Department of Labor).

370. The scope of mandatory collective bargaining is defined in section 8(d), which states: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." 29 U.S.C. § 158(d) (1982). The Supreme Court has stated that when Congress adopted the open-ended language of "other terms and conditions of employment," it gave the NLRB discretion "to define those terms in light of specific industrial practices." See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 675 (1981). For a discussion of the scope of mandatory bargaining subjects, see Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447 (1982). Section 8(d) also requires that the parties exercise good faith in bargaining. For a discussion of good faith in the context of mandatory bargaining, see Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

Permissive subjects of collective bargaining are not defined statutorily. See *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 853 n.1 (5th Cir. 1986). Permissive subjects fall into two groups: Those dealing with the relationship of the employer to third parties, and those dealing with the relationship between the union and its members. See R. GORMAN, *supra* note 357, at 523. The first category includes the employer's relationship with its retirees with respect to insurance benefits. *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179-82 (1971). A "ballot clause" calling for a prestrike vote by union members falls into the second category of permissive bargaining—union member relations. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 350 (1958).

The Supreme Court has held that although the employer and the union can propose permissive subjects, neither party may insist on its position to impasse or use economic weapons such as strikes or lockouts to back its position. *Pittsburgh Plate Glass*, 404 U.S. at 181-82. Either party can implement unilateral changes on a subject of permissive bargaining or refuse to bargain over the permissive subject without unfair labor practice sanctions under the Act. *Id.*

The NLRB and the courts have interpreted "wages" under section 8(d) to include hourly pay rates, overtime pay, incentive pay, merit pay, severance pay, group health insurance plans, pension plans, and some forms of bonuses. See *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964, 970 (8th Cir. 1967) (hourly pay rates); *Tom Johnson, Inc.*, 378 F.2d 342, 343 (9th Cir. 1967) (overtime pay); *Richfield Oil Corp. v. NLRB*, 231 F.2d 717, 724 (D.C. Cir. 1956) (stock purchase plans), *cert. denied*, 351 U.S. 909 (1956); *NLRB v. Black-Clawson Co.*, 210 F.2d 523, 524 (6th Cir. 1954) (profit-sharing plans); *NLRB v. Century Cement Mfg. Co.*, 208 F.2d 84, 86 (2d Cir. 1953) (incentive and merit pay); *NLRB v. Niles-Bement-Pond Co.*, 199 F.2d 713, 714 (2d Cir. 1952) (bonuses); *W. W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949) (group health insurance); *Armour & Co.*, 280 N.L.R.B. No. 96, 1986 NLRB Dec. (CCH) ¶ 18,612 (June 24, 1986) (severance pay); *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1216 (1951) (pension plans). "Hours" includes both hours of the day and days of the week. See

of employment” has been construed expansively to mean any subject that “settle[s] an aspect of the relationship”³⁷¹ between the employer and employees or their union representative.³⁷² Thus, drug testing is

Amalgamated Meat Cutters, Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676, 727-28 (1965).

371. *Pittsburgh Plate Glass*, 404 U.S. at 178.

372. See R. GORMAN, *supra* note 357, at 503. The NLRB has held that work rules are conditions of employment and are therefore mandatory subjects of bargaining. *Murphy Diesel Co.*, 184 N.L.R.B. 757, 765 (1970) (rules governing absenteeism are a condition of employment and thus mandatory subjects of collective bargaining), *enforced*, 454 F.2d 303 (7th Cir. 1971); see also *Womac Indus., Inc.*, 238 N.L.R.B. 43 (1978) (plant rules requiring doctor’s excuse for absences are a condition of employment and thus mandatory subjects of bargaining). The Board has considered safety rules conditions of employment and therefore mandatory subjects of bargaining. See *Gulf Power Co.*, 156 N.L.R.B. 622, 625 (1966); see also *Boland Marine & Mfg. Co.*, 225 N.L.R.B. 824 (1976) (safety rules and employee discipline rules are conditions of employment and thus mandatory subjects of bargaining). These work rules and safety rules are considered “terms and conditions” that settle an aspect of the employment relationship. *Pittsburgh Plate Glass*, 404 U.S. at 182. In *Ford Motor Co. v. NLRB*, the Supreme Court held that the price of in-plant vending machine food was a condition of employment, because it related to the availability of food during a worker’s eight-hour shift. 441 U.S. 488, 498 (1979). The Court in *Ford* discussed the reasons for concluding that food prices are a mandatory subject of bargaining:

It is not suggested by petitioner that an employee should work a full 8-hour shift without stopping to eat. It reasonably follows that the availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those “conditions” of employment that should be subject to the mutual duty to bargain. By the same token, where the employer has chosen, apparently in his own interest, to make available a system of in-plant feeding facilities for his employees, the prices at which food is offered and other aspects of this service may reasonably be considered among those subjects about which management and union must bargain.

Id.

In *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass*, the Court held that third party retirees’ benefits were not mandatory subjects of bargaining because they did not “vitaly affect” the employment terms and conditions of active employees. 404 U.S. 157, 182 (1971). The Court concluded that retirees were not included in the term “employees” and were not members of the bargaining unit. *Id.* at 168. The Court held that the collective bargaining obligation extends only to “terms and conditions of employment” for active employees. *Id.* at 180. Moreover, the employer is not obligated to bargain over anything that does not “vitaly affect” terms and conditions of active employees’ employment. *Id.* at 182. Because retirees’ benefits did not “vitaly affect” bargaining unit employees’ “terms or conditions of employment,” this subject did not fall within the meaning of section 8(d)’s “terms or conditions” language, and therefore the employer was under no duty to bargain over them. *Id.*

Similarly, in *NLRB v. Wooster Division of Borg-Warner Corp.*, the Court held that “ballot clauses” and “recognition clauses” were not terms and conditions because they governed the employee-union relationship. 356 U.S. 342, 350 (1958). In *Borg-Warner*, the “ballot clause,” which required the employees to vote on the employer’s last offer prior to strike, dealt only with the relationship between the employees and the union, as opposed to employer-employee relations, which fall within the scope of mandatory bargaining. *Id.* To make it subject to mandatory bargaining would allow the employer to deal directly with employees, which would weaken the independence of the union representative, and thereby contravene the purpose of the statute. *Id.* Similarly, labelling the “recognition clause,” which excludes the

a mandatory subject of bargaining if it falls within the confines of the phrase “terms and conditions of employment.”

In interpreting this phrase, the Supreme Court has held that a management decision made for purely economic reasons does not fall within the language of other terms and conditions of employment, and therefore is not a mandatory subject of bargaining.³⁷³ In *Fibreboard Paper Products Corp. v. NLRB*³⁷⁴ and *First National*

union as a party to the contract, as a mandatory subject would allow the employer to bypass the union representative in contravention of the policy of the statute. *Id.* For these reasons, the Court held that both clauses fell outside the protected language of section 8(d). *Id.* Because neither the retiree’s benefits in *Pittsburgh Plate Glass*, nor the ballot and recognition clauses in *Borg-Warner*, settled an aspect of employment between the employer and the employee, they were not mandatory subjects of bargaining. *Pittsburgh Plate Glass*, 404 U.S. at 178; *Borg-Warner*, 356 U.S. at 350.

373. *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981). In *First National Maintenance*, the employer supplied cleaning and maintenance services to commercial customers. *Id.* at 668. One of the employer’s contracts for the maintenance of a nursing home became unprofitable. *Id.* at 669. The employer discontinued its services to the nursing home and terminated those employees who serviced that contract. *Id.* at 668-69. The Court held that the decision to terminate the nursing home contract was made “purely for economic reasons,” and therefore was “not part of § 8(d)’s ‘terms and conditions of employment’ over which Congress has mandated bargaining.” *Id.* at 667. The Court did hold that the employer would be required to bargain about the effects of its decision. *Id.* at 681.

In *Fibreboard Paper Products Corp. v. NLRB*, the employer operated a manufacturing plant and employed unionized workers. 379 U.S. 203, 205 (1964). The maintenance operations performed by unionized employees became costly. *Id.* at 206. In an effort to reduce costs, the employer contracted out the maintenance operations and terminated its own maintenance employees. *Id.* at 207. The Court held that the decision to contract out maintenance operations was not made purely for economic reasons. *Id.* at 213. The company’s basic operation was not altered; the maintenance work still had to be performed at the plant. *Id.* Therefore, the decision was within the scope of the “terms and conditions of employment” under section 8(d) and was subject to mandatory bargaining. *Id.* at 215.

For an analysis of the application of Supreme Court precedent on mandatory subjects of bargaining to drug testing of professional football players, see Lock, *The Legality Under the National Labor Relations Act of Attempts by National Football League Owners to Unilaterally Implement Drug Testing Programs*, 39 U. FLA. L. REV. 1, 28-36 (1987).

374. 379 U.S. at 203 (1964). Justice Stewart’s concurring opinion influenced the Court’s decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Justice Stewart stated that many management decisions have an indirect and uncertain effect on employee job security. *Id.* at 223. He further remarked:

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

Id.

Maintenance Corp. v. NLRB,³⁷⁵ the Court concluded that employers are free to make certain unilateral decisions affecting the profitability and direction of the business, even though these decisions might affect the employee relationship.³⁷⁶ The Court stressed that only certain management decisions that turn on the profitability and direction of the business are exempt from mandatory bargaining.³⁷⁷ The NLRB further refined the *First National Maintenance* Court's reasoning in *Otis Elevator Co.*³⁷⁸ In *Otis*, the Board held that a managerial decision is excluded from mandatory bargaining if it turns on a fundamental change in the nature and direction or scope of the business—including selling a business, restructuring, consolidating, subcontracting, or investing in labor-saving machinery—as long as the decision does not turn on a reduction of labor costs.³⁷⁹

An employer who wishes to make a management decision to implement drug testing without bargaining would have to prove that the profitability of the business was declining as a result of drug abuse, and that drug testing would provide a viable solution to the problem.³⁸⁰ Because these extreme circumstances rarely occur,³⁸¹ an

375. 452 U.S. at 666. Referring to *Fibreboard*, the Court divided management decisions into three categories. *Id.* at 676, 677. The first category addresses management decisions "such as choice of advertising and promotion, product type and design, and financing arrangements . . ." *Id.* This first area is not subject to mandatory bargaining. The second category of management decisions encompasses "the succession of layoffs and recalls, production quotas, and work rules . . ." *Id.* The second category is subject to mandatory bargaining. The final category of management decisions addresses "a change in the scope and direction of the enterprise . . ." *Id.* It is in this area that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 678, 679.

376. *First Nat'l Maintenance*, 452 U.S. at 676-79 (citing *Fibreboard*, 379 U.S. at 223).

377. *Id.* at 666-79.

378. 269 N.L.R.B. 891, 895-900 (1984). In *Otis*, the employer relocated the elevator operations of the company without bargaining with the union. *Id.* at 892.

379. *Id.* The Board also outlined other factors: speed, flexibility, and the need for confidentiality. *Id.*; see also *Westinghouse Broadcasting & Cable, Inc.*, 285 N.L.R.B. No. 32, 1987 NLRB Dec. (CCH) ¶ 18,899 (July 31, 1987) (subcontracting work in an effort to reduce labor costs is subject to the duty to bargain); *Century Air Freight, Inc.*, 284 N.L.R.B. No. 85, 1987 NLRB Dec. (CCH) ¶ 18,933 (June 30, 1987) (same); *DeSoto, Inc.*, 278 N.L.R.B. No. 114, 1986 NLRB Dec. (CCH) ¶ 17,793 (Feb. 28, 1986) (plant relocation that does not turn on an effort to reduce labor costs is not subject to the duty to bargain); *Garwood-Detroit Truck Equip., Inc.*, 274 N.L.R.B. 113, 114 (1985) (employer's decision to contract out work previously performed by union employees was not a mandatory subject of bargaining because it did not turn on labor costs but rather on a change in the nature and direction of the business); *Mack Trucks, Inc.*, 277 N.L.R.B. 711 (1985) (same); *GHR Foundry Div. of Dayton Malleable, Inc.*, 275 N.L.R.B. 707 (1985) (same); *Hawthorn Melody, Inc.*, 275 N.L.R.B. 339 (1985) (same).

380. *Cf. Otis*, 269 N.L.R.B. at 892. If the employer believed that a drug problem was causing a decrease in the community's confidence, and hence a decrease in clients and profits, an employer might be justified in unilaterally implementing a drug-testing program. The

employer will ordinarily be unable to justify unilateral implementation of drug testing as a management decision made to change the nature and direction of the business, and would therefore be obligated to bargain with the union before implementation.³⁸²

A. *Drug Testing as a Mandatory Subject of Collective Bargaining*

In classifying drug testing as a mandatory subject of bargaining, the general counsel has reasonably concluded that drug testing is a "condition of employment" protected under section 8(d) of the Act.³⁸³ Drug testing furthers work rules against drug use as a means of enforcing compliance with these rules.³⁸⁴ Employees who test positive for drug use and those who refuse to submit to testing are subject to suspension,³⁸⁵ discharge³⁸⁶ or other discipline, transfer, or

general counsel indicates, however, that an employer's implementation of a drug-testing program unilaterally, is not the type of management decision embodied in *First National Maintenance*. See Daily Lab. Rep. (BNA) No. 184, at D-3 (Sept. 24, 1987); cf. *First Nat'l Maintenance*, 452 U.S. at 677; Wayne State Univ., 87 Lab. Arb. (BNA) 953 (1986) (Lipson, Arb.) (upholding discharge of an employee drug abuser because of the adverse impact to the university and its programs); Martin-Marietta Aerospace, 81 Lab. Arb. (BNA) 695 (1983) (Aronin, Arb.) (upholding employee discharge because of the damage to employer's reputation, production, and employer's ability to discipline his employees).

381. *But see* Medicenter Mid-south Hosp., 221 N.L.R.B. 670 (1975). With regard to whether polygraph testing was a mandatory subject of bargaining, Chairman Murphy of the NLRB stated, "[T]he widespread sabotage and vandalism of the hospital facilities that were occurring daily created an emergency situation excusing or justifying such unilateral action as a temporary measure to try and bring that situation under control." *Id.* at 670 n.2 (Chairman Murphy, adopting the administrative law judge's dismissal of the complaint).

382. See *First Nat'l Maintenance*, 452 U.S. at 677. The employer's action would be subject to a two-step analysis. First, the employer must have made the decision for economic reasons and second, the burden on the employer must outweigh the benefit to labor relations. *Id.* at 678, 679. The employer's unilateral implementation of drug testing would fail at the first level of analysis. *Id.*; see Medicenter Mid-south Hosp., 221 N.L.R.B. 670, 670 (1975); Wayne State Univ., 87 Lab. Arb. (BNA) 953, 957 (1986) (Lipson, Arb.); Martin-Marietta Aerospace, 81 Lab. Arb. (BNA) 695, 698-99 (1983) (Aronin, Arb.).

383. See Daily Lab. Rep. (BNA) No. 184, at D-1 (Sept. 24, 1987).

384. Cf. *Murphy Diesel Co.*, 184 N.L.R.B. 757, 763 (1970), *enforced*, 454 F.2d 303 (7th Cir. 1971). The memorandum states that drug testing goes beyond a rule and becomes a means of enforcing a rule. See Daily Lab. Rep. (BNA) No. 184, at D-2 (Sept. 24, 1987). Enforcement of workplace rules are conditions of employment. *Murphy Diesel*, 184 N.L.R.B. at 763.

385. *Crown Zellerbach Corp.*, 87 Lab. Arb. (BNA) 1145, 1148 (1986) (Cohen, Arb.) (reducing discharge to suspension for refusal to submit to a drug test); *Union Oil of Calif.*, 87 Lab. Arb. (BNA) 297, 298 (1985) (Boner, Arb.) (upholding suspension of employee for positive test result); see also *Vaughan v. Shop & Go, Inc.*, No. 4-86-2148, slip op. at 1 (Fla. 4th DCA Nov. 25, 1987) (employee's refusal to submit to a polygraph test resulted in termination without unemployment compensation expenses).

386. *Roadway Express, Inc.*, 87 Lab. Arb. (BNA) 224, 231 (1986) (Cooper, Arb.) (upholding discharge of employee based on positive urinalysis result); *Concrete Pipes Prods. Co.*, 87 Lab. Arb. (BNA) 601, 606 (1986) (Caraway, Arb.) (upholding employee discharge for refusing to sign form evidencing receipt of drug-testing policy).

rehabilitation. These consequences affect employment security,³⁸⁷ which is a "condition of employment" protected under section 8(d) of the NLRA.³⁸⁸ Under this reasoning, even drug testing of applicants is a condition of employment, because it is a prerequisite of employment³⁸⁹ and affects active employees by altering the makeup of the bargaining unit.³⁹⁰ This in turn affects the union's representative duties toward its current members, which is also a subject of mandatory bargaining.³⁹¹

The general counsel's conclusion that drug testing of applicants for employment may be a condition of employment,³⁹² subject to mandatory bargaining, may create tension in the bargaining unit between active employees and applicants for employment. Drug testing of applicants for employment can be contrasted with the retirees' benefits at issue in *Allied Chemical & Alkali Workers of America v.*

387. See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring).

388. See *supra* note 370 and accompanying text.

389. See Houston Chapter, Associated Gen'l Contractors of Am. 143 N.L.R.B. 409, 411-13 (1963), *enforced*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966).

390. See *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass*, 404 U.S. 157, 171-73 (1971).

391. *Id.*

392. With respect to applicants for employment, the general counsel has stated:

The issue of whether drug testing of applicants for employment is also a mandatory subject of bargaining is more difficult. However, since the issue is an important one and since reasonable argument can be made that the subject is mandatory, I have authorized complaints on this issue in order to place the question before the Board. Arguably, a pre-hire drug test not only establishes a condition precedent to employment for job applicants, it also settles a term and condition of employment of current employees by vitally affecting their working environment.

Regarding the first point, the Board has held that conditions of becoming employed can constitute a mandatory subject. With court affirmation, the Board held that both the agreement to use, and the internal operation of, a hiring hall are mandatory subjects of bargaining. . . . Most significantly, the Board's 1984 decision in *Lockheed Shipbuilding*, [273 N.L.R.B. 171 (1984)], specifically dealt with the applicant issue and held that an employer violated Section 8(a)(5) of the Act by unilaterally implementing new medical screening tests "for the purpose of denying employment to new employees."

As to the second point, the Board has held that information regarding the race and sex of applicants is presumptively relevant to a union's performance of its representative duties toward current employees, because "an employer's hiring practices inherently affect terms and conditions of employment." . . . [J]ust as existing unit employees have a legitimate interest in working in a racially and sexually integrated workplace, so too do they have a legitimate interest in the issue of whether steps should be taken to screen out drug users from employment, and what those steps should be.

Daily Lab. Rep. (BNA) No. 184, at D-1, D-2 (Sept. 24, 1987) (quoting *White Farm Equipment Co.*, 242 N.L.R.B. 1373, 1375 (1979)).

*Pittsburgh Plate Glass Co.*³⁹³ In *Pittsburgh Plate Glass*, the Supreme Court held that third party retirees' benefits were not mandatory subjects of bargaining because they did not "vitaly affect" the employment terms and conditions of active employees.³⁹⁴ The Court further held that the collective bargaining obligation extends only to "terms and conditions of employment" for active employees.³⁹⁵ Drug testing of applicants for employment, however, may be a mandatory subject of collective bargaining, because it affects conditions of employment of active employees by altering the makeup of the bargaining unit. The Court's reasoning in *Pittsburgh Plate Glass*, when applied to the general counsel's conclusion that drug-testing may be a mandatory subject of bargaining for applicants for employment, reveals a potential conflict of interest between active employees and applicants for employment. The bargaining representative of active employees may agree to drug testing of applicants in order to reach agreement on a drug-testing program that is favorable to active employees.³⁹⁶ This tradeoff may be a product of inadequate representation of applicants for employment with respect to drug testing.

Of course, the collective bargaining process inherently creates tension between active employees and applicants for employment. Yet unions routinely bargain over subjects such as wages that may create tension between these two groups. Similarly, the union would be motivated to bargain over drug testing, because an employer's action with respect to drug testing, unlike wages, is one step removed from the bargaining unit. For example, applicants for employment have already been admitted to the bargaining unit when the issue of wages arises; the issue is merely one of wage rates of new members versus wage rates of senior members. An employer's action in these circumstances would not encroach on the union's position as the bargaining representative of new members any more than it does for senior members. An employer's action with respect to drug testing, however, may constitute more of an encroachment on the union's representative position, because drug testing occurs before applicants are admitted to the union. This encroachment may be an attempt by the employer to circumvent or undermine the union's representative power.³⁹⁷ Moreover, as the general counsel's memorandum indi-

393. 404 U.S. at 176; see *supra* note 370.

394. 404 U.S. at 182.

395. *Id.* at 180, 182.

396. *Cf. Pittsburgh Plate Glass*, 404 U.S. at 180; *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988) (upholding drug testing of active employees but not addressing the issue as to applicants).

397. See *Daily Lab. Rep.* (BNA) No. 184, at D-3 (Sept. 24, 1987); *cf. NLRB v. Wooster*

cates, adding a drug-testing requirement to an existing medical exam constitutes a substantial change in the purpose of that examination,³⁹⁸ because the goal of the medical exam is to measure employee fitness, whereas the goal of drug testing is to discover illicit drug use.³⁹⁹

B. *Bargaining over Drug Testing*

The rights and duties implicated by categorizing drug testing as a mandatory subject of collective bargaining⁴⁰⁰ arise in two situations: During negotiations between the employer and the union over the terms of a new labor contract, and during the term of an existing agreement.⁴⁰¹

1. BARGAINING DURING THE NEGOTIATION OF A NEW AGREEMENT

During contract negotiations, and after a contract has expired, both parties are under an obligation to bargain in good faith over the implementation of a drug-testing program.⁴⁰² The parties cannot refuse to bargain over⁴⁰³ and the employer cannot unilaterally implement⁴⁰⁴ a drug-testing program without risking unfair labor practice claims under the Act.⁴⁰⁵ Both parties may bargain to impasse and back their positions on drug testing with a strike or lockout, however.⁴⁰⁶

Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (Ballot clauses and recognition clauses, if defined as mandatory subjects of collective bargaining, would circumvent the union's representative power.).

398. See Daily Lab. Rep. (BNA) No. 184, at D-2 (Sept. 24, 1987).

399. *Id.* A drug test can only discover the presence of illicit drugs and cannot measure intoxication. *Jones v. McKenzie*, 833 F.2d 335, 339 & n.10 (D.C. Cir. 1987). *But see* Daily Lab. Rep. (BNA) No. 232, at A-1, A-2 (Dec. 4, 1987) (reporting that the Seventh Circuit, in a dispute between an employer and a union under the Railway Labor Act, stated that "the addition of a drug screen as a second component of the urinalysis [in physical exams] previously required of all employees does not constitute such a drastic change in the employees' routine medical examinations . . .").

400. See *infra* notes 402-06 and accompanying text.

401. See R. GORMAN, *supra* note 357, at 399-417, 455-66.

402. See *supra* note 370.

403. See 29 U.S.C. § 158(a)(5) (1985); see also *Jacobs Mfg. Co.*, 94 N.L.R.B. 1214, 1216 (1951) (refusal to bargain over a mandatory subject violates the National Labor Relations Act), *enforced*, 196 F.2d 680 (2d Cir. 1952).

404. "A unilateral change as to a subject within this [mandatory] category violates the statutory duty to bargain . . ." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674-75 (1971) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)).

405. See 29 U.S.C. §§ 158(a)(5), (b)(3) (1982).

406. See T. COLOSI, *supra* note 375, at 120.

It must be noted that often one party believes that negotiations have reached impasse while the other party may not. As section 8(d) of the Taft-Hartley Act states, the obligation to bargain in good faith "does not compel either party to

To fulfill the duty to bargain in good faith over drug testing, an employer must disclose any information that the union has shown is pertinent to its statutory power to represent employees on drug testing as a mandatory subject of collective bargaining. Full disclosure of pertinent data aids both parties in reaching agreement at the negotiation stage.⁴⁰⁷ Initially, the union may seek information as to the employer's justification for instituting drug testing.⁴⁰⁸ The employer may believe that drug testing will reverse a decline in productivity or safety that he surmises is caused by illicit drug use.⁴⁰⁹ The union's second threshold concern is whether the consequences of drug testing will be rehabilitative or punitive in nature.⁴¹⁰ The employer must disclose what sanctions, if any, will apply after a positive screening result, a confirmatory positive test result, or a refusal to test.⁴¹¹ The employer must also disclose technical details such as the type of drug tests it plans to use,⁴¹² the reliability of each test,⁴¹³ and the quality control procedures of the testing laboratory.⁴¹⁴ A union can also obtain information on a model program implemented by another unionized company to use as an aid to setting procedures⁴¹⁵ and test cutoff levels for specific drugs.⁴¹⁶

The duty to disclose drug-testing information limits the

agree to a proposal or require the making of a concession." Thus hard bargaining—taking and strongly adhering to one position—may not be acting in bad faith or creating an impasse per se.

Id.; see R. Gorman, *supra* note 357, at 498.

407. *Id.* In a recent survey, only 17.4 percent of unionized companies responding had developed their drug-testing programs through collective bargaining. The employer's duty to disclose key information to the union facilitates the use of the collective bargaining process in the development of drug-testing programs. EXECUTIVE KNOWLEDGEWORKS, DRUG TESTING IN THE WORKPLACE 150 (1987).

408. *Id.*

409. See *supra* notes 16-38 and accompanying text.

410. A union would be more likely to support the implementation of a drug-testing program that was rehabilitative in nature rather than punitive. See EXECUTIVE KNOWLEDGEWORKS, *supra* note 407, at 148; see also Hanson, *supra* note 22, at 14 (questioning whether drug testing actually measures on-the-job impairment).

411. Crown Zellerbach Corp., 87 Lab. Arb. (BNA) 1145, 1148 (1986) (Cohen, Arb.); Union Oil of Calif., 87 Lab. Arb. (BNA) 297, 298 (1985) (Boner, Arb.).

412. For a comparative analysis of drug tests and their reliability, see *supra* notes 41-79 and accompanying text.

413. *Id.*

414. For a discussion of laboratory quality control procedures, see *supra* notes 41-65 and accompanying text.

415. See generally R. GORMAN, *supra* note 357, at 409-15. The duty to disclose also exists during the term of an agreement. Any unreasonable delay by the employer in disclosing information constitutes a breach of the duty to bargain. *Id.*

416. For a discussion of cutoff levels and how they may reflect an employer's subjective decision on the amount of drug use that will be tolerated in the workplace, see *supra* notes 42-64 and accompanying text.

employer's ability to implement a drug-testing program unilaterally after impasse.⁴¹⁷ For example, the employer may present a drug-testing program with a ten-point agenda to the union. In response, the union may request information on drug testing because it is a mandatory subject of bargaining. After the employer complies,⁴¹⁸ the parties may ultimately bargain to impasse. By requesting and receiving information on the various points of the employer's proposal, the union has limited the employer to the confines of the proposed plan should the negotiations reach impasse. Under these circumstances, impasse does not provide an opportunity for the employer to alter the terms of the proposed plan.⁴¹⁹ If the employer's plan is complete enough to implement,⁴²⁰ however, then unilateral implementation after impasse is authorized.⁴²¹

The union has the power to use economic tactics, both during negotiations and after impasse, and can strike to support its bargaining position over drug testing.⁴²² The employer cannot discharge employees for engaging in these activities, because section 7 protects employees from such action.⁴²³ It can retaliate, however, by permanently replacing employees.⁴²⁴ Alternatively, union employees can engage in peaceful, concerted, unprotected activity such as refusing to submit to drug testing, but the employer can respond by discharging

417. See *supra* note 405; see also R. GORMAN, *supra* note 357, at 445-50.

418. See R. GORMAN, *supra* note 357, at 409-15.

419. *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 64 (1964). An employer's unilateral grant of a wage increase may give it an advantage during bargaining, and because this increase cannot be implemented until after impasse, an employer may attempt to precipitate an impasse. This contrived impasse would be an unfair labor practice. In the drug-testing context, however, it is unlikely that the employer would gain any advantage from its unilateral implementation. See *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963), *cert. denied sub nom. Bethlehem Steel Co. v. NLRB*, 375 U.S. 984 (1964).

420. For example, if the proposed plan did not include safeguards for chain-of-custody errors, or a confirmatory test after initial screening, it would most likely be incomplete. *Cf. Mandatory Guidelines on Federal Drug Testing Programs*, Daily Lab. Rep. (BNA) No. 70, at E-1 (Apr. 12, 1988).

421. *Bi-Rite Foods, Inc.*, 147 N.L.R.B. at 64.

422. See R. GORMAN, *supra* note 357, at 431, 432.

423. Section 7 of the Act states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1982); see R. GORMAN, *supra* note 357, at 296-97.

424. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938); *Emerson Elec. Co.*, 278 N.L.R.B. No.102 (Jan. 18, 1988) LEXIS, Labor library, NLRB file.

or otherwise disciplining the participating employees without fear of an unfair labor practice claim.⁴²⁵ As a practical matter, a union strike during negotiations would likely be an arbitrable grievance that a court could enjoin.⁴²⁶ Because the union faces the possibility of an injunction, it will most likely negotiate rather than strike over drug testing.

2. BARGAINING DURING THE TERM OF AN EXISTING AGREEMENT

Because drug testing is not yet a part of most collective bargaining agreements,⁴²⁷ it will most likely surface as an issue during the term of an existing contract when an employer attempts to implement a drug-testing program unilaterally. Section 8(d)⁴²⁸ of the NLRA sets out three rules that govern the parties' bargaining duties during the contract term.⁴²⁹ First, neither party has a duty to bargain over the proposed modification of any term "contained in" the contract.⁴³⁰ Therefore, midterm modification of any term contained in the contract can only occur with the other party's consent.⁴³¹ Second, even if the term is not contained in the contract, if it is a mandatory subject of collective bargaining, then the bargaining obligations that governed during the negotiation stage continue to govern during the contract term.⁴³² Third, a party wishing to terminate or modify the contract must give timely notice to the other party and to federal and state mediation agencies, and must refrain from unilateral or economic action such as strikes or lockouts for a specified time.⁴³³

425. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 492-95 (1960). The termination of employees over these unprotected activities with respect to drug testing may not be valid once it is addressed in grievance arbitration. See *Daily Lab. Rep.* (BNA) No. 231, at A-1 (Dec. 3, 1987) (questioning the validity of a drug-testing program and reinstating seven employees who had been terminated after a positive urinalysis result, pending negotiations over the program between the union and the employer).

426. *Boys Markets, Inc. v. Retail Clerks, Union Local 770*, 398 U.S. 235, 253-54 (1970). In *Boys Markets*, the Supreme Court carved out an exception to the anti-injunction rule of the Norris-LaGuardia Act. See 29 U.S.C. § 104 (1982). The *Boys Markets* Court ruled that a court could grant an injunction to an employer seeking to enforce the union's contractual obligation to arbitrate grievances rather than strike over them. *Id.* at 249-54.

427. Most collective bargaining agreements have rules prohibiting illicit drug use. S.D. Warren Co. v. *United Paperworkers' Int'l Union, Local 1069*, 815 F.2d 178, 180 (1st Cir. 1987) (dicta), *vacated*, 108 S. Ct. 497 (1987). For a sample drug and alcohol policy, see Cathcart, *Alcohol and Drug Use and AIDS in the Workplace: A Review of Current Issues*, in *RESOURCE MATERIALS: LABOR AND EMPLOYMENT LAW* 659, 682 app. A. (1986).

428. 29 U.S.C. § 158(d) (1982).

429. See R. GORMAN, *supra* note 357, at 457.

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

An employer's unilateral midterm implementation of a drug-testing program triggers the same bargaining obligations that apply to the parties during the negotiation stage.⁴³⁴ Because drug testing is not "contained in" the agreement at this time, the employer does not need to obtain the consent of the union before implementing a drug-testing program,⁴³⁵ but it must bargain to impasse before implementing any changes.⁴³⁶ If the parties reach impasse⁴³⁷ in good faith, the employer has an advantage because it can unilaterally impose its proposed drug-testing program.⁴³⁸ Contriving or precipitating impasse is an unfair labor practice under section 8(d), however, because it constitutes a refusal to bargain.⁴³⁹ Similarly, the employer's refusal to disclose drug-testing information before impasse would constitute a failure to bargain in good faith by preventing full exploration of the issue. If the employer contrives or precipitates impasse and then unilaterally implements a drug-testing program, the union may file an unfair labor practice claim with the general counsel⁴⁴⁰ and invoke its own grievance arbitration procedures. The Board will typically defer the unfair labor practice claim to the arbitrator,⁴⁴¹ however, as in disputes hinging on contract interpretation.⁴⁴² Although the union can strike after the employer unilaterally initiates a drug-testing program after bargaining to impasse, it is unlikely to do so. If the contract provides for mandatory grievance procedures for dispute resolution, and the unilateral implementation is an arbitrable grievance, then a court may enjoin the strike pending arbitration.⁴⁴³ Moreover, if an unfair labor practice claim over drug testing arises, and it is cognizable under the grievance provision of the collective bargaining agreement, the NLRB may defer the claim to arbitration.⁴⁴⁴

434. See *supra* notes 400-26 and accompanying text.

435. See *supra* note 429.

436. *International Woodworkers of Am., Local 3-10 v. NLRB*, 380 F.2d 628, 629 (D.C. Cir. 1967). The employer may not make changes after impasse if drug testing is "contained in" the contract. See R. GORMAN, *supra* note 357, at 464-65.

437. For the factors used to determine impasse, see *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), *petition for review denied sub nom. American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

438. *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59, 64-65 (1964).

439. 29 U.S.C. § 158(a)(5) (1982).

440. See 29 U.S.C. §§ 158(a)(5), (b)(3) (1982).

441. See *supra* notes 367, 514-24 and accompanying text.

442. *Olin Corp.*, 268 N.L.R.B. 573 (1985); *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

443. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 249-54 (1970).

444. See *Daily Lab. Rep. (BNA) No. 184*, at D-3 (Sept. 24, 1987). The memorandum suggests that the regional offices need not defer to arbitration in contract interpretation cases or in unfair labor practice cases if deferral would undermine a union's position as bargaining representative, is "unlawfully motivated" or applied, or if drug testing is "highly invasive." *Id.*

When a dispute arises over an issue that is not contained in the agreement, an employer may take economically motivated action without obtaining the union's consent.⁴⁴⁵ In *Milwaukee Spring Division of Illinois Coil Spring*,⁴⁴⁶ the employer relocated the assembly line portion of its operation to a nonunion plant.⁴⁴⁷ The contract did not contain language preserving the right of the bargaining unit to work at the union facility, and the parties stipulated that the relocation was economically motivated.⁴⁴⁸ Even though the relocation decision was a mandatory subject of collective bargaining, the Board held that because the contract did not embody terms on work preservation, the employer could relocate its operations without obtaining the union's consent.⁴⁴⁹ This reasoning would most likely not aid an employer in the unilateral implementation of a drug-testing program, because it could not base its decision on economic factors, even though drug testing was absent from the contract.⁴⁵⁰

3. TERMINATION OF THE AGREEMENT; MODIFICATION OF THE AGREEMENT TO INCLUDE DRUG TESTING

Unilateral midterm implementation of a drug-testing program in effect modifies the contract and thus triggers the notification requirements under section 8(d).⁴⁵¹ An employer who wishes to modify an existing contract to include drug testing must notify the union sixty days before implementing a drug-testing program, or sixty days before the contract expires.⁴⁵² This cooling off period gives the employer and the union time to resolve the drug-testing issue peacefully through bargaining, and obviates the need to resort to economic tactics or unilateral changes.⁴⁵³

The employer must bargain with the union over drug testing even if the collective bargaining agreement has expired.⁴⁵⁴ The agreement marks the status quo at the date of expiration. If the status quo did not include a drug-testing program, the employer must

445. *Milwaukee Spring Div. of Ill. Coil Spring*, 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

446. *Id.* This decision reversed the Board's decision in *Milwaukee Spring Division of Illinois Coil Spring*, 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*).

447. *Milwaukee Spring*, 268 N.L.R.B. at 601.

448. *Id.* at 602.

449. The employer did propose a plan for relocation which the union rejected. The Board concluded that this proposal satisfied the employer's bargaining obligation. *Id.* at 601.

450. *See supra* note 382.

451. 29 U.S.C. § 158(d) (1982).

452. *Id.*

453. *Id.*

454. NLRB v. Southwest Sec. Equip. Corp., 736 F.2d 1332, 1337-38 (9th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985).

wait to implement drug testing until the parties negotiate a new agreement that contains provisions on drug testing, or reach a good faith impasse over the issue.⁴⁵⁵ Similarly, the employer must arbitrate grievances that arise under the collective bargaining agreement even after the contract expires.⁴⁵⁶ The employer's unilateral implementation of a drug-testing program is subject to grievance arbitration after the term of the contract has ended.

C. Waiver of a Statutory Right

The parties can forego bargaining over mandatory subjects of collective bargaining by waiving their right to bargain.⁴⁵⁷ The courts⁴⁵⁸ and the NLRB⁴⁵⁹ have found that during the collective bargaining process, a union may relinquish its right to bargain over certain mandatory subjects during the term of the agreement in exchange for benefits from the employer.⁴⁶⁰ Waiver of a statutory right will not be "lightly inferred," however, but will be found only if made in "clear and unmistakable" terms.⁴⁶¹

Unions commonly bargain away the statutory right to strike by accepting a no-strike clause in the collective bargaining agreement in exchange for other rights.⁴⁶² Waiver of a statutory right can occur by

455. *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981) (citing *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735-36 (9th Cir. 1981)).

456. *Indiana & Mich. Elec. Co.*, 284 N.L.R.B. No. 7, 1987 NLRB Dec. (CCH) ¶ 18,748 (May 29, 1987).

457. *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953, 956 (1958).

458. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707 (1983); *International Bhd. of Elec. Workers Local 1466 v. NLRB*, 795 F.2d 150, 155-56 (D.C. Cir. 1986); *American Freight Sys., Inc. v. NLRB*, 722 F.2d 828, 832 (D.C. Cir. 1983); *Chesapeake & Potomac Tel. Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982); *NLRB v. Marine Optical, Inc.*, 671 F.2d 11, 16 (1st Cir. 1982); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964).

459. *Beacon*, 121 N.L.R.B. at 956; *Press Co.*, 121 N.L.R.B. 976, 977-78 (1958).

460. See R. GORMAN, *supra* note 357, at 466-80.

461. See *Beacon*, 121 N.L.R.B. at 956.

462. See *Metropolitan Edison Co.*, 460 U.S. at 705; *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 343 (1939). Although strikes are protected economic activity under the Act, the employer can discipline an employee for engaging in strike activity as a breach of contract. See *Sands Mfg. Co.*, 306 U.S. at 343-44. In *Sands*, the union's refusal to work under the terms of the contract constituted a breach of contract and justified the employer in discharging unionized employees. The Court held that the terms of the contract were valid and the employees' discharge was not an unfair labor practice. *Id.* at 344. The Court has also held, however, that a union cannot waive rights that would impair the selection of the employees' bargaining representatives. *Metropolitan Edison*, 460 U.S. at 705-06. A waiver of the employees' choice of bargaining representative would seriously dilute section 7 rights. *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974) (citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956)).

express language in a collective bargaining agreement or by conduct of the parties.⁴⁶³ Waiver by express language, or waiver by contract, occurs when the union adopts language in the contract that clearly and explicitly waives the union's right to bargain over a specific subject.⁴⁶⁴ The Supreme Court explained the clear and unmistakable waiver standard in *Metropolitan Edison Co. v. NLRB*.⁴⁶⁵ In *Metropolitan Edison*, the Court considered whether the employer was justified in imposing harsher penalties on a union official than on rank and file members for participating in an unlawful strike.⁴⁶⁶ The question turned on whether the union official had a duty to attempt to prevent strikes.⁴⁶⁷ The Court held that the no-strike clause in the collective bargaining agreement did not impose an explicit contractual duty on the union official to attempt to enforce its terms, but merely required that he refrain from participating in a strike.⁴⁶⁸ The court found no evidence that the union had clearly and unmistakably waived the official's statutory rights under the Act, and thus found that the harsher penalties constituted an unfair labor practice.⁴⁶⁹

1. WAIVER BY CONTRACT

Before drug testing is incorporated into the contract, the only way that the employer can bring drug testing within the "contained in" language of the agreement is to assert that the union clearly and unmistakably waived its right to bargain over drug testing.⁴⁷⁰ The most common methods of union waiver occur through zipper clauses⁴⁷¹ and management rights clauses⁴⁷² in the contract. Ordinarily, the zipper clause brings drug testing into the "contained in" terms of the contract and closes out bargaining over drug testing, but only during the term of the contract.⁴⁷³ It does not authorize the employer to implement drug testing unilaterally.⁴⁷⁴ Similarly, a management rights clause may authorize the employer to implement

463. See *Chesapeake & Potomac*, 687 F.2d at 636.

464. *Id.*; see *Beacon*, 121 N.L.R.B. at 956.

465. 460 U.S. 693, 709 (1983).

466. *Id.* at 697.

467. *Id.* at 700.

468. *Id.* at 708-10.

469. *Id.* at 709-10.

470. *Metropolitan Edison*, 460 U.S. at 693.

471. "A zipper or integration clause purports to close out bargaining during the contract term and to make the written contract the exclusive statement of the parties' rights and obligations." R. GORMAN, *supra* note 357, at 471.

472. A management rights clause authorizes the employer to take unilateral action over specific subjects without bargaining with the union. *Id.* at 469.

473. *UAW v. NLRB*, 765 F.2d 175, 180 (D.C. Cir. 1985).

474. See R. GORMAN, *supra* note 357, at 463-64.

drug testing without bargaining with the union.⁴⁷⁵ The general counsel avoids this differing result, however, by stating that waivers through zipper clauses and management rights clauses must specifically address the issue of drug testing in order to be effective.⁴⁷⁶ To be effective as a waiver, a zipper or management rights clause must recite in clear and unmistakable terms the union's intent to waive the employees' statutory rights or to relinquish privileges to management. For example, in *New York Mirror*,⁴⁷⁷ the NLRB found that a union that had accepted a zipper clause waiving the union's right to bargain over subjects outside the contract had not waived the union's right to receive notice and negotiate to impasse the employer's decision to shut down and sell the assets of the business.⁴⁷⁸ Similarly, in *NLRB v. C & C Plywood Corp.*,⁴⁷⁹ the Supreme Court held that a union that had accepted a management rights clause that expressly reserved to the employer the power to pay higher rates for specialized employees had not waived its right to bargain over the employer's unilateral change in wages for an entire job classification.⁴⁸⁰ Nor does a management rights clause authorize unilateral employer action unless it identifies the specific subject of unilateral employer action. As such, the NLRB has found that a broad management rights clause that gave an employer the right to change wage rates did not authorize an employer to set unilateral wage rates for new job positions.⁴⁸¹

The requirement of a specific waiver of a statutory right through zipper clauses and management rights clauses conflicts with the position of the courts and the Board, which is that general waivers by zipper clauses and management rights clauses are sufficient to waive the right to bargain.⁴⁸² The general counsel will not infer a union waiver from generally worded⁴⁸³ management rights clauses,⁴⁸⁴ zipper

475. See *supra* note 472.

476. Daily Lab. Rep. (BNA) No. 184, at D-2 (Sept. 24, 1987).

477. 151 N.L.R.B. 834 (1965).

478. *Id.* at 840.

479. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 431 (1967).

480. *Id.* at 430-31.

481. *LeRoy Mach. Co.*, 147 N.L.R.B. 1431, 1431 (1964).

482. *UAW v. NLRB*, 765 F.2d 175, 184 (D.C. Cir. 1985) (holding that a general waiver through a management rights clause was sufficient to waive the union's right to bargain over the employer's plant relocation); *LeRoy Mach. Co.*, 147 N.L.R.B. at 1432 (finding that a management rights clause authorizing the employer to determine "qualifications" for employment gave management the right to initiate physical exams for employees with records of absenteeism).

483. See *supra* note 476 and accompanying text.

484. See *Ciba-Geigy Pharmaceuticals Div.*, 264 N.L.R.B. 1013, 1017 (1982) (management rights clause was not sufficient to waive the union's right to bargain over an employer's unilateral change in absentee policy).

clauses,⁴⁸⁵ or from contract silence on the subject.⁴⁸⁶ The D.C. Circuit, in *UAW v. NLRB*,⁴⁸⁷ held that a management rights clause constituted a general waiver of the duty to bargain and was sufficient to bring the subject of plant relocation into the "contained in" language of the contract.⁴⁸⁸ The management rights clause precluded the union from bargaining over the plant's relocation.⁴⁸⁹ In *LeRoy Machine Co.*,⁴⁹⁰ the NLRB held that a generally worded management rights clause,⁴⁹¹ which authorized the employer to determine qualifications for employment, gave the employer the right to conduct physical exams for employees with records of absenteeism.⁴⁹²

Because the courts and the Board have previously construed general waivers as "clear and unmistakable" waivers of the union's right to bargain and grounds for unilateral employer action, the extent of requisite specificity of waiver in the drug-testing context is unclear. Drug testing encompasses a multitude of issues including the justification⁴⁹³ and purpose of testing,⁴⁹⁴ the type of test,⁴⁹⁵ the reliability of the tests and laboratory,⁴⁹⁶ and test cutoff levels.⁴⁹⁷ Thus, inclusion of the term "drug testing" in a zipper clause or management rights clause without reference to these details may not be sufficiently specific to constitute a waiver of the union's right to bargain over unilateral employer implementation on particular drug-testing issues. For example, if a mere mention of "drug testing" in a management rights clause operated as a blanket waiver, the employer could unilaterally determine many issues within the program such as the cutoff levels for the test. Cutoff levels have a direct correlation to the results of an initial screening in terms of a positive or negative test result. If the

485. See *Suffolk Child Dev. Center, Inc.*, 277 N.L.R.B. 1345, 1350-51 (1985).

486. *Elizabethtown Water Co.*, 234 N.L.R.B. 318, 320 (1978) (Silence in the contract on the negotiation of a retirement plan, which expired midterm, did not waive the union's right to bargain over this subject.). The Board decision in *Milwaukee Spring II*, however, indicates that an employer can circumvent the requirement of union consent if the contract does not contain terms on the issue in question, and the bargaining requirements are met. 268 N.L.R.B. 601 (1984), *aff'd sub nom. UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985). If this interpretation of *Milwaukee Spring II* is correct, the absence of a term on a disputed issue functions as a quasi-waiver by the union. *Id.* at 602.

487. *UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

488. *Id.* at 184.

489. *Id.* at 181-83.

490. *Leroy Mach. Co.*, 147 N.L.R.B. 1431 (1964).

491. *Id.*

492. *Id.* at 1432.

493. See *supra* note 407 and accompanying text.

494. See *supra* note 410 and accompanying text.

495. See *supra* note 412 and accompanying text.

496. See *supra* notes 412-14 and accompanying text.

497. See *supra* note 416.

cutoff level is too low, the employee risks a false positive test result.⁴⁹⁸ Without bargaining over this specific aspect, the union runs the risk that a member who tests positive may be disciplined or rehabilitated on the basis of a false positive test result. The specific waiver requirement may prevent indirect relinquishment of the union's statutory right to bargain and thus promote discussion of the numerous and often technical issues of drug testing. Waiver by contract will most likely surface as an issue after the parties integrate drug testing into their collective agreement.⁴⁹⁹

2. WAIVER BY CONDUCT OF THE PARTIES

The second category of waiver, conduct of the parties, includes the parties' past practices, bargaining history, and action or inaction.⁵⁰⁰ A waiver based on past practices must clearly encompass the program at issue.⁵⁰¹ Thus, the Board has found that a union that had previously acquiesced to numerous employer changes regarding work rules had waived its right to bargain over changes in the tardiness policy.⁵⁰² In contrast, the NLRB held that a union had not waived its right to bargain over the implementation of an employee purchase plan even though the union had acquiesced to previous employer changes in the program, because the new plan was not discussed at the bargaining table.⁵⁰³ Union inaction has operated as a waiver of the right to bargain over an employer's decision to relocate to a more modern facility, because the union knew about the plans to relocate but failed to request bargaining.⁵⁰⁴ A union's waiver by conduct over drug testing is likely to arise as an issue during the term of an existing agreement. The union may receive notice of bargaining, then bargain to impasse.⁵⁰⁵ The employer will then unilaterally implement its proposed plan after impasse. In light of the Board's policy requiring specific waivers, it is unlikely that the Board or an arbitrator would find union conduct other than an express waiver, specific enough to consti-

498. *Id.*

499. *See supra* note 431.

500. *Chesapeake & Potomac Tel. Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982).

501. *See Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953, 957 (1958).

502. *Continental Tel. Co. of Calif.*, 274 N.L.R.B. 1452, 1453 (1985). The contract also contained a management rights clause indicating that the parties had agreed that management had the unilateral right to revise work rules such as the attendance policy. *Id.*

503. *Owens-Corning Fiberglass Corp.*, 282 N.L.R.B. No. 85, 1986 NLRB Dec. (CCH) ¶ 18,499 (Jan. 5, 1986).

504. *Inland Steel Container Co.*, 275 N.L.R.B. 929, 938 (1985), *review denied sub nom. Local 2179, United Steelworkers of Am. v. NLRB*, 822 F.2d 559 (5th Cir. 1987).

505. The notice must be given sufficiently in advance of implementation of a drug-testing program to allow the union a reasonable opportunity to bargain over the issue. *Ciba-Geigy Pharmaceuticals Div.*, 264 N.L.R.B. 1013, 1017 (1982).

tute a waiver on the issue of drug testing.⁵⁰⁶

The past practice waiver directive also requires that drug testing be specifically addressed prior to waiver.⁵⁰⁷ Because the subject of drug testing is virtually absent at the negotiation stage, an employer cannot rely on the union's acquiescence to drug testing and unilaterally initiate a drug-testing program.⁵⁰⁸ The Board has held that a union acquiesced to an employer's unilateral changes to a work rule by failing to question the employer's actions.⁵⁰⁹ But the mere fact that the contract does not mention drug testing does not operate as a waiver by past practice.⁵¹⁰ Prior submission to a physical exam that did not include drug testing, or acceptance of rules that prohibit drug use does not work a waiver of the union's right to bargain over drug testing. Acquiescence that does not go specifically to the issue of drug testing⁵¹¹ cannot justify amending existing rules or practices without bargaining.⁵¹² Similarly, assent to drug testing "for cause" does not waive the union's right to bargain over random or mass drug testing.⁵¹³ In essence, the general counsel's limitations mean that no waiver will be found unless the union clearly and unmistakably intended to consent to the employer's unilateral implementation of drug testing during the term of the contract.

D. Board Deferral Policy of Contract Disputes and Unfair Labor Practice Claims

Determining whether drug testing is "contained in" the agreement depends upon interpreting the contract to assess the specificity of the zipper or management rights clause. The NLRB routinely defers issues of contract interpretation to the parties' grievance procedure or arbitration.⁵¹⁴ The Board's position is that because of the frequency of disputes, the contractual nature of the agreement, and

506. See *supra* notes 493-99 and accompanying text.

507. See Daily Lab. Rep. (BNA) No. 184, at D-2 (Sept. 24, 1987).

508. *Murphy Diesel Co.*, 184 N.L.R.B. 757, 763 (1970) (holding that unilateral changes of shop tardiness rules that were not discussed at the bargaining table did not constitute a waiver by the union even though the union had acquiesced in these changes), *enforced*, 454 F.2d 303 (7th Cir. 1971).

509. *Continental Tel.*, 274 N.L.R.B. at 1453.

510. *Ciba-Geigy Pharmaceuticals Div.*, 264 N.L.R.B. 1013, 1016 (1982) (holding that silence in the contract over absenteeism does not authorize the employer, through the management rights clause, to set absenteeism policy unilaterally without bargaining with the union).

511. See *Beacon Piece Dyeing & Finishing Co.*, 121 N.L.R.B. 953, 959-60 (1958).

512. *Id.* (holding that a waiver must encompass the program at issue).

513. See *supra* note 360.

514. *In re Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 706 (1943), *enforced*, 141 F.2d 785 (9th Cir. 1944).

the varying context of the agreement,⁵¹⁵ the parties themselves are best situated to give meaning to their collective bargaining agreement.⁵¹⁶

In case of a dispute, the general counsel's memorandum directs the Board to defer to arbitration as outlined in *Collyer Insulated Wire*.⁵¹⁷ In *Collyer*, the union alleged that the employer unilaterally changed wages and working conditions in violation of section 8(a)(5) of the Act.⁵¹⁸ After the union rejected a proposed wage increase, the employer increased wages twenty cents an hour.⁵¹⁹ The contract empowered the employer to adjust wages and provided that grievance arbitration machinery was "the exclusive forum for resolving contract disputes."⁵²⁰ Because contract interpretation was at the center of the dispute, the Board deferred the dispute to arbitration.⁵²¹ It emphasized the "special skill and experience"⁵²² of arbitrators that made them more adept and efficient than the Board in deciding grievances under collective bargaining agreements.⁵²³ Under the *Collyer* defer-

515. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 840-43 (1971).

516. The Board, in addressing the widespread acceptance of arbitration, stated: "The reason for its success is the underlying conviction that the parties to a collective-bargaining agreement are in the best position to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract." *United Technologies Corp.*, 268 N.L.R.B. 557, 558 (1984). In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the Supreme Court expressed its support for deferral to arbitration:

Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Id. at 581.

517. 192 N.L.R.B. 837, 842-43 (1971).

518. *Id.* at 837.

519. *Id.* at 838.

520. *Id.* at 839.

521. *Id.* at 842.

522. "In our view, disputes such as these can be better resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute." *Id.* at 839.

523. *Id.* Under labor policy, private grievance arbitration is preferable to involvement of the Federal Mediation and Conciliation Service. 29 U.S.C. § 173(d) (1982). Section 173(d) states in full:

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional circumstances.

29 U.S.C. § 173(d) (1982); see also *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S.

ral standard, arbitrators may address unfair labor practice claims in addition to contract interpretation issues.⁵²⁴ This deferral policy has the effect of channeling contract issues and unfair labor practice claims into arbitration, in effect limiting Board review of drug testing.

E. Comment

The general counsel's conclusion that drug testing is a mandatory subject of bargaining significantly changes the bargaining relationship between the employer and the union by giving the union a voice in bargaining with the employer over drug testing. The mutual duty to bargain inherent within mandatory subjects of bargaining compels the employer and the union to consider and settle on the particulars of a drug-testing program before implementation.⁵²⁵ A refusal to bargain over drug testing by either party violates the duty

397 (1976) (The method agreed upon by the parties is the preferred method for settlement of grievance disputes arising over the interpretation of an existing collective bargaining agreement.). Courts have expressed this same preference for private grievance resolution on questions of contract interpretation when faced with union petitions for injunctive relief from railroad drug-testing programs. See *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R.*, 802 F.2d 1016, 1017 (8th Cir. 1986); *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 659 F. Supp. 325, 330 (N.D. Ill.), *aff'd*, 833 F.2d 700 (7th Cir. 1987). In *Brotherhood of Maintenance of Way*, 802 F.2d at 1017; *Railway Labor Executives' Ass'n*, 659 F. Supp. at 330, the courts denied injunctive relief, stating that the dispute over drug testing was a minor dispute and cognizable under the collective bargaining agreement. The union's petition for the maintenance of status quo with no drug testing was referred to the National Railway Adjustment Board, because the Board has exclusive jurisdiction over minor disputes. *Id.* The Ninth Circuit, however, has held that railroad drug-testing programs are not minor but major disputes. See *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 838 F.2d 1102 (9th Cir. 1988) (the use of sniffing dogs to detect the presence of illicit drugs was not cognizable under the collective bargaining agreement, and therefore a major dispute). The *Burlington Northern* court also found that mandatory urinalysis of train crews involved in human factor accidents was not expressly or impliedly cognizable under the collective bargaining agreement, and therefore was a major dispute. As a major dispute, the court had jurisdiction to enjoin the drug-testing program. *Id.*

Arbitrators are likely to be faced with several issues, ranging from the legality of drug testing, including whether it was reasonable to administer a drug test, to the technical aspects of each test, the laboratory accuracy, and the nexus between off-duty drug use and workplace impairment. For a discussion of arbitration issues in drug testing, see Denenberg & Denenberg, *Employee Drug Testing and the Arbitrator: What Are the Issues?*, *ARB. J.*, June 1987, at 19, 19. For a discussion of the arbitration of drug abuse cases, see Hopson, *Alcohol and Drug Abuse Cases in Arbitration*, in *SECOND ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE* 275 (1986), and *DRUG TESTING IN THE WORKPLACE*, *supra* note 407, at 264-80.

524. See *Collyer*, 192 N.L.R.B. 837, 837 (1971). For a discussion of the *Collyer* deferral factors, see *supra* note 367.

525. The general counsel's memorandum extends the bargaining obligation to the particulars of drug testing in the same manner as a physical exam. The parties must discuss the purpose of the test, the results of such testing, the specifics of each type of test, and the mechanics of the laboratory involved. See *Daily Lab. Rep. (BNA) No. 184*, at D-1 (Sept. 24, 1987). The duty to disclose on drug testing issues is likely to be very broad, as more information will be needed to integrate this issue into the collective bargaining agreement.

to bargain under section 8(d) of the Act.⁵²⁶ The employer and the union can bargain to impasse, and back their respective positions on drug testing issues with a strike or lockout.⁵²⁷ Unilateral implementation of a drug-testing program is permissible only if the union has waived its right to bargain over drug testing.⁵²⁸ But any waiver of the statutory right to bargain over drug testing must be made in clear and unmistakable terms.⁵²⁹

The general counsel's memorandum, however, goes beyond creating a statutory right to bargain over drug testing. It reveals the transitory nature of the issue of drug testing within private sector unionized employment. Because most collective bargaining agreements do not contain terms on drug testing,⁵³⁰ drug testing will most likely surface as an issue during the term of a collective bargaining agreement. If the employer and the union cannot reach agreement over the employer's implementation of a drug-testing program midterm, the union can strike to support its position on the issue. This type of activity is likely to be enjoined by the courts because the dispute arises out of an arbitrable grievance.⁵³¹ The dispute will then proceed to arbitration as an issue of contract interpretation. The employer, however, will likely face an unfair labor practice claim filed by the union. Again, the dispute will be deferred to arbitration. Moreover, the limited duration of labor contracts⁵³² may deter the employer and the union from addressing this issue midterm. The parties may wait until the contract expires and then negotiate the terms of drug testing in the new agreement. By relying on the Board's deferral policy, the general counsel has forced management and labor to privately order their rights and obligations through their own grievance machinery in a grass roots approach to the problem of

526. See *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).

527. See T. COLOSI, *supra* note 375, at 120; R. GORMAN, *supra* note 357, at 431-32.

528. See *Metropolitan Edison*, 460 U.S. at 705-06.

529. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983).

530. The agreements may contain rules prohibiting the use of drugs in the workplace. See *S.D. Warren Co. v. United Paperworkers' Int'l Union, Local 1069*, 815 F.2d 178, 180 (1st Cir. 1987). As the general counsel noted in the memorandum, "[A] drug test is not simply a work rule; . . . it is a means . . . of enforcing compliance with a rule." See *Daily Lab. Rep. (BNA)* No. 184, at D-2 (Sept. 24, 1987).

531. If the grievance is not covered within the collective bargaining agreement, it may not be arbitrable, and therefore may not be enjoined by a court. See *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 249-53 (1970). The issue becomes more complex when the collective bargaining agreement contains a no strike clause, and the employer has implemented a drug-testing program unilaterally, after bargaining to impasse with the union, during the term of the agreement.

532. Most collective bargaining agreements are three years in length. BUREAU OF LABOR STATISTICS, U.S. DEP'T. OF LABOR, BULLETIN NO. 2065, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, Table 1-4 (1980).

workplace drug abuse and its attempted solution through drug testing.⁵³³ The general counsel's guidelines go further, however, in that they stonewall any true analysis of drug testing by the Board and implicitly express the Board's desire to avoid the controversy over drug testing until the parties incorporate specific terms on drug testing into collective bargaining agreements. Once drug testing is integrated into collective agreements and becomes part of the "contained in" language, the employer cannot implement drug testing without the consent of the union.⁵³⁴ This should protect unionized workers as drug testing becomes a common subject in collective bargaining agreements.⁵³⁵ Ultimately, this private rights model may prove to be more successful than the nonnegotiable federal mandate of drug testing of public employees.

V. FEDERAL ANTIDISCRIMINATION STATUTES

In certain cases, employees in the public and private sectors may be entitled to protection under two federal antidiscrimination statutes. If a drug-testing program discriminates against members of a minority group, Title VII of the Civil Rights Act of 1964 is implicated.⁵³⁶ In addition, "otherwise qualified" drug abusers may invoke the Rehabilitation Act of 1973⁵³⁷ to oppose a drug-testing program.

A. *Title VII of the Civil Rights Act of 1964*

In limited circumstances, an employee may successfully challenge the discriminatory purpose or effect of a drug-testing program under Title VII of the Civil Rights Act of 1964. Title VII prohibits employers from discriminating against employees or applicants for employment on the basis of their "race, color, religion, sex or national origin."⁵³⁸ Because the purpose of Title VII is to eliminate the histor-

533. Moreover, by requiring the NLRB to defer to grievance arbitration, the general counsel has preserved the policy and goal of the National Labor Relations Act, which is to ensure the private resolution of disputes, and prevent industrial strife. For the relevant sections of the Act, see *supra* note 358.

534. See R. GORMAN, *supra* note 429 and accompanying text.

535. See *supra* notes 402-16 and accompanying text.

536. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

537. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C. (1982 & Supp. II 1984)).

538. 42 U.S.C. § 2000e-2(a) (1982). The statute specifically describes prohibited employer actions:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for

ical barriers that have excluded minorities from employment opportunities,⁵³⁹ courts have held that Title VII prohibits both intentional and unintentional acts of discrimination.⁵⁴⁰ Intentional discrimination, or "disparate treatment," can manifest itself in two ways: (1) an employer may adopt an employment policy that overtly discriminates against a minority group; or (2) an employer may use an apparently neutral employment policy as a mere pretext to discriminate against members of a minority group.⁵⁴¹ Unintentional discrimination occurs when an employer implements a facially neutral employment policy that has a discriminatory effect, or "disparate impact," on minority groups, even though the employer did not intend this result.⁵⁴² "Disparate impact" means that the effect of the policy is to deny employment opportunities to a disproportionately high number of qualified minority applicants relative to the qualified applicant pool.⁵⁴³

employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. For a general discussion of the scope of Title VII, see Comment, *Title VII Today: The Shift Away from Equality*, 20 J. MARSHALL L. REV. 525 (1987).

539. In *Griggs v. Duke Power*, 401 U.S. 424 (1971), the Supreme Court discussed the objective of Congress in enacting Title VII:

It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Id. at 429-30.

540. The Supreme Court first addressed the issue of whether unintentional discrimination was within the scope of Title VII in *Griggs v. Duke Power*, 401 U.S. 424 (1971). In *Griggs*, black job applicants challenged a requirement that employees have graduated from high school or passed a standardized intelligence test. *Id.* at 424. The plaintiffs did not demonstrate that the employer had adopted the employment policy in order to discriminate overtly against blacks. *Id.* The Court held that the plaintiffs could still maintain a cause of action for unintentional discrimination under Title VII, because the purpose of the Act is to eliminate barriers to employment resulting from intentional and unintentional discrimination. *Id.* at 431-36; see also *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 218 (10th Cir. 1972) ("Title VII is aimed at the consequences of employment practices, not simply the motivation.").

541. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973).

542. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). For an analysis of the foundation of the theory of disparate impact, see Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299-1311 (1987).

543. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Intelligence testing and minimum educational requirements are common examples of facially neutral job requirements that may have a disparate impact on minorities. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (invalidating job requirement that employees have a high school diploma or pass a standardized intelligence test); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) (invalidating job requirement of high school diplomas).

Most employers adopt drug-testing programs to identify drug-impaired employees or job applicants. It is conceivable, however, that an employer who suspects that members of minority groups are more likely to use drugs may attempt to use a drug-testing program as a means of intentionally discriminating against them. Yet proving intentional discrimination can be an insurmountable hurdle.⁵⁴⁴ As such, an employee or job applicant would probably not challenge a drug-testing program on the basis of disparate treatment. If Title VII becomes a vehicle for challenging drug testing, disparate impact will likely be the most viable theory for such an action.

In *Griggs v. Duke Power Co.*,⁵⁴⁵ the Supreme Court of the United States established a burden-shifting test for disparate impact claims under Title VII.⁵⁴⁶ A plaintiff alleging disparate impact must first make a prima facie showing that the challenged policy has a discriminatory effect on a minority group.⁵⁴⁷ Once the plaintiff makes this showing, the burden shifts to the employer to prove by statistical evidence that the challenged condition of employment is "job related."⁵⁴⁸ Some courts have obviated the need for statistical evidence or otherwise lightened the defendant's burden in proving job relatedness for positions that require a high degree of skill, pose a high degree of risk to third persons, or involve high economic risks.⁵⁴⁹

544. Cf. UNITED STATES COMMISSION ON CIVIL RIGHTS, *AFFIRMATIVE ACTION IN THE 1980'S: DISMANTLING THE PROCESS OF DISCRIMINATION* 8 (1981) ("Although open and intentional prejudice persists, individual discriminatory conduct is often hidden and sometimes unintentional."); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 266 (1971) (An "admission is, of course, unlikely, especially where social mores disapprove of the conduct prohibited by the law.")

545. 401 U.S. 424 (1971).

546. *Id.* at 432.

547. A plaintiff must show that the employment policy results in an employee pool that has a "racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

548. *Id.* at 431; see also 29 C.F.R. § 1607.5(B) (1987) (detailing the requisite statistical evidence to prove disparate impact). For a discussion of the employer's burden of proving job relatedness, see Rutherglen, *supra* note 542, at 1312-29; Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981). For a discussion of the use of statistics in Title VII cases, see Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299 (1984).

549. In *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972), a black applicant challenged the requirement that a flight officer have a college degree and earn at least 500 flight hours. The court held that the defendant had a slight burden of proving that the job requirement was job related because of the public's safety interest in having qualified pilots as well as the airline's financial interest in protecting their multimillion dollar investment. *Id.* at 219; see also *Walker v. Jefferson County Home*, 726 F.2d 1554, 1559 (11th Cir. 1984) (requiring employer to meet a substantial burden in demonstrating that the requirement of supervisory experience for the position of supervisor of a housekeeping department was job related because the employer failed to show that high risks were inherent in the job).

A court may refuse to invalidate a drug-testing program under Title VII even if the plaintiff has made a sufficient showing of disparate impact. Drug-testing programs are a means of enforcing a condition of employment that employees or applicants refrain from drug use. Even under the more stringent *Griggs* requirement of statistical proof,⁵⁵⁰ an employer may easily show that the prohibition against drug use is job related if drug use affects job performance, absentee rates, and job safety.⁵⁵¹ In *New York Transit Authority v. Beazer*,⁵⁵² employees and job applicants who were receiving methadone treatment challenged the New York City Transit Authority's firing of employees and refusal to employ applicants who were receiving methadone treatment for heroin addiction.⁵⁵³ The petitioners argued that the rule against methadone use had a disparate impact on blacks and Hispanics, but the court found that the statistical evidence did not substantiate their position.⁵⁵⁴ The Court stated, in dicta, that even if the petitioners had established a showing of disparate impact, the policy would have been valid under Title VII, because it served the "legitimate employment goals of safety and efficiency."⁵⁵⁵

550. See *supra* note 545-47 and accompanying text.

551. For a discussion of the impact of employee drug use on productivity and safety, see *supra* notes 19-20 and accompanying text.

552. 440 U.S. 568 (1979).

553. *Id.* at 576.

554. *Id.* at 585. The plaintiffs proffered the following statistical evidence: First, 81 percent of the employees who were referred to the Transit Authority's medical director for suspected use of narcotics were black or Hispanic; second, 63 percent of the individuals receiving methadone treatment in public programs were black or Hispanic. *Id.* at 584-85. The Court rejected the first figure because the database was not limited in scope to methadone users. *Id.* The second figure was misleading because it did not accurately reflect the racial composition of Transit Authority job applicants and employees receiving methadone treatment. *Id.* at 585.

In *Shield Club v. City of Cleveland*, 647 F. Supp. 274 (N.D. Ohio 1986), *rev'd*, 838 F.2d 138 (6th Cir. 1987), a class of police officer cadets argued that a drug-testing program unlawfully discriminated against them because the tests "may misidentify . . . melanin as cannabinoids." *Id.* at 277. The viability of this theory remains uncertain, however, because the court merely decided whether discovery was warranted under a consent decree, and did not reach the merits of the case.

555. *Beazer*, 440 U.S. at 587 n.31. *But cf.* *Toledo v. Nobel-Sysco, Inc.*, 651 F. Supp. 483 (D.N.M. 1986). In *Toledo*, the court held that an employer's refusal to hire a truck driver who used peyote twice per year in religious ceremonies discriminated against him on the basis of his religion, and therefore violated Title VII. *Id.* at 485-86. After the employee brought suit, the employer offered to accommodate the employee's use of peyote in religious ceremonies by allowing him to take a day off after using the peyote, and providing supervision on the days after he used the drug to ensure that he would not drive a truck while under the influence of peyote. *Id.* at 492. The court held that these accommodations were reasonable. *Id.*

It is interesting to note that in defending the Title VII action, the employer argued that it would suffer undue hardship by hiring a known drug user because of the potential for tort liability. *Id.* at 491. The court, however, rejected this argument, because the employee did not need to be scheduled for work the day after his use of peyote. *Id.* For a discussion of employer

At least one court has indicated that drug testing may not serve a legitimate employment goal when it reaches off-duty drug use. In *Drayton v. City of St. Petersburg*,⁵⁵⁶ black job applicants challenged a police and fire department rule permitting employers to reject job applicants who were found to have used marijuana within a six-month period preceding application.⁵⁵⁷ The United States District Court for the Middle District of Florida found that the plaintiffs had failed to demonstrate statistically that the "six months clean time rule" had a disparate impact on black applicants.⁵⁵⁸ Yet the court noted that "there would seem to be no logical nexus whatever between recent marijuana usage and employment as a Firefighter"⁵⁵⁹ Thus, the court stated that if the applicants had proved disparate impact, they might have established a violation of Title VII.⁵⁶⁰ The court indicated, however, that a logical nexus would exist between marijuana use and fitness as a police officer.⁵⁶¹

The *Drayton* court did not indicate the reason for distinguishing between a firefighter and a police officer, but the rationale may be found in *Davis v. City of Dallas*.⁵⁶² In *Davis*, black applicants for positions as police officers challenged various job requirements, including a rule against "recent or excessive marijuana use."⁵⁶³ The court held that the rule against marijuana use was job related because the police department had a "compelling interest in enforcing existent criminal laws,"⁵⁶⁴ and because a police officer who used marijuana himself was less likely to enforce the laws prohibiting such use.⁵⁶⁵

Courts may apply *Beazer* to invalidate drug testing in those limited circumstances in which off-duty drug use is not job related.⁵⁶⁶ A

tort liability for negligent hiring and negligent retention of employees who are drug users, see *infra* notes 827-51 and accompanying text.

556. 477 F. Supp. 846 (M.D. Fla. 1979).

557. *Id.* at 851.

558. *Id.* at 855. The statistical evidence established that 49 percent of the black applicants and 51 percent of the white applicants had passed a polygraph examination concerning recent use of marijuana. *Id.* at 855 n.14.

559. *Id.* at 855.

560. *Id.*

561. *Id.*

562. 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).

563. *Id.* at 223.

564. *Id.* at 225.

565. *Id.* at 224-25; see also *Shield Club v. City of Cleveland*, 647 F. Supp. 274 (N.D. Ohio 1986) (holding that drug testing of police cadets was job related), *rev'd on other grounds*, 838 F.2d 138 (6th Cir. 1987).

566. For a discussion of cases brought under state handicap discrimination statutes holding that employees who were drug abusers were able to perform their jobs satisfactorily, see *infra* notes 603-09 and accompanying text.

drug test cannot measure levels of intoxication,⁵⁶⁷ and some drugs remain in the bloodstream weeks after their intoxicating effects have subsided.⁵⁶⁸ Consequently, an employer who implements mass or random drug testing can effectively monitor employees' off-duty drug use even though such use may not relate to the employees' responsibilities.⁵⁶⁹ As such, under *Beazer*, a court will invalidate a drug-testing program under Title VII if the program has a disparate impact on a minority group and the employees' use of drugs has no relation to their job performance.

In addition, under *Drayton*, an employer cannot use drug testing to screen applicants for employment who have used drugs in the past unless past drug use will affect future job performance and safety. Thus, drug testing that is used to screen job applicants for secretarial or administrative positions may not be permissible under Title VII if a disparate impact on a minority group results. Conversely, an employer may be able to drug test job applicants for positions involving law enforcement or the interception of drugs into the country, despite any disparate impact on minority groups.

B. *The Rehabilitation Act of 1973*

Considering the prevalence of illicit drug use and the increasing use of drug testing in the workplace, it is inevitable that employees with drug abuse problems will be among those testing positive for drugs.⁵⁷⁰ Many employers react to positive drug test results by demoting, discharging, or taking other adverse action against the offending employees.⁵⁷¹ The Rehabilitation Act of 1973⁵⁷² is one vehicle for protecting certain employees who are addicted to drugs.⁵⁷³

567. See *supra* note 44 and accompanying text.

568. Zeese, *supra* note 48, at 26.

569. See *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 732 n.5 (S.D. Ga. 1986) ("Because the test can yield positive results days and even weeks after drug use, they in effect allow the employer to control the employee's off-duty behavior . . .").

570. For a discussion of the prevalence of illicit drug use and the increasing use of drug testing in the workplace, see *supra* notes 22-40 and accompanying text. Conservative estimates place the number of workers who have drug abuse problems at 6 to 7 percent. CORPORATE STRATEGIES FOR CONTROLLING SUBSTANCE ABUSE 11 (H. Axel ed. 1986). For a discussion of alcohol and drug abuse issues in the workplace, see generally W. SCANLON, *supra* note 33, and T. DENENBERG & R. DENENBERG, *supra* note 249.

571. See *supra* note 42.

572. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C. (1982 & Supp. II 1984)).

573. For a discussion of drug abuse handicaps under the Rehabilitation Act, see Comment, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act*, 1983 WIS. L. REV. 725, 725-32. Some state handicap discrimination laws also may provide protection for employees who are addicted to drugs. For a discussion of

Courts agree that drug abuse constitutes a handicapping condition.⁵⁷⁴ The Act prohibits certain classes of employers from discriminating against handicapped persons on the basis of their handicaps,⁵⁷⁵ provided that they are able to perform their jobs and do not pose a safety threat to others.⁵⁷⁶ A claim of employment discrimination under the Rehabilitation Act is based on four elements: (1) the employer is subject to the Act;⁵⁷⁷ (2) the employee has a handicapping condition;⁵⁷⁸ (3) the employee is an "otherwise qualified" handicapped person;⁵⁷⁹ and (4) the employer has not reasonably accommodated the employee's handicap.⁵⁸⁰

1. EMPLOYERS SUBJECT TO THE ACT

Congress included three types of employers, each governed by a separate statutory section, within the scope of the Act. Section 501⁵⁸¹ prohibits federal employers from discriminating against handicapped persons in all facets of employment⁵⁸² and requires them to take affirmative action in the "hiring, placement, and advancement" of handicapped persons.⁵⁸³ Section 503⁵⁸⁴ prohibits government

state antidiscrimination statutes, see Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 ARK. L. REV. 261 (1986). Protection also may be found under the Vietnam Era Veterans' Readjustment Assistance Act of 1972 for employees who are Vietnam veterans. See 38 U.S.C. §§ 2011-2014 (1982 & Supp. II 1984). This statute requires government contractors and subcontractors who have federal contracts equal to or in excess of \$10,000 to "take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era." 38 U.S.C. § 2012(a) (1982). The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 provides additional protection for formerly alcoholic federal employees. See 42 U.S.C. § 290dd-1 (Supp. II 1984). The Act states that "[n]o person may be denied or deprived of Federal civilian employment . . . solely on the ground of prior alcohol abuse or prior alcoholism." 42 U.S.C. § 290dd-1(c)(1) (Supp. II 1984). This section does not, however, "prohibit the dismissal from employment of a Federal civilian employee who cannot properly function in his employment." 42 U.S.C. § 290dd-1(d) (Supp. II 1984). For a discussion of employers' role in assisting employees who are addicted to drugs, see Spencer, *The Developing Notion of Employer Responsibility for the Alcoholic, Drug-Addicted or Mentally Ill Employee: An Examination Under Federal and State Employment Statutes and Arbitration Decisions*, 53 ST. JOHN'S L. REV. 659 (1979).

574. See *infra* note 592 and accompanying text.

575. See, e.g., 29 U.S.C.A. § 794 (West Supp. 1987).

576. See *infra* note 599 and accompanying text.

577. See *infra* notes 581-87 and accompanying text.

578. See *infra* notes 588-96 and accompanying text.

579. See *infra* notes 597-632 and accompanying text.

580. See *infra* notes 633-47 and accompanying text.

581. 29 U.S.C.A. § 791 (West Supp. 1987).

582. *Id.* § 791(a) (West Supp. 1987).

583. *Id.* § 791(b) (West Supp. 1987). "Section 501 was intended to make the federal government a 'leader' or 'model employer' of the handicapped." *Whitlock v. Donovan*, 598 F. Supp. 126, 130 (D.D.C. 1984), *aff'd without opinion sub nom. Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986). Federal employees have a private right of action to enforce their right to

contractors from discriminating against handicapped job applicants or employees who are involved with carrying out government contracts or subcontracts, and requires contractors to take affirmative action "to employ and advance" qualified handicapped individuals.⁵⁸⁵ Finally, section 504⁵⁸⁶ prohibits employers who receive federal funds from discriminating against handicapped persons in all facets of employment.⁵⁸⁷

receive affirmative action. *Milbert v. Koop*, 830 F.2d 354, 356 (D.C. Cir. 1987); *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 302-03 (5th Cir. Unit A Nov. 1981); 29 U.S.C. § 794a(a)(1) (1982).

584. 29 U.S.C.A. § 793 (West Supp. 1987).

585. *Id.* § 793(a). This section applies to "[a]ny contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States." *Id.* This section also applies to "any subcontract in excess of \$2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States." *Id.*

Courts have held that section 503 does not create a private right of action against employers for alleged discrimination. *See, e.g., Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1244 (7th Cir. 1980); *Healy v. Bergman*, 609 F. Supp. 1448, 1455 (D. Mass. 1985); *Doss v. General Motors Corp.*, 478 F. Supp. 139, 141 (C.D. Ill. 1979). *Contra Clarke v. FELEC Servs., Inc.*, 489 F. Supp. 165, 169 (D. Alaska 1980).

586. 29 U.S.C.A. § 794 (West Supp. 1987). This section is not limited in scope to employment situations as it applies to "any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." *Id.*

587. *Id.* Congress recently passed the Civil Rights Restoration Act of 1987, which provides that employers are subject to section 504 of the Rehabilitation Act if any program within their organization receives federal assistance. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 (Mar. 22, 1988), 102 Stat. 28. This Act has the effect of overruling *Grove City College v. Bell*, in which the Supreme Court of the United States held that students' receipt of federal assistance did not mandate that an entire institution comply with a federal statute that prohibited sex discrimination. 465 U.S. 555, 573 (1984). The Act thus substantially expands the scope of section 504. Under previous constructions of section 504, most courts held that employers were subject to liability only when the particular program at issue received federal assistance. *See, e.g., Doyle v. University of Ala. in Birmingham*, 680 F.2d 1323, 1326-27 (11th Cir. 1982) (holding that a university was not subject to liability under section 504 because although the university received federal funds for some programs, the program at issue was not federally funded); *Foss v. City of Chicago*, 640 F. Supp. 1088, 1090-96 (N.D. Ill. 1986) (holding that a city fire department was not subject to liability under section 504 because the federally funded programs were not related to the plaintiff's employment), *aff'd*, 817 F.2d 34 (7th Cir. 1987).

At least ten circuits have held that section 504 creates a private right of action. *See Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1107 (9th Cir. 1987); *Jennings v. Alexander*, 715 F.2d 1036, 1040-41 (6th Cir. 1983), *rev'd on other grounds sub nom. Alexander v. Choate*, 469 U.S. 287 (1985); *Jones v. Metropolitan Atlanta Rapid Transit Auth.*, 681 F.2d 1376, 1377 n.1 (11th Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984); *Miener v. State*, 673 F.2d 969, 973-74 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982); *Pushkin v. Regents*, 658 F.2d 1372, 1376-80 (10th Cir. 1981); *Camenisch v. University of Tex.*, 616 F.2d 127, 131 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1258-59 (3d Cir. 1979); *Davis v. Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Leary v. Crapsey*,

2. DEFINING A HANDICAPPING CONDITION

The primary purpose of the Act is to provide employment opportunities to handicapped individuals in order to promote their independence and integration into society.⁵⁸⁸ The Act defines an "individual with handicaps" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."⁵⁸⁹ By encompassing persons who were previously impaired or are now regarded as being impaired, the Act protects persons who are stigmatized by a history of impairment or by erroneous public perceptions that they are impaired.⁵⁹⁰ Thus, it reflects Congress' general intent to protect the handicapped, "not only from simple prejudice, but from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.'"⁵⁹¹

Courts have uniformly held that drug abuse is a handicapping condition within the meaning of the Act.⁵⁹² In 1978, Congress amended the Act to reflect its intent to include drug abusers within

566 F.2d 863, 865 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1284-88 (7th Cir. 1977); *cf. Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (holding that a plaintiff who alleges intentional discrimination may bring an action for backpay under section 504); *Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth.*, 718 F.2d 490, 493 (1st Cir. 1983) (assuming, but not deciding, the issue of whether a private right of action exists under section 504). Yet this issue has not been resolved dispositively. For a discussion of the controversy surrounding whether a remedy of damages exists under section 504, see generally Comment, *Safeguarding Equality for the Handicapped: Compensatory Relief Under Section 504 of the Rehabilitation Act*, 1986 DUKE L.J. 197.

588. *See School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123, 1129 n.10 (1987). The Act states that its purpose is

to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living, for individuals with handicaps in order to maximize their employability, independence, and integration into the workplace and the community.

29 U.S.C.A. § 701 (West Supp. 1987).

589. 29 U.S.C.A. § 706(8)(B) (West Supp. 1987).

590. *See Arline*, 107 S. Ct. at 1126-27.

591. *Id.* at 1126 (quoting S. REP. NO. 1297, 93d Cong., 2d Sess. 50 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6400).

592. *See, e.g., Crewe v. United States Office of Personnel Management*, 834 F.2d 140, 141 (8th Cir. 1987); *Whitlock v. Donovan*, 598 F. Supp. 126, 129 (D.D.C. 1984), *aff'd without opinion sub nom. Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986); *see also Burka v. New York City Transit Auth.*, 2 IER Cas. (BNA) 1625, 1630 (S.D.N.Y. 1988) (the Act only protects those otherwise qualified drug abusers who have been or are in the process of being rehabilitated).

the scope of protection.⁵⁹³ Although the Act as amended does not expressly include drug abusers, it does include them by implication. The amendment provides that the term "individual with handicaps"

does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.⁵⁹⁴

Thus, by explicitly excluding drug abusers who are unable to perform their jobs or whose employment would threaten the safety of others, Congress has implicitly included drug abusers who can perform their jobs safely.⁵⁹⁵ Courts are unlikely to find that recreational drug users

593. See 29 U.S.C.A. § 706(8)(B) (West Supp. 1987).

594. *Id.* This limitation applies specifically to sections 503 and 504. *Id.* One court has held that the limitation does not apply to section 501 because of the express language of the statute, and the fact that the federal government has a greater affirmative duty to employ handicapped individuals. *Crewe*, 834 F.2d at 142. In *Crewe*, an alcoholic employee claimed that her employer discriminated against her because she was an alcoholic. *Id.* at 141. The court held that her alcoholism was a handicapping condition, but that the employer would not be able to exclude her from employment opportunities, even if her alcoholism rendered her unable to perform the functions of the position, or posed a safety risk to others, because the limitation contained in the amendment does not apply to section 501. *Id.* at 142. Yet the court further held that the federal employer was justified in asking the employee to resign because the employer could reject any applicant to "promote the efficiency of the service." *Id.* at 142-43; see 5 C.F.R. § 731.201 (1987). The court also stated that the employer was justified because the plaintiff had failed to make a prima facie showing that the employer could have reasonably accommodated her handicap. *Crewe*, 834 F.2d at 143.

595. Comment, *Section 504 of the Rehabilitation Act of 1973: Protection Against Employment Discrimination for Alcoholics and Drug Addicts*, 28 AM. U.L. REV. 507, 518 (1979). In a recent handicap discrimination case brought under the Act, the Supreme Court of the United States described the legislative purpose of the 1978 amendment:

There, Congress recognized that employers and other grantees might have legitimate reasons not to extend jobs or benefits to drug addicts and alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under the Act. Congress therefore rejected the original House proposal to exclude addicts and alcoholics from the definition of handicapped individual, and instead adopted the Senate proposal excluding only those alcoholics and drug abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment . . . would constitute a direct threat to property or the safety of others."

School Bd. of Nassau County v. Arline, 107 S. Ct. 1123, 1130 n.14 (1987) (quoting 29 U.S.C. § 706(7)(B) (1982) (current version at 29 U.S.C.A. 706(8)(B) (West Supp. 1987))).

Although under the Act a drug abuser would be considered a handicapped person, it is uncertain how the courts will define "drug abuse" for the purposes of inclusion or exclusion of some drug users. Experts have adopted conflicting models of drug addiction. See *generally Visions of Addiction*, 17 J. DRUG ISSUES 1 (1987) (collection of articles discussing theories of addiction). If courts narrowly construe "drug abuse" as relating only to physical addiction, a person who is "abusing" cocaine would not qualify under the Act because this drug is not

fall within the scope of the Act, however, because courts may consider that recreational drug users have more control over their use of drugs, and that their impairments are temporary.⁵⁹⁶

3. DEFINING AN "OTHERWISE QUALIFIED" HANDICAPPED PERSON

A person claiming discrimination under the Act must show that he is an "otherwise qualified" handicapped person,⁵⁹⁷ meaning that he would be able to perform his job if the employer reasonably accommodated his handicap.⁵⁹⁸ An employee who is handicapped by drug abuse is not "otherwise qualified" if his addiction poses a threat to the

physically addicting. See McLaughlin, *Cocaine: The History and Regulation of a Dangerous Drug*, 2 DRUG ABUSE L. REV. 254, 269 (1972-73). This construction, however, may be inconsistent with the definition in the Act of "individual with handicaps." 29 U.S.C.A. § 706(8)(B) (West Supp. 1987). This definition includes persons who are suffering from "a mental impairment which substantially limits one or more of such person's major life activities." *Id.* Thus, a court may find that psychological addiction constitutes "mental impairment." A broad definition of "drug abuse" would fulfill the essential purposes of the Act. See *supra* note 588 and accompanying text.

596. "[T]he chemical-dependent person [does] not intend to lose control. He or she probably [drinks] or [uses] drugs for the same effect that the social drinker or recreational drug user seeks. The difference between the two . . . is that one can stop at any point and the other cannot." W. SCANLON, *supra* note 34, at 10; Miller, *Hiring the Handicapped: An Analysis of Laws Prohibiting Discrimination Against the Handicapped in Employment*, 16 GONZAGA L. REV. 23, 27-28 n.22 (1980) ("While the Act can be read to protect temporary impairments, the legislative history and purpose of the Act indicate that protection should be provided only to individuals with serious, permanent or long term impairments.") (quoting Memorandum from James D. Henry, Associate Solicitor, to Regional Solicitors (Jan. 9, 1980)). For an analysis of the concept of addiction, see Alexander, *The Disease and Adaptive Models of Addiction: A Framework Evaluation*, 17 J. DRUG ISSUES 47 (1987).

If the recreational drug user is disabled by his use of drugs, he may argue that his use of drugs has "substantially limit[ed] one or more of [his] major life activities." 29 U.S.C.A. § 706(8)(B) (West Supp. 1987). The recreational drug user who is not disabled by drug use but tests positive for drugs may argue that he is stigmatized as a drug abuser. *Cf. Blackwell v. United States Dep't of Treasury*, 656 F. Supp. 713, 715 (D.D.C. 1986) (Transvestites have a handicapping condition "because many experience strong social rejection in the work place as a result of their mental ailment."). For a discussion of the Act's protection of individuals who are stigmatized by their handicaps, see *supra* notes 589-90 and accompanying text.

It is an open question whether the Act protects employees who use marijuana to control the nausea and vomiting that follow chemotherapy or alleviate the eye pressure associated with glaucoma. At least thirty-three states have enacted statutes that permit cancer and glaucoma patients to use marijuana as part of their treatment program. Gampel, *supra* note 242, at 47-48.

597. Section 504 states that the Act protects "otherwise qualified handicapped individual[s]." 29 U.S.C.A. § 794 (West Supp. 1987). Section 503 refers to "qualified individuals with handicaps." 29 U.S.C.A. § 793(a) (West Supp. 1987). Section 501 merely discusses "handicapped individuals." 29 U.S.C.A. § 791 (West Supp. 1987). The regulations accompanying this section, however, refer to "qualified handicapped person[s]." 29 C.F.R. § 1613.702(f) (1987). In this Survey, the term "otherwise qualified" handicapped persons will be used for the purpose of uniformity.

598. See, e.g., 41 C.F.R. § 60-741.2 (1987); see *infra* note 601 and accompanying text.

safety of others.⁵⁹⁹

In *Southeastern Community College v. Davis*,⁶⁰⁰ the Supreme Court of the United States held that a handicapped student claiming discrimination under the Act was required to show that, in spite of her handicap, she was "otherwise qualified" to enter the school's nursing program.⁶⁰¹ Courts have applied *Davis* to determine whether employees are "otherwise qualified" handicapped persons.⁶⁰² Recent decisions from the highest courts in two states illustrate that an employee may be able to perform the functions of his job satisfactorily even though he is a drug abuser.⁶⁰³ In *Consolidated Freightways v. Cedar Rapids Civil Rights Commission*,⁶⁰⁴ a salesman was discharged from his job after entering an alcohol treatment center.⁶⁰⁵ The Supreme Court of Iowa held that "if the alcoholic remains sober the disability should not prevent the individual from performing his or her job in a reasonably competent and satisfactory manner."⁶⁰⁶ In *Hazlett v. Martin Chevrolet, Inc.*,⁶⁰⁷ an employee was discharged after requesting a leave of absence to obtain treatment for alcohol and drug addiction.⁶⁰⁸ The Supreme Court of Ohio held that the employer had discriminated against the employee, because he was able to perform his job, and thus he was otherwise qualified for the position.⁶⁰⁹

599. See *supra* note 595 and accompanying text. The regulations accompanying the Act provide: "'Qualified handicapped person' means with respect to employment, a handicapped person who . . . can perform the essential functions of the position in question without endangering the health and safety of the individual or others . . ." 29 C.F.R. § 1613.702(f) (1987). Courts have adopted this definition as well. See, e.g., *Heron v. McGuire*, 803 F.2d 67, 68 (2d Cir. 1986); *McCleod v. City of Detroit*, 39 Fair Empl. Prac. Cas. (BNA) 225, 228 (E.D. Mich. 1985).

600. 442 U.S. 397 (1979).

601. *Id.* at 414. In *Davis*, the Court held that an individual with a serious hearing disability was not qualified for admission to the nursing program of a state community college because the college was not required to lower its admission standards in order to accommodate the individual's handicap. *Id.* at 413-14. In *Alexander v. Choate*, the Court stated that "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." 469 U.S. 287, 300 (1985). For a discussion of reasonable accommodation, see *infra* notes 633-47 and accompanying text.

602. See, e.g., *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982); *Boyd v. United States Postal Serv.*, 32 Fair Empl. Prac. Cas. (BNA) 1217, 1222 (W.D. Wash. 1983), *aff'd*, 752 F.2d 410 (9th Cir. 1985).

603. These decisions construe state handicap antidiscrimination statutes modeled after the Rehabilitation Act. For a discussion of forty-five state antidiscrimination statutes, see *Flaccus, supra* note 573, at 268-72 & nn.40-47.

604. 366 N.W.2d 522 (Iowa 1985).

605. *Id.* at 525.

606. *Id.* at 528.

607. 496 N.E.2d 478 (Ohio 1986).

608. *Id.* at 479.

609. *Id.* at 480.

If an employee proves that he is qualified to perform his duties satisfactorily, the burden shifts to the employer to prove that the employee cannot perform safely in the position.⁶¹⁰ Federal courts have adopted two conflicting legal standards to address the requisite level of risk of harm that satisfies this burden and enables an employer to terminate or deny employment to a handicapped person.⁶¹¹ Some courts have held that an employer may refuse to hire a handicapped person if he poses "any appreciable risk" of harm to others.⁶¹² In *Doe v. New York University*,⁶¹³ the Second Circuit applied the appreciable risk standard to a medical student who was denied readmission into a medical school.⁶¹⁴ The student claimed that she was a victim of discrimination and merited protection under the Act because she suffered from a personality disorder that caused self-destructive behavior.⁶¹⁵ The court held that if the handicapped student presented "any appreciable risk" of harm to herself or others, she would be unqualified for medical school under the Act.⁶¹⁶ The court stated that an "appreciable risk" of harm may be present when there is less than a 50 percent chance that the employee will pose a safety risk to herself or others.⁶¹⁷

The court in *Doe* did not precisely delineate the exact boundaries of the appreciable risk standard. The court's definition of "appreciable risk" as a risk occurring less than 50 percent of the time may be interpreted to mean that a handicapped person is not otherwise qualified if he poses a chance of risk of harm to others ranging from 1 to 49 percent. As one commentator has stated, under this standard, employers have a light burden in proving that the handicapped

610. See *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 308 (5th Cir. Unit A Nov. 1981).

611. The few federal court decisions addressing the issue of whether an employee who is a drug abuser can perform the functions of the position safely have little precedential value because they are devoid of any legal standard reflecting the requisite level of injury that justifies an employer in terminating or denying employment to a handicapped person. See, e.g., *Heron v. McGuire*, 803 F.2d 67, 68 (2d Cir. 1986) (holding that a police officer was not a qualified handicapped individual because he had admitted that his heroin addiction made him unfit to serve as a police officer); *Healy v. Bergman*, 609 F. Supp. 1448, 1456 (D. Mass. 1985) (holding that an alcoholic employee who was hired as a fireman and maintenance worker was not an unqualified handicapped individual per se).

612. See, e.g., *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981). See generally Note, *Section 501 of the Rehabilitation Act of 1973: Finally, A Legal Standard*, 1986 ARIZ. ST. L.J. 147 (discussing standards courts apply in determining whether an employee is qualified under the Act).

613. 666 F.2d 761 (2d Cir. 1981).

614. *Id.* at 777.

615. *Id.*

616. *Id.*

617. *Id.*

employee poses a safety risk to others.⁶¹⁸

Other courts have applied the “reasonable probability of substantial harm” standard in deciding whether a handicapped individual poses a safety risk to others.⁶¹⁹ In *Mantolete v. Bolger*,⁶²⁰ the Ninth Circuit explained the reasonable probability of substantial harm standard:

[A]n employer must gather all relevant information regarding the applicant’s work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job.⁶²¹

Compared to the appreciable risk standard, the reasonable probability of substantial harm standard places a heavier burden on the employer to prove that the handicapped employee poses a safety risk to others.⁶²² As such, the reasonable probability of substantial harm standard is consistent with the purpose of the Act—to eradicate discrimination in the hiring, placement, and advancement of handicapped persons.⁶²³

The Merit Systems Protection Board, an administrative authority responsible for adjudicating federal employee discrimination appeals,⁶²⁴ has issued a number of decisions discussing whether employees who have drug abuse problems are “otherwise qualified” handicapped persons under the Act. In *Green v. Department of the Air Force*,⁶²⁵ a clinical nurse admitted that she had stolen drugs from the nursing unit of an Air Force medical center and injected the drugs while on duty.⁶²⁶ Although the nurse voluntarily entered a treatment program, the employer discharged her, claiming that her drug addiction would threaten patient safety.⁶²⁷ Applying the substantial

618. Note, *supra* note 612, at 157. “A mere ‘elevated risk’ standard is not sufficient to insure handicapped people’s ‘right to employment which complements their abilities.’” *Mantolete v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985) (quoting S. REP. NO. 48, 93d Cong., 1st Sess. 16 (1974)).

619. See, e.g., *id.* at 1422 (applying the reasonable probability of substantial harm standard to a job applicant who was an epileptic); *Kelley v. Bechtel Power Corp.*, 633 F. Supp. 927, 936 (S.D. Fla. 1986) (applying the reasonable probability of substantial harm standard in an employment discrimination action brought under a state antidiscrimination statute).

620. 767 F.2d 1416 (9th Cir. 1985).

621. *Id.* at 1423.

622. See Note, *supra* note 612, at 157.

623. See *supra* note 588 and accompanying text.

624. A federal employee may appeal the Board’s decision to the United States Court of Appeals for the Federal Circuit within thirty days after the date on which the employee received notice of the final decision. 5 U.S.C. § 7703(a)(1)-(b)(1) (1982).

625. 31 M.S.P.R. 152 (1986).

626. *Id.* at 153.

627. *Id.* at 153-54.

harm standard, the Board rejected the employer's argument and held that the nurse was an "otherwise qualified" handicapped person because she had received satisfactory reviews during the past five years, notwithstanding her addiction, and the employer had no evidence that the nurse endangered her patients' safety.⁶²⁸

In *Kulling v. Department of Transportation*,⁶²⁹ the Board rejected an air traffic controller's claim that he was an "otherwise qualified" handicapped individual after he had tested positive for cocaine use.⁶³⁰ Although the Board did not articulate a legal standard to address the requisite level of risk of injury that justifies an employer in terminating or denying employment to a handicapped person, its decision focused on the safety concerns of the position:

Air traffic controllers are responsible for the lives and safety of thousands of people. The position entails awesome pressures and requires split second decisions. Few, if any, positions demand more alertness of mind and soundness of judgment and the stress and strains of the controller are incalculable.⁶³¹

Based on these safety concerns, the Board found that the air traffic controller was not an "otherwise qualified" handicapped person.⁶³² *Kulling* may indicate that in some dangerous industries, the gravity of the potential harm is the most important factor in determining whether a person who has a drug abuse problem is "otherwise qualified" for a position. Of course, defining dangerous industries remains an open question, as some courts may find that the nursing position at issue in *Green* is equally dangerous.

4. REASONABLE ACCOMMODATION

In certain circumstances, the Act imposes a duty on employers to reasonably accommodate an employee's handicap.⁶³³ An "otherwise qualified" employee is someone who would be able to perform the job if the employer reasonably accommodated his handicap.⁶³⁴ The issue

628. *Id.* at 156-57.

629. 24 M.S.P.R. 56 (1984).

630. *Id.* at 58-59. The employer required the plaintiff to submit to a urinalysis test because he was asleep in an adjacent briefing room. *Id.* at 58 n.1. The employee also slurred his speech and appeared ill. *Id.*

631. *Id.* at 59 (quoting *Borsari v. FAA*, 699 F.2d 106, 110-11 (2d Cir.), cert. denied, 464 U.S. 833 (1983)).

632. *Id.* at 59.

633. The employee must first make a prima facie showing that his handicap could be accommodated, and then the burden shifts to the employer to show that it cannot accommodate the employee's handicap. *Whitlock v. Donovan*, 598 F. Supp. 126, 137 (D.D.C. 1984), aff'd without opinion sub nom. *Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986).

634. See *supra* note 598 and accompanying text.

of reasonable accommodation is therefore relevant in two contexts: First, reasonable accommodation may enable an employee to "perform 'the essential functions' of the job,"⁶³⁵ and second, reasonable accommodation may eliminate any safety threat that an employee's handicap might otherwise pose to others.⁶³⁶ In *School Board of Nassau County v. Arline*,⁶³⁷ the Supreme Court of the United States explained that "[a]ccommodation is not reasonable if it either imposes 'undue financial [or] administrative burdens' on [an employer]."⁶³⁸ Courts have further held that accommodation is not reasonable if it requires "fundamental" or "substantial" alterations in the nature of the program.⁶³⁹

An employer may identify an employee who is a drug abuser through drug testing. The employer may then be required to take certain steps to comply with the reasonable accommodation requirement of the Act if reasonable accommodation is feasible and not unduly burdensome. For example, the employer might be obligated to offer rehabilitative assistance and sick leave if necessary for treatment before taking disciplinary action against the employee for drug-related misconduct.⁶⁴⁰ If the employee refuses to obtain assistance, the employer might still be required to offer the employee a "firm choice" between treatment and discharge.⁶⁴¹ In *Whitlock v. Donovan*,⁶⁴² the United States District Court for the District of Columbia held that a federal employer's failure to offer a "firm choice" between treatment and discharge before firing the employee violated the reasonable accommodation requirement of the Act, even though the employer had given the employee a "firm choice" in prior years, and the employer had treated the employee's drug problem with "compas-

635. See *School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123, 1131 n.17 (1987).

636. *Id.* at 1131 n.16. For a discussion of reasonable accommodation under section 504, see Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881 (1980).

637. 107 S. Ct. 1123 (1987).

638. *Id.* at 1131 n.17 (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979)).

639. See, e.g., *Alexander v. Choate*, 469 U.S. 287, 300 (1985). Similarly, in *Copeland v. Philadelphia Police Department*, the Third Circuit held that a police department was not required to accommodate a police officer who was an illicit drug user, because accommodation would "constitute a 'substantial modification' of the essential functions of the police department and would cast doubt upon the integrity of the police force." 2 IER Cas. (BNA) 1825, 1831 (3d Cir. 1988).

640. See *Whitlock v. Donovan*, 598 F. Supp. 126, 137 (D.D.C. 1984), *aff'd without opinion sub nom. Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986).

641. *Id.* at 134.

642. 598 F. Supp. 126 (D.D.C. 1984).

sion and tolerance" for approximately six years.⁶⁴³

The duty of reasonable accommodation may include the duty to make drug testing available as a means of monitoring an employee who has completed a drug rehabilitation program. In *Averill v. Department of the Navy*,⁶⁴⁴ a rehabilitated employee, working as an equipment servicer, utilized drug testing to support his claim that he was an "otherwise qualified" handicapped person.⁶⁴⁵ Offering to submit to and pay for regular urinalysis, the employee argued that the employer's ability to monitor his progress through drug testing would effectively guard against any perceived safety risk.⁶⁴⁶

Averill illustrates that a drug-testing program may ensure that a rehabilitated employee is free from drugs, thereby reducing the probability of harm to others.⁶⁴⁷ If an employer regularly tests employees for drugs, the administrative costs of providing additional drug tests are not burdensome. Paradoxically, although many employees seek protection from drug testing, the employee who is a drug abuser may utilize a drug testing program to support his claim that he is "otherwise qualified" for a position.

VI. STATE CONSTITUTIONS AND STATUTES

Private, nonunionized employees constitute the majority of the American workforce,⁶⁴⁸ and generally do not enjoy the same protections as other employees do under the Constitution of the United States or collective bargaining agreements. Increasingly, these employees are invoking state constitutional and statutory protections to challenge drug-testing programs.

643. *Id.* at 134-36; see also *Burchell v. Department of the Army*, 679 F. Supp. 1393 (D.S.C. 1988) (adopting the reasoning of the court in *Whitlock*).

644. 30 M.S.P.R. 327 (1986).

645. *Id.* at 331.

646. *Id.*

647. This argument is bolstered by statistical evidence that reveals that drug testing is an effective way to reduce substantially the total number of accidents occurring on the job. See *supra* notes 39-41 and accompanying text.

648. See Comment, *Urinalysis Drug Testing of Private Employees: A Call for Legislation in Pennsylvania*, 91 DICK. L. REV. 1015, 1017 n.17 (1986) (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1986, at 424 (1986)). The majority of employees work in the private sector and are nonunionized. Among the groups that have been subjected to drug testing are lawyers, business school graduates, engineers, marketing personnel, sales persons, construction workers, bus and truck drivers, railroad workers, and athletes. Englade, *supra* note 42, at 22; Noble, *When Walking Papers Lead to Court*, N.Y. Times, Oct. 13, 1985, § 4, at 10, col. 2 ("[S]eventy percent of American workers are not covered by collective bargaining agreements or employment contracts . . .").

A. State Constitutional Protections

Because few federal remedies exist for private employees challenging employer conduct, employees have attempted to seek safe harbor from drug testing in their state constitutions.⁶⁴⁹ Private employers have challenged drug testing in state courts under the express right of privacy.⁶⁵⁰ Ten state constitutions provide an express right of privacy: Arizona, Florida, Louisiana, South Carolina, Washington, Alaska, California, Hawaii, Illinois, and Montana. Of these ten states, the privacy provisions of the first five state constitutions each appear to apply only to state action, and not to actions of exclusively private entities.⁶⁵¹ The privacy language embodied in the constitutions of the latter five states is not limited to state action and may broaden the privacy rights of individuals by limiting the actions of private employers.⁶⁵² In practice, only the California privacy provision has been construed to protect individuals from acts of private entities, as well as governmental entities.⁶⁵³

Employees in California have invoked the privacy protection of their state constitution to challenge compulsory drug testing.⁶⁵⁴ In

649. See Comment, *supra* note 648, at 1037 (citing Bamberger, *Boosting Your Case with Your State Constitution*, A.B.A. J., Mar. 1, 1986, at 49). Underlying these constitutional claims is the venerated legal principle that although state constitutions may not afford individuals a lesser degree of protection than the federal Constitution, they may extend greater protection. See, e.g., *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (refusing to follow the Supreme Court of the United States' construction of the fourth amendment to the Constitution of the United States, and interpreting California's virtually identical constitutional guarantee more broadly); cf. *Patchogue-Medford v. Board of Educ.*, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987) (holding random urinalysis of school teachers unconstitutional under the fourth amendment to the Constitution of the United States, and article 1, section 12 of the Constitution of New York).

650. I. SHEPARD & R. DUSTON, *WORKPLACE PRIVACY: EMPLOYEE TESTING, SURVEILLANCE, WRONGFUL DISCHARGE, AND OTHER AREAS OF VULNERABILITY* 13-14 (1987).

651. ARIZ. CONST. art. II, § 8; FLA. CONST. art. I, § 23; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7; see McGovern, *supra* note 59, at 1466.

652. McGovern, *supra* note 59, at 1466. This observation is similarly based on the express language of the state constitutions. See ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; MONT. CONST. art. II, § 10.

653. See *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829-30, 134 Cal. Rptr. 839, 842 (1976) (The privacy provision of the Constitution of California protects Californians "not merely against state action; it is considered an inalienable right which may not be violated by anyone."). State courts in Alaska and Montana have held that the right of privacy provisions of their state constitutions provide the same degree of protection as the Constitution of the United States. Comment, *Development in the Law—Statutory and Other Limitations to Drug Testing*, 23 WILLAMETTE L. REV. 573, 578 (1987).

654. See, e.g., *Luck v. Southern Pac. Transp. Co.*, No. 843,230 (Cal. Super. Ct. Nov. 6, 1987) (judgment on special verdict); *Price v. Pacific Ref. Co.*, No. 292,000 (Cal. Super. Ct. Mar. 11, 1987) (preliminary injunction); *Mora v. 3M Co.*, No. 942,330 (Cal. Super. Ct. Jan. 6, 1987) (permanent injunction).

Price v. Pacific Refining Co.,⁶⁵⁵ employees of an oil refinery sued under the state constitutional right of privacy to enjoin a random drug-testing program.⁶⁵⁶ The court held that, in the absence of any individualized suspicion of employee drug use, the compulsory testing program was an unreasonable invasion of the employee's right of privacy.⁶⁵⁷ In so holding, the court applied a balancing test, weighing the employee's privacy interests against the employer's interest in preserving the safety of its employees and of the community surrounding the oil refinery.⁶⁵⁸

The validity of drug testing under the California Constitution was at issue again in *Mora v. 3M Co.*⁶⁵⁹ In *Mora*, an employer proposed a program to test twenty-five employees who would be randomly selected by computer every week.⁶⁶⁰ Employees who tested positive for drugs or alcohol would be offered counseling and referral to a rehabilitation program, and employees who tested positive a second time would be subject to dismissal.⁶⁶¹ The California trial court preliminarily enjoined the random program on the grounds that it

655. No. 292,000 (Cal. Super. Ct. Mar. 11, 1987) (preliminary injunction).

656. The complaint, filed on behalf of the employees of Pacific Refining Company, alleged that the compulsory urinalysis program violated the rights of the employees under the privacy provision of the Constitution of California in several respects: First, requiring employees to undergo drug testing as a condition of continued employment; second, mandating the termination of employees who test positive; third, requiring employees to execute authorization forms for the release of confidential medical information to the employer, its agents, servants, and employees; fourth, implementing procedures for drug testing which require employees to expose private parts of their bodies to lab technicians while giving a urine sample; fifth, requiring employees to provide samples of bodily fluids; sixth, reporting the results of drug tests to persons and entities not expressly authorized to receive the results; seventh, subjecting employees to the possible scorn of coworkers, supervisors, potential employers, and others because of positive test results; eighth, attempting to direct and control the off-duty conduct of employees; ninth, attempting to control employees' off-duty conduct without reasonable grounds to believe that the employees' job performance was impaired; and tenth, intruding into the off-duty conduct of the lives of employees without a compelling need to do so. See AMERICAN MANAGEMENT ASSOCIATION, DRUG ABUSE 77-78 (1987).

The state trial court granted the injunction, partly on the grounds that the drug-testing program violated the privacy provision of the state constitution. In addition, the drug-testing program was overbroad because it encompassed all employees, regardless of position, and it failed to provide adequate guidelines, giving managers too much discretion to decide which employees to test and determine the circumstances under which they would be tested. *Id.*

657. *Price*, No. 292,000 (Cal. Super. Ct. Mar. 11, 1987) (preliminary injunction).

658. For an analysis of the balancing of interests test under the California right of privacy provision, see Comment, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Testing Constitutional in California?*, 19 LOY. L.A.L. REV. 1451 (1986) (An individual's right of privacy is protected from intrusions by government and business unless a compelling public interest exists.)

659. *Mora v. 3M Co.*, No. 942,330 (Cal. Super. Ct. Jan. 6, 1987).

660. Enriquez, *Court Enjoins 3M's Drug Screening of Camarillo Workers*, L.A. Times, Jan. 7, 1987, 16, col. 4.

661. *Id.* at 3, col. 1.

violated the employees' right of privacy under the California Constitution.⁶⁶² The court was not convinced that the drug-testing program had reduced the drug problem at the plant, and therefore the employer's need for the program was not sufficiently compelling to outweigh the employees' privacy rights.⁶⁶³

B. State Statutes

The right of privacy may prove to be an effective weapon for employees to challenge mandatory drug testing. Yet California is the only state that has made constitutional privacy protection available to private employees. As such, over the past year, state legislatures have begun to fill the void of protection by enacting statutes that regulate compulsory drug testing of private employees.⁶⁶⁴ Typically, these statutes limit the power of private employers to test employees for drug use, and regulate the testing procedures that private employers may use.⁶⁶⁵ These state statutes provide employees with some measure of protection from the privacy intrusion that results from drug-testing programs, but uniformity of protection may be provided if federal legislation addresses this issue in the future.⁶⁶⁶

662. *Id.*

663. *Id.* The employer settled the case, and ultimately abandoned the random drug-testing program. Doctoroff, *Random 3M Drug Tests End; Court Test Avoided*, L.A. Times, Feb. 22, 1987, pt. 2, at 6, col. 1.

In a highly publicized case against Southern Pacific Transport Company of San Francisco, the plaintiff, Barbara Luck, alleged that Southern Pacific's administration of mandatory employee urinalysis constituted an invasion of privacy under article I, section 1 of the Constitution of California. *Luck v. Southern Pac. Transp. Co.*, No. 843,230 (Cal. Super. Ct. Nov. 6, 1987) (judgment on special verdict). Southern Pacific administered urinalyses to 485 other employees on the day that Luck refused to cooperate, and terminated Luck for refusing to provide a urine sample for urinalysis. Weinstein, *supra* note 6, at 1, col. 1.

664. Before 1987, no state had enacted legislation addressing drug testing in the private sector. McGovern, *supra* note 59, at 1470.

665. These statutes typically prohibit the use of random drug testing in the workplace. The statutes require employers to express their policies on drug testing in writing, permit employees to confirm results of drug tests independently, and adopt employee assistance programs to rehabilitate employees identified as drug users. See *infra* notes 667-89 and accompanying text. Typically, these laws amend or supplement existing statutes regulating the use of polygraphs in the workplace. See *infra* note 667.

Commentators have suggested that state legislatures are the best forum for balancing the employee's privacy interests and the employer's interest in a drug-free working environment. McGovern, *supra* note 59, at 1454 n.8 (citing McClenahan, *The Privacy Invasion*, INDUS. WEEK, Nov. 11, 1985, at 50, 53 ("[S]tate-level action is preferable because it is 'closer to the people . . . where employers through their political arms . . . can have more of an impact on what the state legislature is doing.'")).

666. Many of the largest Fortune 500 companies and other employers that test workers for drugs have a national workforce. As drug testing becomes an integral part of corporate personnel policies, many more national employers will be faced with different rules of law in different states, thereby preventing the achievement of coherent personnel policies. This lack

Seven states have passed legislation that regulates drug testing in the private sector: Connecticut, Iowa, Minnesota, Montana, Rhode Island, Vermont, and Utah.⁶⁶⁷ All the state statutes except Utah limit the employer's discretion to drug test employees. The Utah statute is unique in that it expresses support, as a matter of public policy, for the use of drug and alcohol testing by private employers.⁶⁶⁸ The Utah legislature found that "in balancing the interests of employers, employees, and the welfare of the general public . . . fair and equitable testing for drugs and alcohol in the workplace . . . is in the best interest of all parties."⁶⁶⁹

All of the state statutes except Utah prohibit random drug test-

of uniformity among the states could have a disruptive effect on interstate commerce. Congress has not yet enacted legislation that affords employees protection from the increased emphasis on drug testing in the private sector. The House of Representatives is considering legislation that would require private employers to have a reasonable suspicion of drug use before requiring any individual employee to undergo drug testing. H.R. 691, 100th Cong., 1st Sess. § 2(b) (1987). The bill would prohibit employers from requiring employees to undergo drug testing, unless: first, the employer has reasonable suspicion that the employee is using drugs; second, the employee is engaged in a drug-sensitive occupation; or third, the employer may require drug tests under a collective bargaining agreement covering the employee. *Id.* at § 2(b). The bill requires employers to post notices that the employer is prohibited from requiring employees to submit to drug testing absent probable cause of drug use. *Id.* at § 4. For an analysis of the differences between the standards of suspicion and probable cause in the public sector, see *supra* notes 100-50 and accompanying text.

The potential impact of this legislation on drug testing of private employees is far reaching. Because the provisions of the bill would apply to all private employers that either directly or indirectly engage in or affect interstate commerce, the potential impact of the legislation on private employers and employees is sweeping. For an illustration of the broad range of activities affecting interstate commerce, see *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (An individual farmer's production of home grown wheat for his own consumption affects interstate commerce under the national market theory.). Conversely, the bill is limited in that it does not apply to job applicants. Some of the statutory procedures for drug testing of employees provide useful guidelines for employers who plan to invite drug testing of applicants. For example, under the proposed statute, if the results of a drug test indicate that an employee has been using drugs, the employer may not disclose the test results to anyone until a confirmatory test confirms the positive result. H.R. 691, 100th Cong., 1st Sess. § 3 (1987). It would also be unlawful for an employer to discriminate or take disciplinary action against any employee who has refused to submit to a drug test that is not based on reasonable suspicion of drug use. *Id.* at § 2.

In the absence of federal statutes, several states recently have enacted legislation addressing drug testing in the workplace. For a discussion of these statutes, see *infra* notes 667-89 and accompanying text. The complete absence of federal drug testing legislation is a factor contributing to the continued challenges to private employment drug-testing in the state arena. See generally Thompson, *Battle over Drug Testing is Shifting to the States; Guidelines are Stricter at Local Level*, Wash. Post, June 19, 1987, at A4, col. 1 (discussing the movement of employees' battle against drug testing from the federal courts to the state courts).

667. See 1987 Conn. Acts 551 (Reg. Sess.); 1987 Iowa Legis. Serv. § 730.5; MINN. STAT. § 181.950 (1987); MONT. CODE ANN. § 39-2-304 (1987); R.I. GEN. LAWS § 28-6.5 (1987); UTAH CODE ANN. § 34-38-1 to 15 (1987); VT. STAT. ANN. tit. 21, §§ 511-20 (1987).

668. UTAH CODE ANN. § 34-38-1 (1987).

669. *Id.*

ing of employees. The level of suspicion required for a drug test differs in these statutes, but all of them offer private employees significant protection from unbridled drug testing.⁶⁷⁰ With limited exceptions,⁶⁷¹ all of these statutes require an employer to have some level of individualized suspicion before requiring an employee to submit to drug testing. In Connecticut and Minnesota, an employer must have "reasonable suspicion" that an employee is under the influence of drugs or alcohol before administering a drug test.⁶⁷² Employers in Iowa and Vermont may not test employees for drug use unless they have "probable cause" for believing that an employee is using or is under the influence of drugs.⁶⁷³ The Montana and Rhode Island statutes prohibit employers from administering drug tests to employees unless they have "reason to believe" that an employee is using drugs.⁶⁷⁴

670. For a discussion of the application of the probable cause and reasonable suspicion standards for drug testing in the public sector, see *supra* notes 100-50 and accompanying text.

671. In Connecticut, random testing is permissible only for employees in positions that the commissioner of labor has designated as high-risk or safety sensitive, when conducted pursuant to an employee assistance program in which an employee voluntarily participates, or when authorized by federal law. 1987 Conn. Acts 551(7) (Reg. Sess.). The requirement that employers place employees in employee assistance programs, rather than automatically discharging them, manifests the underlying statutory policy favoring rehabilitation over discharge. The goal of a personnel policy that includes drug detection and rehabilitation is to maximize employee productivity, because rehabilitation may end the adverse effect of drug use on employee productivity and absenteeism. See AMERICAN MANAGEMENT ASSOCIATION, *supra* note 656, at 89 (Although the recognition and treatment of job impairment is grounded in the notion of cost-benefits, corporate employment practices are reflecting a growing emphasis on "human resources management."). For a discussion of employee assistance programs and their role in the context of employee drug testing, see *supra* notes 22-40 and accompanying text.

In Minnesota, employees in safety-sensitive positions are subject to random selection for drug testing instead of an individualized suspicion standard. MINN. STAT. § 181.951(4) (1987).

672. 1987 Conn. Acts 551(6) (Reg. Sess.); MINN. STAT. § 181.951(5) (1987).

673. In Iowa, employee drug testing is permissible only if all of the following conditions are met: First, the employer has probable cause to believe that an employee's faculties are impaired on the job; second, the drug impairment endangers the safety of the public and other employees or violates work rules; third, the department of public health has approved the testing facility; fourth, a positive test result is confirmed by an alternate testing method; fifth, the employee is given a reasonable opportunity to explain or rebut the results of the drug test; and sixth, the employer will not take disciplinary action against a first-time offender who enters and successfully completes a substance abuse program provided by the employer. 1987 Iowa Legis. Serv. § 730.5(3).

In Vermont, an employer may require an individual employee to submit to a drug test only if: First, the employer has probable cause to believe that the employee is using or is under the influence of drugs or alcohol on the job; second, the employer has made a rehabilitation program available to the employee; and third, the employer does not terminate employees who successfully complete an assistance program. VT. STAT. ANN. tit. 21 § 513(c) (1987).

674. To complement the Montana polygraph statute, the Montana legislature has enacted a statute that provides that an employer must have reason to believe that the employee's

Conversely, the Utah statute expressly advocates testing of job applicants and employees in the private sector on any basis, random or otherwise, as a condition of hiring or continued employment.⁶⁷⁵ Moreover, because the statute broadly defines "drugs" for testing purposes,⁶⁷⁶ employers in Utah are implicitly authorized to test employees for the presence of legal, as well as illicit, drugs.

The drug-testing statutes in Connecticut, Iowa, Minnesota, Montana, and Vermont apply to testing of job applicants and current employees.⁶⁷⁷ In Minnesota and Vermont, an employer may require applicants to submit to drug testing only after extending them job offers.⁶⁷⁸ In these states, the fulfillment of the job offer is contingent on the applicant receiving a negative drug test result.⁶⁷⁹ The Iowa statute, with certain exceptions,⁶⁸⁰ restricts an employer's power to include drug testing as part of a preemployment physical examination of job applicants.⁶⁸¹ Under the Montana statute, employers may not require job applicants to submit to drug testing as a condition of employment, "except for employment in hazardous work environments, or in jobs the primary responsibility of which is security, public safety, or fiduciary responsibility."⁶⁸² The Connecticut statute

faculties are impaired on the job as a result of alcohol or drug consumption before requiring a blood or urine test. MONT. CODE ANN. § 39-2-304(1)(c) (1987).

An employer in Rhode Island may require employees to submit to drug testing only if: First, the employer has reasonable grounds to believe that the employee is drug impaired; second, the employer permits the employee to produce the test sample in private and unattended; third, the testing is performed in conjunction with a rehabilitation program; fourth, employees have the right to confirm a positive test result at an independent testing facility at their own expense; and fifth, employees are given a reasonable opportunity to rebut or explain the results. R.I. GEN. LAWS § 28-6.5-1 (1987).

675. See UTAH CODE ANN. § 34-38-3 (1987). The Utah statute merely requires employers to maintain written guidelines for the collection and testing of test samples. *Id.* at § 34-38-7.

676. The statute defines drugs as "any substance recognized as a drug in the United States Pharmacopeia, the National Formulary, the Homeopathic Pharmacopeia, or other drug compendia, or supplement to any of those compendia." UTAH CODE ANN. § 34-38-2 (1987).

The Utah statute gives employers immense latitude in drug testing of employees. Daily Lab. Rep. (BNA) No. 107, at A-13 (June 3, 1987) (discussing the benefits accruing to employers under the Utah statute, including protection from suit for mistakenly firing an employee for using drugs as long as the employer has reasonably relied on two test results.).

677. See 1987 Conn. Acts 551(3) (Reg. Sess.); 1987 Iowa Legis. Serv. § 730.5(7); MINN. STAT. § 181.951(2) (1987); MONT. CODE ANN. § 39-2-304(1)(b)-(c) (1987); VT. STAT. ANN. tit. 21, § 512(b)(1) (1987).

678. MINN. STAT. § 181.951(2) (1987); VT. STAT. ANN. tit. 21 § 512(b)(1) (1987).

679. MINN. STAT. § 181.951(2) (1987); VT. STAT. ANN. tit. 21 § 512(b)(1) (1987).

680. The restriction on drug testing of job applicants does not apply to drug testing for positions as Iowa peace officers or correctional officers, or to drug tests required by federal statute or conducted pursuant to a policy statement of the Nuclear Regulatory Commission. 1987 Iowa Legis. Serv. § 730.5(2).

681. 1987 Iowa Legis. Serv. § 730.5(7).

682. MONT. CODE ANN. § 39-2-304(1)(b) (1987).

gives employers the most latitude in testing job applicants for drug use, in that they need only inform applicants in writing that drug testing is a condition of employment.⁶⁸³ All of the statutes that condition employment on negative drug test results require confirmation of positive test results with an alternative testing methodology that is at least as accurate as the initial methodology.⁶⁸⁴

The state statutes on drug testing confer private rights of action upon job applicants and employees to challenge drug-testing policies that contravene the statutory requirements.⁶⁸⁵ Statutes in Connecticut, Iowa, Minnesota, Rhode Island, and Vermont give aggrieved employees and applicants the right to sue for damages and injunctive relief when an employer violates the drug-testing statutes.⁶⁸⁶ In addition, the Iowa statute expressly entitles aggrieved persons to the equitable relief of reinstatement with backpay, or, in the case of applicants, the right of employment.⁶⁸⁷ Of the six states that regulate employee drug testing, only Montana does not give aggrieved employees or job applicants the right to sue for damages. Instead, an employer who violates any provision of the Montana statute has committed a misdemeanor.⁶⁸⁸

For job applicants and employees, state statutory guidelines for the administration of employee drug testing are preferable to no regulation at all. In the absence of state statutes, employees are dependent on the employer's sensitivity to safety and personal privacy concerns.⁶⁸⁹ Employees who lack state statutory protection are increasingly resorting to common law tort theories to obtain redress and limit the private employer's power to test employees for drug use.

683. 1987 Conn. Acts 551(3)(1) (Reg. Sess.).

684. The statutes uniformly require employers to confirm positive drug test results with the gas chromatography/mass spectrometry technique. See 1987 Conn. Acts 551(2) (Reg. Sess.); 1987 Iowa Legis. Serv. § 730.5(3)(d); MINN. STAT. § 181.953(4) (1987); MONT. CODE ANN. § 39-2-304(2)(E) (1987); R.I. GEN. LAWS § 28-6.5-1(12) (1987); UTAH CODE ANN. § 34-38-6(5) (1987); VT. STAT. ANN. tit. 21, § 514(6) (1987). For a discussion of drug-testing techniques, see *supra* notes 42-65 and accompanying text.

685. 1987 Conn. Acts 551(11)(a)-(b) (Reg. Sess.); 1987 Iowa Legis. Serv. § 730.5(9); MINN. STAT. § 181.956(2)-(3) (1987); R.I. GEN. LAWS § 28-6.5-1(F)(1)-(3); VT. STAT. ANN. tit. 21 § 519 (1987).

686. 1987 Conn. Acts 551(11)(a)-(b) (Reg. Sess.) (entitling aggrieved persons to punitive damages); 1987 Iowa Legis. Serv. § 730.5(9); MINN. STAT. § 181.956(2)-(3) (1987); R.I. GEN. LAWS § 28-6.5-1(F)(1)-(3) (entitling prevailing employee to punitive damages); VT. STAT. ANN. tit. 21 § 519 (1987).

687. 1987 Iowa Legis. Serv. § 730.5(9).

688. MONT. CODE ANN. § 39-2-304(5) (1987).

689. McGovern, *supra* note 59, at 1456.

VII. COMMON LAW PROTECTIONS

Private employees challenging drug-testing programs have found increasing success under common law theories of protection. The most commonly invoked protections are wrongful discharge,⁶⁹⁰ and tort actions⁶⁹¹ for invasion of privacy and defamation,⁶⁹² and intentional⁶⁹³ and negligent infliction of emotional distress.⁶⁹⁴

A. *Wrongful Discharge*

If the term of an employment relationship is indefinite, or the relationship is without term, the relationship is at will, and therefore terminable by either party.⁶⁹⁵ This relationship is rooted in state common law and is known as the employment at will doctrine.⁶⁹⁶ Employees subject to the doctrine may be discharged for "good cause, for no cause or even for cause morally wrong."⁶⁹⁷ The employment at will doctrine has been recognized uniformly in all jurisdictions,⁶⁹⁸ and therefore affects the vast majority of private nonunionized employees

690. For a discussion of wrongful discharge and the doctrine of employment at will in the context of mandatory drug testing, see *infra* notes 695-742 and accompanying text.

691. For public and private unionized employees, the issue of drug testing is a mandatory subject of collective bargaining. See *supra* note 360 and accompanying text. These employees are precluded from bringing tort claims against their employers because tort claims are subsumed within the grievance arbitration procedures of their collective bargaining agreement. Nonunion federal employees also may be precluded from seeking redress through tort claims because of the bar to certain claims imposed by the Federal Tort Claims Act. See 28 U.S.C. § 1346 (1982). Claims against the federal government are barred if the government employee committing the tort was "exercising due care, in the execution of a statute or regulation," or was exercising a "discretionary function." 28 U.S.C. § 2680(b) (1982). In addition, claims for libel and slander are expressly barred. 28 U.S.C. § 2680(h) (1982). Even if tort liability is imposed on the federal government, the recovery of punitive damages is barred. 28 U.S.C. § 2402 (1982).

692. For a discussion of defamation claims that may arise from compulsory drug testing in the private sector, see *infra* notes 775-98 and accompanying text.

693. For a discussion of the claims of intentional infliction of emotional distress that may arise from compulsory drug testing in the private sector, see *infra* notes 799-807 and accompanying text.

694. For a discussion of negligent infliction of emotional distress claims arising out of compulsory urinalyses in the private sector, see *infra* notes 808-10 and accompanying text.

695. See H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 271 (1981).

696. See A. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 5 n.25 (1987).

697. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884) (overruled on other grounds, by *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915)).

698. A treatise written in 1877 by Horace Wood, a New York lawyer, first articulated the employment at will doctrine. The author proposed that an indefinite hiring constituted prima facie proof of a hiring at will, and that the employee bear the burden of proving a term of employment. See H. WOOD, *supra* note 695, at 271. For a treatment of the historical development of the employment at will doctrine, see A. HILL, *supra* note 696, at 1-13.

in the United States.⁶⁹⁹ In at will employment, a presumption exists that all employment is terminable for any reason, unless the parties clearly expressed their intent in the contract at the inception of the relationship to provide for a definite term.⁷⁰⁰

1. THE EMPLOYMENT AT WILL DOCTRINE

Private employers in employment at will jurisdictions may use the threat of discharge without cause to coerce employees' behavior. Thus, at will employees who refuse to submit to drug testing may face immediate discharge. Further, at will employees who submit to testing may be discharged on the basis of one unconfirmed positive test result, and have no recourse to challenge the results. At will employees have been discharged from their jobs under circumstances that would otherwise be unlawful in states that regulate drug testing. In *Jennings v. Minco Technology Labs, Inc.*,⁷⁰¹ a Texas employee brought a class action suit against his employer to enjoin the implementation of a random, periodic drug-testing program. The court found that the employment at will doctrine was applicable to the case, and held that the program could not be enjoined because the employee would have no cause of action against the employer after discharge.⁷⁰² The court reasoned that in Texas, which follows the employment at will doctrine, an employer may terminate an employee for refusing to undergo urinalysis, and the employee will have no grounds for a wrongful discharge action.⁷⁰³

In *Satterfield v. Lockheed Missiles & Space Co.*,⁷⁰⁴ an employee was discharged after two urinalyses of the same specimen showed signs of marijuana use. Subsequent to his termination, the employee

699. Comment, *supra* note 648, at 1046 n.263; see also Stieber, *Recent Developments in Employment-at-Will*, 36 LAB. L.J. 557-58 (1985) (About 60 million employees are subject to the employment at will doctrine.); Comment, *Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 EMORY L.J. 1011, 1023 (1986) (At will employees constitute "approximately [55] percent of workers in the United States.") [hereinafter Comment, *Use and Abuse*]; Noble, *supra* note 648, § 4, at 10, col. 2 ("[S]eventy percent of American workers are not covered by collective bargaining agreements or employment contracts . . .").

700. Murg & Scharman, *Employment-at-Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 334-35 (1982) (citing Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGIS. HIST. 118, 126 (1976)).

701. *Jennings v. Minco Technology Labs, Inc.*, No. 409,151 (Tex. 1987), cited in AMERICAN MANAGEMENT ASSOCIATION, *supra* note 656, at 76.

702. Letter from Judge Joseph H. Hart, District Judge, 126th Judicial District Court of Texas, to Mr. James C. Harrington, Texas Civil Liberties Union Foundation (May 23, 1987) (on file at the Texas Civil Liberties Union, Austin, Texas) [hereinafter Letter from Judge Joseph H. Hart].

703. *Id.*

704. *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359, 1360 (D.S.C. 1985).

brought a wrongful discharge action, alleging that the employer knew or should have known that his urine sample had been mixed with others in unlabeled bottles.⁷⁰⁵ The trial court found that the employee's at will status meant that he could be terminated at any time without cause, and therefore he could not maintain an action for wrongful discharge based on the drug-testing program.⁷⁰⁶

2. EXCEPTIONS TO THE DOCTRINE

The employment at will doctrine is firmly grounded in both the industrial revolution and the spirit of *laissez faire* capitalism. Nonetheless, courts are beginning to recognize the plight of nonunionized employees in the private sector, who lack both constitutional and collective bargaining protections, and therefore suffer from inferior bargaining power.⁷⁰⁷ Sympathy for these workers has led to a partial rescission of the employment at will doctrine within the last two decades.⁷⁰⁸ Thus, changes in the the doctrine have inevitably resulted from changes in the perception of the employment relation-

705. *Id.* The employee also sought recovery, unsuccessfully, under theories of breach of a covenant of good faith and fair dealing, intentional infliction of emotional distress, and invasion of privacy. *Id.*

706. *Id.* at 1362-63. In determining the employment status of the employee, the court found that the employee's "hire notice," which stated the employee's position, salary, and start date, made no mention of an employment contract or employment for a specific time period. *Id.* at 1362. One commentator has also identified two early cases in which employers in employment at will states successfully discharged employees in conjunction with compulsory urinalysis. See Comment, *Use and Abuse*, *supra* note 699, at 1023-26. In *Finklea v. Tonsey*, an employee was discharged for using prescribed tranquilizers under the theory that the employee was drug-impaired and unable to perform assembly line work safely. 317 Pa. Super. 553, 556-57, 464 A.2d 460, 462-63 (1983). In *New Orleans Public Service v. Masaracchia*, an employee was dismissed after one unconfirmed drug test showed positive signs of marijuana use. 464 So.2d 866, 867-68 (La. Ct. App. 1985). A coworker had implicated the employee in the drug use. *Id.* at 867.

707. See AMERICAN MANAGEMENT ASSOCIATION, *supra* note 656, at 71 (" 'The wrongful discharge' suit . . . [is a] relatively contemporary legal animal [and] may turn out to be the employee-at-will's equivalent to a union contract."); Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 5 (1984). One commentator has traced the rise of judicial intervention in the employment relationship to the decline of the number of blue collar and unionized jobs in the workplace, and the consequent decrease in the percentage of employees protected by grievance procedures incorporated into most collective bargaining agreements. Murg & Scharman, *supra* note 700, at 339.

708. See, e.g., Heshizer, *The New Common Law of Employment: Changes in the Concept of Employment at Will*, 36 LAB. L.J. 95, 96 (1985) (Judicial weakening of the employment at will doctrine can be traced back fifteen years, and "the social, economic, and legal frameworks of the doctrine are under increasing criticism."); St. Antoine, *The Revision of Employment-at-Will Enters a New Phase*, 36 LAB. L.J. 563, 563 (1985) ("The most significant development in the whole field of labor law during the past decade was the growing willingness of the courts to modify the traditional doctrine of employment-at-will.").

ship. As a result, judicial intervention has established a modicum of common law protection for the most vulnerable of American workers.

Increasingly, state courts have limited the effect of the employment at will doctrine by recognizing exceptions to the doctrine.⁷⁰⁹ These courts have carved out three broad exceptions to the employment at will doctrine, and accordingly have upheld claims of wrongful discharge on any of three grounds: (1) the discharge violates public policy; (2) an implied employment contract can be inferred;⁷¹⁰ or (3) the employer has breached an implied covenant of good faith and fair dealing.⁷¹¹ Both public and private employees may challenge drug-testing programs based on exceptions to the employment at will doctrine, thereby somewhat decreasing the disparity of protections between these two sectors of the workforce.⁷¹²

a. The Public Policy Exception

Under the public policy exception to the employment at will doctrine, the common law recognizes that "an employee who acts to uphold public policy, or who refuses to act in contravention of public policy, should not be discharged for such acts or omissions and, if terminated, will have a tort cause of action for wrongful discharge."⁷¹³ At least thirty-seven states recognize the public policy

709. Estimates vary on the number of states that recognize at least one exception to the employment at will doctrine. One commentator has identified ten states that do not recognize any exceptions to the doctrine: Colorado, Delaware, Florida, Georgia, Iowa, Louisiana, Mississippi, Rhode Island, Utah, and Vermont. See Comment, *Use and Abuse*, *supra* note 699, at 1023 n.71 (citing Strasser, *Employment at Will: The Death of a Doctrine?*, Nat'l L.J., Jan. 20, 1986, at 1, col. 2.); see also I. SHEPARD & R. DUSTON, *supra* note 650, at 91 (forty-six states recognize one or more exceptions).

710. The two most widely recognized exceptions to the employment at will doctrine in the state courts are the public policy and implied contract exceptions. See generally Lopatka, *supra* note 707, at 6-26 (discussing the exceptions); Comment, *Use and Abuse*, *supra* note 699, at 1022-27 (same). For a state-by-state survey of recognized exceptions, see I. SHEPARD & R. DUSTON, *supra* note 650, app. A at 107-46. For a discussion of the public policy exception to employment at will, see *infra* notes 713-27 and accompanying text. For a discussion of the implied contract exception to employment at will, see *infra* notes 728-33 and accompanying text.

711. The covenant of good faith and fair dealing has been described as the implied covenant exception to employment at will, under which an employee may only be discharged "for cause." See I. SHEPARD & R. DUSTON, *supra* note 650, at 95-96 (discussing the "good cause" requirement for employee discharges); see also Murg & Scharman, *supra* note 700, at 330-31; Comment, *Use and Abuse*, *supra* note 699, at 1022 n.69 (discussing the implied covenant exception). For a discussion of the implied covenant of good faith and fair dealing, see *infra* notes 734-42 and accompanying text.

712. Comment, *supra* note 352, at 835.

713. Comment, *Use and Abuse*, *supra* note 699, at 1022 n.67 (citing Heshizer, *The New Common Law of Employment: Changes in the Concepts of Employment at Will*, 36 LAB. L.J. 95, 101 (1985)). Depending on the jurisdiction, the limits that the public policy exception imposes on an employer's discretion to discharge is based either in contract, wherein public

exception to the employment at will doctrine.⁷¹⁴ This broad exception comprises three categories of retaliatory discharges: (1) discharges for refusing to commit an unlawful act; (2) discharges for exercising or seeking to exercise a legal right or privilege; and (3) discharges for complaining of employer wrongdoing, commonly known as whistleblowing.⁷¹⁵

Courts have sought to limit sources of public policy to constitutional or statutory provisions so as not to unduly restrict employers' discretion to discharge.⁷¹⁶ In cases of statutory public policy, the exception applies only when the mandate of public policy is clear and the employee lacks alternative remedies.⁷¹⁷ The public policy of a state can normally be found "in the form of a legislative enactment or may arise from the rulemaking authority of an administrative agency,"⁷¹⁸ but only if the statute does not supply administrative machinery for relief.⁷¹⁹ Five statutes provide employees with remedies for violations of the drug-testing statutes,⁷²⁰ and therefore do not provide bases for the public policy exception to the employment at will doctrine.

The public policy exception has provided employees with effective protection from invasive employer conduct. In *Perks v. Firestone Tire & Rubber Co.*,⁷²¹ an at will employee, who had been fired

policy limits an employer's motives for enforcing the at will contract, or in tort, wherein an employee may recover for tortious discharge based on public policy. See *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (tort); Casebeer, *Teaching an Old Dog Old Tricks: Coppage v. Kansas and At-Will Employment Revisited*, 6 CARDOZO L. REV. 765, 784 (1985) (citing *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (contract)).

714. Comment, *Use and Abuse*, *supra* note 699, at 1022 n.67 (citing Strasser, *Employment at Will: The Death of a Doctrine?*, Nat'l L.J., Jan. 20, 1986, at 1, col. 2). The public policy exception is a popular challenge to the at will employment doctrine. Lopatka, *supra* note 707, at 6 (citing Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931 n.5 (1983)).

715. Springer, *The Wrongful Discharge Case*, TRIAL, June, 1985, at 38, 40; see also AMERICAN MANAGEMENT ASSOCIATION, *supra* note 656, at 71-72 (discussing the public policy exception).

716. See Lopatka, *supra* note 707, at 14.

717. See A. HILL, *supra* note 696, at 27 (discussing the lack of statutory relief that is a prerequisite to the public policy exception to the employment at will doctrine if the public policy is statutorily based); I. SHEPARD & R. DUSTON, *supra* note 650, at 93.

718. A. HILL, *supra* note 696, at 27 (quoting Mauk, *A History and Analysis of the Employment-at-Will Doctrine*, 21 IDAHO L. REV. 201, 229 (1985)).

719. A. HILL, *supra* note 696, at 26-27.

720. For a discussion of the private causes of action conferred by state drug-testing statutes, see *supra* notes 685-88 and accompanying text.

721. 611 F.2d 1363 (3d Cir. 1979) (Pennsylvania public policy limits the use of polygraphs in the workplace, and does not expressly provide for a private right of action, yet *Perks* implied a cause of action in favor of employees who prove a causal relationship between the polygraph test or refusal to submit to such a test, and their discharge).

for allegedly refusing to submit to a polygraph examination, sued the employer, claiming that the discharge violated the " 'clear mandate of public policy' " of the state of Pennsylvania.⁷²² Although a Pennsylvania statute prohibits the use of polygraph examinations by employers as a condition of hiring or continued employment, the statute does not provide employees with a private right of action.⁷²³ The court concluded that the polygraph statute embodied a "recognized facet of public policy" against polygraph testing, and thus reversed the summary judgment granted to the employer in the trial court.⁷²⁴

The public policy exception may also provide protection to employees who refuse to submit to mandatory drug testing. In *Luck v. Southern Pacific Transport Co.*,⁷²⁵ an employee who was discharged after refusing to submit to a random drug test successfully claimed that her dismissal was a wrongful discharge in violation of public policy based on California's constitutional protection against invasion of privacy.⁷²⁶ *Luck* illustrates the future viability of such actions in states where the public policy exception is based in policies that are broader than the issue of drug testing itself.

In drug-testing cases in which a public policy is statutorily based, the requirement of an absence of alternative remedies limits the scope of the public policy exception to the employment at will doctrine.⁷²⁷ Employees are caught in a classic Catch-22 situation, in that the utility of the exception for challenging compulsory drug testing is strongest in states that have expressed a clear public policy against unrestricted drug testing in statutes, which already provide employees with private rights of action against employers. Rarely will a state both express a public policy against unrestricted drug testing in a statute and omit a statutory remedy. Yet it is only in this rare situation that the statutory public policy exception to the employment at will doctrine is useful.

b. The Implied Employment Contract Exception

The second major exception to the employment at will doctrine is based on an implied in fact contract term.⁷²⁸ An implied in fact

722. *Id.* at 1364 (citing *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974)).

723. See 18 PA. CONS. STAT. § 7321(a) (1983).

724. *Perks*, 611 F.2d at 1366.

725. No. 843,230 (Cal. Super. Ct. Nov. 6, 1987) (judgment on special verdict).

726. Daily Lab. Rep. (BNA) No. 212, at A-2 (Nov. 4, 1987).

727. In *Luck*, for example, the public policy exception to employment at will was based on California's constitutional protection against invasion of privacy. *Id.*

728. See Lopatka, *supra* note 707, at 17 (discussing the effectiveness of the implied in fact contract exception, but noting that the public policy exception is more widely recognized);

term is commonly inferred from written personnel policies and employee handbooks.⁷²⁹ Oral statements of policy or procedure, assurances at the time of hiring, and business custom and usage have also led the courts to find implied exceptions to the employment at will doctrine.⁷³⁰ When a court finds that an implied contract term exists, the employment relationship is removed from at will status, and the parties are bound by the general principles of contract law applicable to the implied term or terms.⁷³¹

The implied in fact contract exception is of limited utility for employees to challenge drug testing. By its nature, this judicially created exception is fact specific and therefore yields precedent of little value.⁷³² In addition, the exception has no utility for job applicants, because no implied contract of employment is yet in existence.

Courts may not find that an implied in fact contract term exists if the employer has made a clear disclaimer of contractual commitment. Even if the court finds that an implied contract term does exist, however, it must still examine the reason the employee was discharged to determine whether dismissal was justified.⁷³³ In the drug-testing context, the court must thus determine whether refusal to submit to random mandatory drug testing is just cause for dismissal.

c. The Implied Covenant of Good Faith and Fair Dealing Exception

Very few courts recognize an implied covenant of good faith and

Springer, *supra* note 715, at 41 (noting that judicially recognized implied contract terms have eroded the employment at will doctrine more effectively than public policy exceptions).

729. Lopatka, *supra* note 707, at 19. One commentator has noted more specifically that "employer-to-employee communications, including advertisements, interviews, inducements to leave a job, handbooks, officer speeches, performance appraisals, termination interviews, termination documents, and benefit plans [may] imply a contract." Springer, *supra* note 715, at 41; *see, e.g.*, Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (A company personnel manual that stated a policy of discharging employees only for "just cause" was sufficient to create an enforceable promise that an employee would not be terminated except for just cause.). *But see* Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1362-63 (D.S.C. 1985) (A hire notice, which stated the employee's position, salary, and starting date, and briefly explained the employer's conflict of interests policy, was not sufficient to imply contract terms that removed the relationship from at will status.).

730. Lopatka, *supra* note 707, at 19.

731. The employee will attempt to infer a just cause requirement for dismissal. Springer, *supra* note 715, at 41. As of 1986, twenty-six states have recognized the implied contract exception to employment at will. *See* Comment, *Use and Abuse*, *supra* note 699, at 1022 n.68. This number represents an increase of eight states since 1984. Lopatka, *supra* note 707, at 17 n.92.

732. Comment, *Use and Abuse*, *supra* note 699, at 1027.

733. Juries typically decide whether the provisions from which an implied contract were inferred created a just cause requirement for dismissal. *See* Lopatka, *supra* note 707, at 20-21.

fair dealing in the employment relationship as an exception to the employment at will doctrine.⁷³⁴ This exception, nonetheless, arises in two contexts. The law may impose a duty on both parties to an employment agreement that neither will injure the rights of the other.⁷³⁵ In a more expansive context, a good faith exception to employment at will may exist regardless of any prior agreements, express or implied.⁷³⁶ At will employees are primarily concerned with the second context because they do not enjoy the protection of express or implied employment agreements that might otherwise offer some protection from discharge without cause. As an implied in law exception to employment at will, the covenant of good faith may restrict an employer's discretion to discharge an employee for refusing to take a compulsory urinalysis test, even absent an implied contract.⁷³⁷ The principal question is the extent to which the covenant of good faith restricts an employer's discretion to discharge employees.

An employee may recover under the implied covenant of good faith against an employer who has exhibited bad faith in connection with an at will discharge.⁷³⁸ For example, bad faith may exist in the act of discharging an employee for refusing to submit to drug testing if the employee has not displayed signs of drug use, does not have an attendance or disciplinary problem that might indicate drug use, and is not employed in a sensitive position that might otherwise warrant drug testing absent individualized suspicion.⁷³⁹

In *Luck*,⁷⁴⁰ an employee recovered compensatory as well as punitive damages under the implied covenant theory. In the suit against the railroad for wrongful discharge, the jury found that it was not

734. See *infra* note 737 and accompanying text.

735. Lopatka, *supra* note 707, at 23.

736. AMERICAN MANAGEMENT ASSOCIATION, *supra* note 656, at 74.

737: Only five states recognize the implied covenant of good faith and fair dealing exception to the employment at will doctrine: California, Indiana, Massachusetts, Montana, and North Dakota. Comment, *Use and Abuse*, *supra* note 699, at 1022 n.69 (citing Strasser, *Employment at Will: The Death of a Doctrine?*, Nat'l L.J., Jan. 20, 1986, at 6). The good faith covenant may apply to the employment at will relationship in Alaska, Nevada, and Oklahoma. See I. SHEPARD & R. DUSTON, *supra* note 650, at 96 n.31; cf. *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359 (D.S.C. 1985) (refusing to extend the covenant of good faith from the commercial setting to the labor setting).

738. Some state courts that recognize the implied covenant of good faith and fair dealing have refused to create a "for cause" requirement in the discharge of employees. See, e.g., *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 385, 710 P.2d 1025, 1040 (1985) ("[The] implied covenant of good faith . . . does not create a duty for the employer to terminate the employee only for good cause [or] 'no cause' . . . because tenure was never a benefit inherent in the at-will agreement.").

739. Comment, *supra* note 648, at 1047.

740. No. 843,230 (Cal. Super. Ct. Nov. 6, 1987) (judgment on special verdict).

necessary to include the employee in the company's mandatory drug-testing program in order to ensure the safe operation and maintenance of the railroad.⁷⁴¹ The covenant of good faith and fair dealing may also offer a cause of action for an employee who has been discharged on the basis of one unconfirmed positive test result, or an employee who is discharged after the employer has used questionable control procedures in the administration of drug tests. The standard of good faith and fair dealing may further require employers to confirm positive drug tests with alternative, highly reliable testing methods and to utilize strict control procedures when testing employees for drug use.⁷⁴²

B. *Invasion of Privacy*

The common law tort of invasion of privacy is divided into four distinct causes of action: Intrusion upon the plaintiff's private affairs, public disclosure of private facts, publicity that places the plaintiff in a false light in the public eye, and appropriation of the plaintiff's name or likeness.⁷⁴³ Privacy issues are divided into matters of informational and behavioral privacy. "Informational privacy encompasses the acquisition, retention, and dissemination of information about the individual employee. Behavioral privacy concerns the employee's expectation of autonomy or the right to engage in certain activities without public or employer intrusion."⁷⁴⁴ Both issues are relevant when employers collect the urine of their employees and perform analyses to extract personal information. The common law tort of invasion of privacy may protect both the informational and behavioral privacy of employees from compulsory drug testing and may, in some instances, parallel federal constitutional protections available to public employees.⁷⁴⁵

741. *Id.* at 2. The jury awarded the employee \$212,000 in compensatory damages and \$273,000 in punitive damages. *Id.* at 3, 4.

742. For a comparison of the reliability and accuracy of the various drug tests, see *supra* notes 42-65 and accompanying text.

743. Dean William Prosser has explained that invasion of privacy is not one tort, but rather "four distinct kinds of invasion of four different interests of the plaintiff." See Prosser, *Privacy*, 48 CALIF. L. REV. 383, 385 (1960). The American Law Institute later adopted these general privacy principles. See RESTATEMENT (SECOND) OF TORTS § 652A (1977). The fourth theory, appropriation of the plaintiff's name or likeness, would have no application to challenges to compulsory urinalyses.

744. Barnes & White, *Employee Privacy Rights: "Everything You Always Wanted to Know—But Shouldn't"*, MICH. B.J., Oct. 1985, at 1104, 1105.

745. For a discussion of constitutional protections afforded to public employees who are subjected to compulsory drug testing, see *supra* notes 84-355 and accompanying text.

1. INTRUSION UPON PRIVATE AFFAIRS

An intrusion upon a person's private affairs is actionable only if it is highly offensive to a reasonable person.⁷⁴⁶ Application of this test to compulsory urinalysis requires balancing an array of competing interests.⁷⁴⁷ Employees have an interest in minimizing intrusions into their private lives. Employers counterpose their obligation to provide a safe environment for employees and the public, to provide safe products or services of high quality, and to prevent financial loss resulting from employee drug use.⁷⁴⁸

In determining whether drug testing is highly offensive to a reasonable person, some state courts follow a traditional fourth amendment analysis.⁷⁴⁹ The constitutional analysis begins with a determination of whether a reasonable expectation of privacy exists, and then inquires whether the intrusion into this expectation of privacy was reasonable under the circumstances.⁷⁵⁰ Superimposing constitutional analysis onto a tort claim is somewhat misguided, however. The test of intrusion upon private affairs is a separate cause of action that provides greater protection than the fourth amendment, because, in tort actions, the mere intrusion upon the protected interest itself, and not whether there is a reasonable expectation of privacy that has been violated, subjects an actor to liability.⁷⁵¹ If the intrusion is not highly offensive to a reasonable person, however, the tort claim will probably fail.⁷⁵² In this sense, the reasonableness of drug testing is a compelling factor in determining the degree of offensiveness, if any, that follows.

746. "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977).

747. This analysis can proceed in the same manner as cases brought by public employees under the fourth amendment to the Constitution of the United States. For a discussion of fourth amendment protection in public sector drug testing, see *supra* notes 84-150 and accompanying text.

748. NATIONAL INSTITUTE ON DRUG ABUSE, INTERDISCIPLINARY APPROACH TO THE PROBLEMS OF DRUG ABUSE IN THE WORKPLACE 11 (1987). For a discussion of the concept that some employers may have a duty to test their employees for drug use, see *infra* notes 824-79 and accompanying text.

749. I. SHEPARD & R. DUSTON, *supra* note 650, at 22; see, e.g., *Jennings v. Minco Technology Labs, Inc.*, No. 409,151 (Tex. 1987) (following most recent fourth amendment drug-testing cases in finding that a random testing program of private employees was reasonable, and applying that standard to the reasonableness requirement of the tort of invasion of privacy).

750. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

751. RESTATEMENT (SECOND) OF TORTS § 652B comment b (1977).

752. Murphy, *How To Protect Employees Who Are Tested for Drug and Alcohol Abuse*, PRAC. LAW., April, 1987, at 27, 36 (1987).

In an analogous context, employees have challenged mandatory polygraph examinations under the tort of invasion upon private affairs. In *O'Brien v. Papa Gino's of America*,⁷⁵³ an employer required an employee to submit to a polygraph examination based on suspicion of off-duty drug use. The employee sued for invasion of privacy and won a jury award of over \$400,000 in damages.⁷⁵⁴ The First Circuit affirmed the award and the finding that, in addition to answering questions about alleged off-duty drug use, the employee was "asked about matters that were unrelated to his employment and that he was entitled to keep private."⁷⁵⁵ The court concluded that the investigative techniques used by the employer constituted an invasion of privacy, and that the employer's conduct exceeded the scope of any consent that the employee had given to the polygraph examination.⁷⁵⁶

Consent by an employee is a defense to an invasion of privacy claim.⁷⁵⁷ The issue of whether an employee consented to the invasion is therefore integral to any recovery. If, as in *O'Brien*, the employer exceeds the scope of any consent that may have been granted, the consent is ineffective for the excess, and the employee may recover for an intrusion upon private affairs.⁷⁵⁸ Consent is similarly ineffective if given under duress.⁷⁵⁹

753. 780 F.2d 1067 (1st Cir. 1986).

754. *Id.* at 1076.

755. *Id.* at 1071. The employee also sued under theories of wrongful discharge and defamation. The wrongful discharge claim was unsuccessful. *Id.* at 1072.

756. *O'Brien*, 780 F.2d at 1072. The employer had argued that the employee implicitly consented to necessary investigations because the personnel manual forbade drug use. *Id.*; see also Comment, *supra* note 653, at 581-82 (discussing the precedential value of *O'Brien* for other intrusion of privacy claims). These claims may have merit in cases in which the drug tests have been administered improperly. See generally Cross & Haney, *Legal Issues Involved in Private Sector Medical Testing of Job Applicants and Employees*, 20 IND. L. REV. 517, 521-22 (1987) (discussing claims of invasion of privacy and intentional infliction of emotional distress).

The "high offensiveness" requirement for the invasion of privacy tort may be met in cases in which drug testing was mandated absent individualized suspicion of drug use by the employee. Recently, in *Black v. Domino's Pizza, Inc.*, an employee challenged the right of her employer to require all employees to submit to drug testing as a condition of continued employment. No. 4-87-512 (D. Minn. filed June 9, 1987) (case dismissed Dec. 27, 1987 pursuant to an agreement between the parties). The employee refused to submit to a drug test until either the employer had reasonable grounds for suspecting she was using drugs on the job, or until a drug test was developed that could measure drug impairment. After she was discharged, Black filed a common law invasion of privacy action, patterned on the elements of section 652B of the Restatement (Second) of Torts, and claimed that the employer violated her right of privacy by mandating drug testing as a condition of continued employment. Daily Lab. Rep. (BNA) No. 118, at A-4 (June 22, 1987). Significantly, in *Black*, the employee who brought the invasion of privacy claim never submitted to a drug test. See *id.*

757. Prosser, *supra* note 743, at 419.

758. See RESTATEMENT (SECOND) OF TORTS § 892A (1977).

759. See *id.* § 892B.

In *Jennings v. Minco Technology Labs, Inc.*,⁷⁶⁰ however, a court ruled that an employee's consent to a urinalysis that was a condition of continued employment was a defense to a tort claim for intrusion upon private affairs.⁷⁶¹ The court analyzed the elements of the claim in light of section 652B of the Second Restatement of Torts. The court's decision suggests that an employee must first refuse a compulsory urinalysis test in order to meet the element of intentional intrusion. This analysis results in a no-win situation for employees faced with mandatory drug testing. If an employee submits to a drug test, the employer will have the benefit of the defense of consent to the invasion. Conversely, if an employee refuses to submit to compulsory drug testing, no intentional invasion has taken place, and an invasion of privacy claim will not be actionable. A more reasonable assessment of the social forces at work may treat consent that is elicited under the threat of loss of employment as given under duress, and thus ineffective as a defense to the invasion.⁷⁶²

The intrusion upon private affairs tort theory has been criticized on several levels because it does not offer adequate protection to employees against unreasonable searches. First, as explained above, an employee's consent to a drug test is a defense to the tort action. Second, a factual issue exists as to whether the intrusion will be deemed highly offensive to a reasonable person. Third, in balancing the relevant interests, the court or jury must ascertain whether the "employer's purpose outweighed the privacy interest of the employee."⁷⁶³ All of these factors indicate that this action inadequately protects employees from compulsory drug testing.

2. PUBLIC DISCLOSURE OF PRIVATE FACTS

Employers have an obligation to keep personnel and employee medical information confidential unless disclosure is necessary for a legitimate business purpose.⁷⁶⁴ The potential for abuse of informational privacy has grown as employers increasingly collect personal

760. *Jennings v. Minco Technology Labs, Inc.*, No. 409,151 (Tex. 1987). For a discussion of the applicability of the employment at will doctrine to the disposition of *Jennings*, see *supra* notes 701-03 and accompanying text.

761. Letter from Judge Joseph H. Hart, *supra* note 702.

762. State statutes that regulate the use of polygraph testing in the workplace uniformly prohibit employers from requiring consent to an exam as a condition of continued employment. See I. SHEPARD & R. DUSTON, *supra* note 650, at app. A at 107-46; see also Note, *Lie Detectors in the Workplace: The Need for Civil Action Against Employers*, 101 HARV. L. REV. 806, 814 (1988) (discussing the "spurious" nature of consent to polygraphs given the "economic necessity" of finding new employment).

763. Comment, *supra* note 648, at 1023.

764. I. SHEPARD & R. DUSTON, *supra* note 650, at 83.

information about their employees.⁷⁶⁵ An employee may use the common law tort of public disclosure of private facts to recover damages from an employer "when the matter made public [is] highly offensive and objectionable to a reasonable person of ordinary sensibilities."⁷⁶⁶

Under chemical analysis, urine can yield a wealth of information about an employee's health, diet, prescription drug use, and physical and physiological state.⁷⁶⁷ Like blood, urine is a bodily fluid that "can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs."⁷⁶⁸ Two commentators have identified the attendant privacy issue as a concern over "behavioral privacy or personal autonomy."⁷⁶⁹ An unprecedented amount of private information about employees' off-duty conduct has been made available to employers through employee drug testing. During a polygraph examination, an employee's refusal to answer a question may implicate him in certain matters. Conversely, urinalysis yields highly specific information extending far beyond a search for evidence of alcohol and drug use. Moreover, employees submitting to urinalysis are powerless to distinguish between questions and information they may wish not to answer or divulge. Consent to urinalysis effectively becomes a blanket consent to an investigation that is limited only by the technical tools at the employer's disposal.⁷⁷⁰

765. Barnes & White, *supra* note 744, at 1106.

766. W. PROSSER & R. KEETON, *THE LAW OF TORTS* 856-57 (5th ed. 1984). The public disclosure of private facts tort has three requirements for recovery: First, the disclosure of private facts must be made publicly; second, the facts publicly disclosed must be private facts; and third, the matter made public must be one that would be highly offensive and objectionable to a reasonable person of ordinary sensibilities. *Id.*

767. For example, an employee who has taken prescription medication to control epilepsy will show positive signs of drugs such as phenobarbitol, Dilantin, Mysoline, and Depakene in his urine. Millions of Americans are under medication to control illnesses such as depression, diabetes, and hypertension. Pollak, *A Bitter Pill for Epileptics*, N.Y. Times, Sept. 3, 1986, at A27, col. 1. The danger is that employers may be tempted to discharge employees with medical problems despite adequate performance. See Stille, *supra* note 19, at 22.

768. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 387 (E.D. La. 1986) (quoting McDonnell v. Hunter, 612 F. Supp. 1122, 1127 (D. Iowa 1985), *aff'd*, 809 F.2d 1302 (8th Cir. 1986)), *vacated*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

769. See Barnes & White, *supra* note 744, at 1106.

770. As of this writing, the public disclosure of private facts theory has not been tested as a legal means to block an employer's dissemination of private information obtained through urinalysis drug testing. In *Houston Belt & Terminal Railway v. Wherry*, an employee challenged the employer's dissemination of allegedly false positive test results of a urinalysis, but his recovery was premised on the tort of defamation. 548 S.W.2d 743, 745 (Tex. Ct. App.

Unlike the tort of invasion upon private affairs, the tort of public disclosure of private facts attaches to the information collected, and remains viable long after the initial intrusion. Thus, an employee who has been tested can use this action to ensure that the private facts revealed through drug testing are not made public. The public disclosure of private facts theory, however, does not protect employees against the administration of compulsory drug-testing programs, because it restricts only the disclosure of the information after it is collected, and not the collection itself.

3. FALSE LIGHT IN THE PUBLIC EYE

Under the tort theory of placing a person in a false light in the public eye, the plaintiff must show that the false light is "highly offensive to a reasonable person," and that the defendant knew of the false light or acted in reckless disregard of the false light in which the plaintiff would be placed.⁷⁷¹ This tort action protects plaintiffs from statements and other actions that purport to give a factual account of matters but are actually untrue. In the drug-testing context, this theory may apply in cases in which an employer has disseminated false results about an employee's drug test.

The dissemination of falsities about employees may result from

1977), *appeal dismissed*, 434 U.S. 962 (1977). For a discussion of the defamation claim in *Wherry*, see *infra* notes 785-89 and accompanying text.

The issue of the privacy of medical information in the employment context has been litigated, but the physician-patient privilege of confidentiality of medical data does not extend to the relationship between employees and a physician retained by an employer to examine the employees. See *Menard & Morrill, The Employer and the Law of Privacy in the Workplace—The U.S. Model to Date*, 9 N.C. J. INT'L L. & COM. REG. 93, 97 (1983). In *Bratt v. International Business Machines Corp.*, an employee challenged the company physician's written disclosure to management that the employee might be suffering from a paranoid state of mind. 392 Mass. 508, 512, 467 N.E.2d 126, 130 (1984). In answer to certified questions from the First Circuit, the Supreme Judicial Court of Massachusetts noted that in determining whether a company physician's disclosure of private facts about an employee constituted an invasion of privacy, it would balance the employer's business interest with the employee's right of privacy. *Id.* at 523, 467 N.E.2d. at 137. The court stated that disseminating medical information that is reasonably necessary to serve a substantial and valid interest of the employer would not constitute an invasion of privacy. *Id.* at 524, 467 N.E.2d at 137. For example, an employer has a valid interest in an employee's ability to perform job duties effectively. The First Circuit reversed the summary judgment granted to IBM, and, because a genuine issue of material fact existed concerning the violation of Bratt's privacy, remanded the case to the district court. *Bratt v. International Business Machs., Corp.*, 785 F.2d 352 (1st Cir. 1986).

771. RESTATEMENT (SECOND) OF TORTS § 652E (1977); see also *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (In an action under the New York invasion of privacy statute, publication is privileged unless the defendant made false statements "with knowledge of the falsity or acted in reckless disregard of the falsity.").

inaccurate drug tests that result in false positive reports of drug use.⁷⁷² This scenario would not meet the elements of the false light tort action unless the employer had actual knowledge of the falsity or acted in reckless disregard of the falsity. It is unclear whether falsities about an employee that are publicly disseminated under circumstances that may approach negligence on the part of an employer will support an action of this kind.⁷⁷³

As a potential protection for employees from compulsory urinalyses and employer drug policies, the tort theory of invasion of privacy by publicity that places the plaintiff in a false light has only limited merit. In theory, "[r]ecovery for an invasion of privacy on the ground that the plaintiff was depicted in a false light makes sense only when the account, if true, would not have been actionable as an invasion of privacy."⁷⁷⁴ In other words, the tort recovery is based only on the intentional or reckless falsity of the information disseminated. In this respect, these challenges to compulsory urinalyses are no different than if an employer made deliberate falsehoods about other aspects of an employee's work or private life.

C. Defamation

Defamation may be a viable cause of action for employees proceeding against employers who have communicated the results of inaccurate drugs tests to third parties. A communication is defamatory if it "tends to harm [the] reputation [of the employee] so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her."⁷⁷⁵ Most courts hold that a defendant is subject to liability to a private individual if the defendant made a defamatory communication and was negligent with regard to its falsity.⁷⁷⁶ Therefore, an employee must show not only that the employer made an inaccurate statement concerning a positive drug test, but also that the employer negligently failed to ensure the validity of the drug test by confirming the result or using

772. For a discussion of the scientific accuracy of urinalysis drug-testing methods, see *supra* notes 42-65 and accompanying text.

773. In a caveat to section 652E, the American Law Institute took no position on whether recovery would be possible if the tortious actor was merely negligent in releasing the false information, rather than reckless or intentional. RESTATEMENT (SECOND) OF TORTS § 652E caveat (1977).

774. W. PROSSER & R. KEETON, *supra* note 766, at 865.

775. Tannenbaum v. Foerster, 648 F. Supp. 1300, 1302 (E.D. Wis. 1986); RESTATEMENT (SECOND) OF TORTS § 559 (1977).

776. See, e.g., Miller v. Lear Siegler, Inc., 525 F. Supp. 46 (D. Kan. 1981); Jenoff v. Hearst Corp., 453 F. Supp. 541 (D. Md. 1978), *aff'd*, 644 F.2d 1004 (4th Cir. 1981); RESTATEMENT (SECOND) OF TORTS § 580B (1977).

proper testing methods.⁷⁷⁷

The two classifications of libel⁷⁷⁸ are libel per se and libel per quod. Libel per se means that the statement is defamatory on its face.⁷⁷⁹ Libel per quod refers to communications that are either ambiguous on their face, or for which extrinsic facts are necessary to show the defamatory character of the words.⁷⁸⁰ An employer's written statement that an employee has tested positive for drug use is ambiguous because it does not expressly state that the employee is an illicit drug user. Courts would therefore consider the employer's statement actionable per quod.

In a libel per quod action, a plaintiff must prove an "innuendo" as part of his prima facie case.⁷⁸¹ An employer's statement that an employee has tested positive for drug use implies that an employee is an illicit drug user. This implication serves as the innuendo in a libel per quod action. In addition, an employee must prove special damages in a libel per quod action.⁷⁸² An employee's loss of income resulting from the publication of an inaccurate drug test would constitute the requisite special harm.⁷⁸³

Of course, truth is always a defense in a defamation action.⁷⁸⁴ The truth defense must be as broad as the allegation framing the innuendo. In a defamation action arising out of drug testing, the employer

777. For a discussion of drug-testing methods, see *supra* notes 42-65 and accompanying text.

778. "Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." RESTATEMENT (SECOND) OF TORTS § 568(1) (1977). In contrast, "slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any other form of communication other than those stated [in the libel definition]." *Id.* at § 568(2).

779. See *Ellsworth v. Martindale-Hubbell Law Directory, Inc.*, 66 N.D. 578, 587, 268 N.W. 400, 405 (1936).

780. See *Battista v. United Illuminating Co.*, 10 Conn. App. 486, 491, 523 A.2d 1356, 1359, *appeal denied*, 204 Conn. 802, 525 A.2d 1352 (1987).

781. See *Quartana v. Utterback*, 609 F. Supp. 72, 74 (E.D. Mo. 1985), *rev'd on other grounds*, 789 F.2d 1297 (8th Cir. 1986).

782. See *Georgia-Pacific Corp. v. First Wisconsin Fin. Corp.*, 625 F. Supp. 108, 125-26 (N.D. Ill. 1985). Special damages represent a pecuniary loss that flows from the harm to reputation. RESTATEMENT (SECOND) OF TORTS § 575 comment b; *id.* at § 622. In a slander action, a plaintiff need not prove special damages if the defamatory statement falls within one of four categories. See *id.* at § 571 (slanderous imputations of criminal conduct); *id.* at § 572 (slanderous imputations of loathsome disease); *id.* at § 573 (slanderous imputations affecting a business, trade, profession or office); *id.* at § 574 (slanderous imputations of sexual misconduct). If an employer publishes a slanderous statement that an employee tested positive for drugs, an employee may argue that the comment is a statement concerning his fitness in a given profession. See *id.* at § 573.

783. *Houston Belt & Terminal Ry. v. Wherry*, 548 S.W.2d 743, 753 (Tex. Ct. App.), *appeal dismissed*, 434 U.S. 962 (1977).

784. I. SHEPARD & R. DUSTON, *supra* note 650, at 100.

will seek to show as a defense that the employee is in fact an illicit drug user. In jurisdictions that do not consider truth as an affirmative defense, the plaintiff has the burden of proving that the defamatory statement is false. One opportunity that an employee may have to disprove statements regarding illicit drug use is to introduce evidence showing that the result of a confirmatory drug test was negative. In *Houston Belt & Terminal Railway v. Wherry*,⁷⁸⁵ an employee who initially tested positive for drug use secured an independent examination⁷⁸⁶ revealing that the initial positive test result was inaccurate, and communicated this finding to the employer.⁷⁸⁷ The employer published the inaccurate test result to the Department of Labor despite knowledge of its falsity,⁷⁸⁸ and was subsequently held liable for defamation.⁷⁸⁹

The utility of a defamation action for employees in drug-testing cases is limited by the employer's qualified privilege to communicate defamatory statements to other employees, supervisors, or agents within a business organization.⁷⁹⁰ In *Merritt v. Detroit Memorial Hospital*,⁷⁹¹ an employee brought a defamation action against his employer for publishing the results of a drug test to supervisory personnel.⁷⁹² The employee had submitted to a drug test as part of an annual physical examination, and had tested positive for morphine.⁷⁹³ The Court of Appeals of Michigan held that the employer's communication of the drug test result to supervisory personnel was privileged.⁷⁹⁴ In order to overcome this qualified privilege, an employee must show that the employer abused the privilege. Abuse of a qualified privilege requires proof that (1) the employer had an improper purpose in publishing the defamatory statements;⁷⁹⁵ (2) the employer had knowledge of the falsity of the statement or had a reckless disregard for the truth;⁷⁹⁶ or (3) the employer exceeded the scope of the

785. 548 S.W.2d 743 (Tex. Ct. App.), *appeal dismissed*, 434 U.S. 962 (1977).

786. In *Wherry*, a urinalysis test of an employee who had fainted on the job revealed traces of methadone. *Id.* at 746.

787. *Id.*

788. *Id.* at 747.

789. *Id.* at 755.

790. I. SHEPARD & R. DUSTON, *supra* note 650, at 100.

791. 81 Mich. App. 279, 265 N.W.2d 124 (1978).

792. *Id.* at 281-82, 265 N.W.2d at 125.

793. *Id.*

794. *Id.* at 285-87, 265 N.W.2d at 127-28.

795. RESTATEMENT (SECOND) OF TORTS § 603 (1977).

796. *Id.* § 600. In some jurisdictions, negligence with regard to the false matter may subject an employer to liability. *See, e.g., Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982), *cert. denied*, 459 U.S. 883 (1982).

privilege.⁷⁹⁷

Employees have been successful in collecting damages in defamation actions from employers for publicizing the results of inaccurate drug tests. The defamation action appears to be limited, however, by an employer's privilege to communicate defamatory statements to persons within the business organization. Nevertheless, as long as employees enjoy the right to independently confirm a positive test result,⁷⁹⁸ an employee can show that the employer abused his privilege if he was notified that the initial test result was inaccurate. The employer's abuse of privilege stems from his knowledge of the falsity of the initial test result.

D. *Intentional and Negligent Infliction of Emotional Distress*

An employer who intentionally or recklessly causes severe emotional distress by engaging in extreme and outrageous conduct may be subject to liability under the tort action of intentional infliction of emotional distress.⁷⁹⁹ To recover damages based on this theory, an employee must prove: (1) that the employer acted in an extreme and outrageous manner; (2) that the employer intended to cause, or acted in reckless disregard of the probability that severe emotional distress would result from the conduct; (3) that the employer's extreme and outrageous conduct actually and proximately caused the emotional distress; and (4) that the resulting emotional distress was severe.⁸⁰⁰

An intentional infliction of emotional distress claim arising from a compulsory urinalysis program is actionable if the manner in which a test is performed is so improper as to constitute extreme and outrageous conduct. Furthermore, an employee who has been discharged for refusing to submit to a urinalysis drug test absent any reasonable suspicion of drug use may have a cause of action under this theory.⁸⁰¹

797. According to the Second Restatement of Torts, an employer exceeds the scope of the privilege if he publishes the defamatory matter to an unprivileged party, RESTATEMENT (SECOND) OF TORTS § 604 (1977), publishes the defamatory matter unnecessarily, *id.* at § 605, or publishes unprivileged defamatory matter in addition to privileged matter, *id.* at § 605a.

798. Recently enacted state statutes grant employees the right to rebut a positive drug test with a confirmatory test. For a discussion of drug-testing statutes, see *supra* notes 664-89 and accompanying text.

799. "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." RESTATEMENT (SECOND) OF TORTS § 46(1) (1977).

800. See *Eckenrode v. Life of Am. Ins. Co.*, 470 F.2d 1, 4 (7th Cir. 1972).

801. Comment, *supra* note 653, at 580. Conversely, the individualized suspicion standard for compulsory drug testing is subject to abuse because it gives employers the discretion to choose which employees to drug test. If an employer singles out an employee for more testing than is reasonably necessary to ensure that the employee is not using drugs, the employee may

Similarly, an employer that does not give employees or job applicants "adequate notice" before requiring them to submit to urinalyses may also be subject to potential liability for intentional infliction of emotional distress.⁸⁰² The tort of intentional infliction of emotional distress has been successfully invoked to challenge the conduct of an employer that arises out of compulsory drug testing. In *Luck v. Southern Pacific Transport Company*,⁸⁰³ a computer programmer alleged that after her refusal to sign a consent form and submit to a urinalysis, her employer initiated a series of discussions with her that lasted for many hours over two days. She alleged that in the course of the discussions, the employer questioned her about her personal beliefs, her attitudes toward her person, her bodily functions, and her assertion of personal rights on which the refusal to submit to the urinalysis was based. Luck recently won a jury award of \$485,000 from her employer.⁸⁰⁴ In *Satterfield v. Lockheed Missiles & Space Co.*,⁸⁰⁵ however, the court disposed of a claim of intentional infliction of emotional distress in urinalysis drug testing in summary judgment for the employer after finding that the employer's conduct did not constitute extreme and outrageous behavior. The employee was terminated after a drug test administered during an annual employment physical examination yielded positive results for marijuana use.⁸⁰⁶ The court focused on the manner in which the employee was actually terminated in finding that the elements of intentional infliction of emotional distress were not met.⁸⁰⁷

In some jurisdictions, a claim of negligent infliction of emotional distress may be an appropriate action for recovery by employees, primarily when negligence has been exhibited by an employer in

be able to prove that the employer has been engaging in extreme and outrageous conduct against him.

802. Cross & Haney, *supra* note 756, at 520.

803. No. 843,230 (Cal. Super. Ct. Nov. 6, 1987) (judgment on special verdict).

804. *Id.* at 3-4; *see also* Pettigrew v. Southern Pac. Transp. Co., No. 851,847 (filed Nov. 21, 1985), consolidated with Pettigrew v. Southern Pac. Transp. Co., No. 849,343 (Cal. Super. Ct. filed Jan. 17, 1986). In *Pettigrew*, an employee alleged that his urinalysis produced a false positive result. The employee was told that he could take another urinalysis, but regardless of the result, he would have to undergo a five day hospital evaluation program. The second test yielded negative results. The employer then committed the employee to a twenty-eight day inpatient hospital rehabilitation program, and subsequently forced him to attend alcohol and narcotics addiction care meetings, and submit to at least ten drug tests. The plaintiff's suit for intentional infliction of emotional distress is pending in San Francisco Superior Court, and the employee also has initiated an action for false imprisonment against the employer based on the forced inpatient stay. Bishop, *Drug Testing Comes to Work*, CAL. LAW., Apr. 1986, at 29, 30.

805. *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359 (D.S.C. 1985).

806. The court reprinted a substantial portion of the employee's description of his termination in the opinion. *Id.* at 1366-69.

807. *Id.* at 1360.

the administration of a compulsory urinalysis examination.⁸⁰⁸ Employers should conduct compulsory urinalyses in accordance with common law or statutorily defined standards of care, which normally require that a positive drug test be confirmed by an alternative testing technique.⁸⁰⁹ Failure to do so may create a foreseeable, unreasonable risk of harm to an employee for which an employer may be liable.⁸¹⁰

As a protection against compulsory drug testing, claims of negligent infliction of emotional distress may prove to be of greater utility than intentional infliction of emotional distress claims because proof of the higher order of wrongdoing of intent or recklessness is not required. If employees can show that after being subjected to a compulsory urinalysis test, their discharge or subsequent employer conduct was based on one, unconfirmed false positive urinalysis, a trier of fact may be able to find negligence in the conduct of the employer.

E. Comment

Common law theories to remedy ill treatment from drug testing do not adequately protect private sector employees. Different states, with different common law traditions, afford their citizens varying degrees of protection. This difference in protection from state to state facilitates the same pattern of inconsistent protection that employees have encountered with state constitutional and statutory protections.

The utility of the widely recognized public policy exception to the employment at will doctrine is limited because only six states have actually expressed a policy in favor of regulating employment drug

808. Claims of negligent infliction of emotional distress that arise out of compulsory drug testing are actionable only in jurisdictions that recognize the tort absent the additional requirement of resulting bodily harm. *See, e.g., Gammon v. Osteopathic Hosp. of Me.*, 534 A.2d 1282, 1285-86 (Me. 1987) (no physical injury required).

809. The courts and state statutes typically require an employer to confirm a positive urinalysis with an alternative technique, usually the gas chromatography/mass spectrometry procedure. *See supra* note 684 and accompanying text. An employee who is discharged or otherwise incurs damages as a result of a single, unconfirmed EMIT test may bring a negligence action against the employer or the testing firm. *See Herman & Bernholz, Negligence in Employee Drug Testing, CASE & COMMENT*, July-August 1987, at 3, 4 (discussing *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986), *rev'd on other grounds*, 833 F.2d 335 (D.C. Cir. 1987)). For a discussion of the reliability of drug-testing techniques, see *supra* notes 42-65 and accompanying text. In *Pettigrew v. Southern Pacific Transport Co.*, an employee brought claims for both intentional and negligent infliction of emotional distress based on the employer's conduct in relation to a mandatory drug testing policy. *Pettigrew*, No. 851,847 (filed Nov. 21, 1985) consolidated with No. 849,343 (Cal. Super. Ct. filed Jan. 17, 1986). The negligent infliction of emotional distress claim includes an allegation that the employer relied on a false positive test result. *See Weinstein, supra* note 6, at 31, col 2.

810. "[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." *RESTATEMENT (SECOND) OF TORTS* § 282 (1977).

testing, upon which the exception could be based.⁸¹¹ The courts have not widely recognized implied in fact contract terms and implied in law covenants of good faith as providing exceptions to the employment at will doctrine.⁸¹² Moreover, one critic has argued that executives and managers are the types of employees who are most likely to sue under these exceptions.⁸¹³ If this is true, most unskilled and lower-salaried employees, who constitute the majority of discharged workers, are unlikely to utilize the exceptions, and will therefore remain unaffected in their vulnerability in at will employment. The protections accorded employees in at will jurisdictions are inadequate in comparison to the public employees' relative security of guaranteed continued employment absent just cause for dismissal,⁸¹⁴ and by private employees in states that regulate drug testing.⁸¹⁵

Tort recoveries are inherently retrospective in nature. Reinstatements or money damages are offered as restitution after the wrong has been committed. Successful tort claims result only after employees have been forced to submit to undue physical, psychological, and social harm via workplace drug testing. In addition, several of the tort actions are only available after employers have failed to confirm positive drug tests with adequate secondary tests.⁸¹⁶ Ironically, the success of certain tort claims inherently depend on the *flawed* administration of drug tests.⁸¹⁷ As drug testing programs proliferate in the private sector, more employers will realize the need to institute confirmatory drug tests and other safeguards. The viability of tort claims

811. For a discussion of the public policy exception to employment at will and its limited utility when statutory remedies are available, see *supra* notes 713-27 and accompanying text. For a discussion of legislative responses to employee drug testing, see *supra* notes 664-89 and accompanying text.

812. Stieber, *supra* note 699, at 558.

813. *Id.*; cf. Comment, *Employer-Employee Relations—The Employee Polygraph Protection Act: Eliminating Polygraph Testing in Private Employment Is Not the Answer*, 11 S. ILL. U.L.J. 355, 376 n.122 (1987) (citing survey responses of 295 small- and medium-size firms that revealed that most employees who have sued for wrongful discharge are from the clerical ranks).

814. For a discussion of the constitutional protection that public employees may invoke to challenge compulsory drug testing by government employers, see *supra* notes 85-355 and accompanying text.

815. For a discussion of state statutes on drug testing in the private sector, see *supra* notes 664-89 and accompanying text.

816. Actions for false light in the public eye, defamation, and negligent infliction of emotional distress, are premised either on an employer's statements and actions based on a single, unconfirmed positive drug test, or, in the alternative, on the intentional dissemination of false information based on a drug test. *But see* *Luck v. Southern Pac. Transp. Co.*, No. 843,320 (Cal. Super. Ct. Nov. 6, 1987) (judgment on special verdict). In *Luck*, an employee recovered damages for intentional infliction of emotional distress after refusing to submit to a drug test. *See supra* notes 803-04 and accompanying text.

817. *See supra* notes 808-10 and accompanying text.

will therefore decrease. Tort theories do not afford the increasing number of subject employees adequate protections to prevent the potential for abuse of mandatory drug testing.

The tort theories described above are not totally devoid of beneficial effects, however. As more cases involving challenges to compulsory urinalyses enter the courts, the common law may begin to define the contours of socially desirable behavior in this area of employment relations. Slowly, the parameters of what constitutes acceptable or unacceptable workplace drug policies will become clearer. The threat of large jury awards for aggrieved employees may also help to deter employers from undesirable behavior in the future.⁸¹⁸

Compulsory drug-testing in the private sector is becoming commonplace and will probably continue to grow in use.⁸¹⁹ Unless a private employer has a sufficient connection with the government, private sector employees generally lack the constitutional protections available to their public sector counterparts.⁸²⁰ Although the states are free to expand individual rights beyond the scope of federal protections, California is the only state that has extended constitutional protection to employees from the administration of compulsory drug testing.⁸²¹

Although state legislatures have begun to respond to the needs of private sector employees by enacting legislation regulating the use of compulsory drug testing in the private sector,⁸²² these statutes provide inconsistent and limited protection to employees. They suffer from the same inadequacy as common law exceptions to the employment at will doctrine and common law tort theories of recovery.⁸²³ The divergence of drug-testing policies among different jurisdictions may impede the ability of national employers to establish coherent national policies of personnel management. The cumulative effect of this lack of uniform personnel policies among interstate employers may have a deleterious effect on the national economy.

818. Jury verdicts against employers for invasion of privacy increased 2,000 percent between 1985 and 1987, as compared to the period between 1981 and 1984. Daily Lab. Rep. (BNA) No. 170, at A-10 (Sept. 3, 1987). The average jury verdict from 1985 to 1987 in employee privacy cases was \$316,000. *Id.*

819. See *supra* notes 23-41 and accompanying text.

820. For a discussion of state action, see *supra* notes 66-83 and accompanying text.

821. For a discussion of state constitutional protections available to private employees from compulsory drug testing, see *supra* notes 649-63 and accompanying text.

822. For a discussion of state statutes relating to drug testing in the private sector, see *supra* notes 664-89 and accompanying text.

823. For a discussion of wrongful discharge, the employment at will doctrine, common law exceptions to the doctrine, and other common law tort theories of recovery, see *supra* notes 690-822 and accompanying text.

Statutory guidelines at the national level would ensure that the interests of all concerned were adequately represented. Until Congress enacts legislation addressing mandatory employee drug testing in the private sector, private employers will remain largely unguided and unrestrained in their administration of drug testing of both job applicants and current employees. Meaningful national legislation would begin to address the twin aims of uniformity of workplace drug-testing laws and meaningful employee protections in this growing area of personnel management.

VIII. THE DUTY TO TEST AND PROTECT THIRD PARTIES

The increased frequency and acceptance of employee drug testing give rise to several novel theories sounding in negligence, and in rare instances, strict liability.⁸²⁴ Under these theories, an employer may, in certain circumstances, have a duty to drug test in an attempt to identify drug-impaired employees.⁸²⁵ If drug testing reveals that an employee has used drugs, employers may have an additional duty to take reasonable action to protect third parties from the hazards associated with the presence of drug-impaired employees.⁸²⁶ At present, theories of liability for failure to drug test and failure to protect third parties from harm have yet to be applied in litigation. As such, their viability will be discussed within a largely theoretical framework, relying on general principles of tort law.

A. *Negligent Hiring*

Employers in certain industries may have a duty to test their job applicants for drug use as part of a background investigation, depending upon the safety and security concerns of the particular position, and in some instances, the burden on the employer to administer a background check. An employer who has inadequately investigated or failed to investigate the background of a job applicant may be subject to liability for negligent hiring.⁸²⁷ An action for negligent hiring

824. For a discussion of the increased frequency and acceptance of employee drug testing, see *supra* notes 23-41 and accompanying text.

825. A duty to test may arise in two situations: First, when a preemployment investigation is conducted, and second, when an employer suspects drug use in the workplace.

826. An employee who tests positive for drugs is not necessarily impaired on the job because a drug test cannot measure intoxication. See *supra* note 44 and accompanying text.

827. See RESTATEMENT (SECOND) OF AGENCY § 213(b) (1958). Most jurisdictions have recognized the theory of negligent hiring. See, e.g., *Ponticas v. KMS Invs.*, 331 N.W.2d 907, 910-11 & n.4 (Minn. 1983) (recognizing negligent hiring and surveying jurisdictions); *Minnesota Developments—Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Invs.*, 68 MINN. L. REV. 1303, 1307-08 & n.23 (1984) (surveying jurisdictions) [hereinafter *Minnesota Developments*]. Courts have applied

imposes primary, rather than vicarious,⁸²⁸ liability on an employer, because the employer has, through his own negligence, created an unreasonable risk of harm to others.⁸²⁹ This unreasonable risk of

negligent hiring to the hiring of independent contractors. See, e.g., *Western Stock Center, Inc. v. Sevit, Inc.*, 195 Colo. 372, 376, 578 P.2d 1045, 1048 (1978); *Woodward v. Mettillie*, 81 Ill. App. 3d 168, 184-85, 400 N.E.2d 934, 947-48 (1980); *Page v. Sloan*, 281 N.C. 697, 703-04, 190 S.E.2d 189, 193 (1972). See generally RESTATEMENT (SECOND) OF TORTS § 411 (1965) (negligence in the selection of a contractor). Negligent hiring originated from the fellow servant rule. See Note, 10 N.M.L. REV. 491, 491 n.3 (1980). This rule recognized that employers had a duty to hire competent employees to protect other employees from harm. *Id.* The protection of the fellow servant rule was extended to the general public. *Id.* For a discussion of the historical development of an employer's duty to select competent employees, see Comment, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717, 719-21 (1977) [hereinafter Comment, *Responsibility of Employers*]. For a discussion of the tort of negligent hiring, see Silver, *Negligent Hiring Claims Take Off*, A.B.A. J., May 1, 1987, at 72; Comment, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52 OR. L. REV. 296 (1973); Comment, *Negligent Hiring: Employer's Liability for Acts of an Employee*, 7 AM. J. TRIAL ADVOC. 603 (1984) [hereinafter Comment, *Negligent Hiring*]; Comment, *Responsibility of Employers, supra*; *Minnesota Developments, supra*; and Note, 10 WM. MITCHELL L. REV. 361 (1984).

If courts recognize a cause of action for negligent hiring based upon an employer's failure to test for drugs, employers will be fearful of unlimited exposure to liability and may be unwilling to hire drug abusers even though these individuals may be competent and reliable employees. Society's goal of rehabilitating drug users, and its perception of drug abuse as a handicapping condition, may be defeated. For a discussion of the protections offered under the Rehabilitation Act to employees who are drug abusers, see *supra* notes 570-647 and accompanying text.

In *Ponticas v. KMS Investments*, the court advanced a similar policy argument. 331 N.W.2d 907 (Minn. 1983). The court held that an owner and operator of an apartment complex did not have a duty to conduct a background investigation that would have divulged the complex manager's criminal record. *Id.* at 913. The court stated:

Were we to hold that an employer can never hire a person with a criminal record at the risk of later being held liable for the employee's assault, it would offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community.

Id.

828. An employer is vicariously liable for an employee's tortious act under the doctrine of respondeat superior. As a theory of vicarious liability, respondeat superior recognizes that an employer is best able to compensate a plaintiff for his loss either through insurance coverage, or by passing the cost to society in the form of higher-priced goods or services. See *Minnesota Developments, supra* note 827, at 1304-05. Commentators have referred to this policy underlying respondeat superior as the "deep pocket," "entrepreneur" or "risk-spreading" principle. See *id.* at 1304 n.11. Negligent hiring incorporates this philosophy but retains the characteristic of liability based on fault. See *id.* at 1305. For a comparison of the doctrines of respondeat superior and negligent hiring, see Comment, *Responsibility of Employers, supra* note 827, at 717-19.

829. Bringing suit under a theory of negligent hiring has at least two advantages. First, a plaintiff may be able to recover punitive damages against an employer for recklessly hiring a job applicant. See, e.g., *Plains Resources, Inc. v. Gable*, 235 Kan. 580, 595, 682 P.2d 653, 664-65 (1984); *Wilson N. Jones Memorial Hosp. v. Davis*, 553 S.W.2d 180, 183 (Tex. Civ. App. 1977); see also RESTATEMENT (SECOND) TORTS § 909(b) (1979) (punitive damages may be awarded against an employer for recklessly employing an employee). For a discussion of

harm pertains to fellow employees, bystanders, and consumers of the employer's goods or services. A plaintiff must establish five basic elements to establish a prima facie case of negligent hiring: (1) an employment relationship existed; (2) the employee was unfit for employment; (3) the employer knew or should have known through reasonable investigation that the employee was unfit for employment; (4) the employee's tortious act was the cause in fact of the plaintiff's injuries;⁸³⁰ and (5) the negligent hiring was the proximate cause of the plaintiff's injuries.⁸³¹

punitive damages recoverable under a respondeat superior theory of liability, see Note, *The Employer's Liability for Punitive Damages for the Acts of an Employee*, 11 STETSON L. REV. 570 (1982). Second, unlike plaintiffs in actions based on respondeat superior, a plaintiff suing under a theory of negligent hiring may introduce an employee's prior negligence or other wrongful acts in a negligent hiring action. See, e.g., *Estate of Arrington v. Fields*, 578 S.W.2d 173, 179 (Tex. Civ. App. 1979); cf. *Woodward v. Mettelle*, 81 Ill. App. 3d 168, 183, 400 N.E.2d 934, 946-47 (1980) (evidence of general reputation for sobriety admissible).

A plaintiff may not be able to recover under both a negligent hiring and respondeat superior theory of liability. Some courts have held that negligent hiring and respondeat superior are mutually exclusive theories. See, e.g., *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex. Civ. App. 1979). Even if a jurisdiction permits recovery under both theories of liability, a plaintiff may not be able to succeed under a theory of respondeat superior because in order to prove vicarious responsibility, the plaintiff must show that the employee's tortious conduct occurred within the scope of the employee's employment. See, e.g., *Pruitt v. Pavelin*, 141 Ariz. 195, 205, 685 P.2d 1347, 1357 (Ct. App. 1984) (holding that plaintiffs could not recover under respondeat superior theory because the employee was not acting within the scope of her employment when she forged documents); see also RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."). See generally W. PROSSER & R. KEETON, *supra* note 766, at 501-08 (discussing employer liability). In a respondeat superior action, an employer generally is not liable for the intentional torts of its employees because an intentional tort usually falls outside of the scope of employment. See *Minnesota Developments*, *supra* note 827, at 1307 n.22. Yet an employee's intentional tort may be within the scope of employment if it is committed in the furtherance of an employer's business. See, e.g., *Lewis v. Accelerated Transport-Pony Express, Inc.*, 219 Md. 252, 255-56, 148 A.2d 783, 785 (1959). An employee's intentional tort may also be within the scope of employment if it is an "out-growth of a job-related controversy." See, e.g., *Johnson v. Weinberg*, 434 A.2d 404, 408 (D.C. 1981). In addition, an employee's intentional tort may be within the scope of employment if an employer ratifies the employee's act. See, e.g., *McChristian v. Popkin*, 75 Cal. App. 2d 249, 256-57, 171 P.2d 85, 90 (1946).

830. For an analysis of causation in general tort law, see Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985).

831. See *Focke v. United States*, 597 F. Supp. 1325, 1344 (D. Kan. 1982); see also Comment, *Negligent Hiring*, *supra* note 827, at 604-05 (listing elements for a cause of action for negligent hiring). The fifth element, proximate cause, is also known as "legal cause." See generally RESTATEMENT OF TORTS (SECOND) § 431 (1965) (defining legal causation). The term "proximate cause" is a misleading term because it connotes "physical or mechanical closeness." W. PROSSER & R. KEETON, *supra* note 766, at 273. Proximate cause goes beyond actual causation. *Id.* Rather, it is "an issue of whether the defendant is under any duty to the plaintiff, or whether the duty includes protection against such consequences." *Id.* Courts have used the doctrine of proximate cause to limit employers' liability for negligent hiring. See, e.g., *F & T Co. v. Woods*, 92 N.M. 697, 701, 594 P.2d 745, 749 (1979) (holding that an

One of the most difficult elements to prove in a negligent hiring action is that the employer knew or should have known through reasonable investigation that the employee was unfit for employment. The issue posed in the context of employee drug testing is whether an employer has a duty to test employees as part of a reasonable pre-hiring investigation. It is well settled that the reasonableness of a pre-hiring investigation depends largely on the nature of the particular position.⁸³² An employer's duty to conduct a thorough background investigation before hiring a job applicant increases with the degree of the sensitivity and safety risk inherent in the particular position. *Welsh Manufacturing Division of Textron v. Pinkerton's, Inc.*⁸³³ exemplifies this rule. In *Welsh*, a manufacturer alleged that a security firm negligently hired a security guard who participated as a co-conspirator in three major thefts at the manufacturer's facility.⁸³⁴ As part of its pre-hiring investigation, the security firm had sent brief reference forms to previous short-term employers and obtained police records indicating that the guard had no prior criminal record.⁸³⁵ The Supreme Court of Rhode Island held that the jury had sufficient evidence to find the security firm negligent in hiring the guard because its investigation was inadequate considering the sensitive nature of the position.⁸³⁶ *Welsh* indicates that a court may find an employer liable for negligent hiring if it fails to drug test a job applicant for a position that is sensitive or poses a high degree of risk to the safety of others. Applying *Welsh*, a court may find that an employer has a duty to drug test job applicants for such positions as police officers, firefighters, air

employer was not liable for negligent hiring of an employee who subsequently raped a customer, because the employer's alleged negligence was not the proximate cause of injury); *cf. McQuade v. Arnett*, 558 F. Supp. 11 (W.D. Okla. 1982) (holding that an employer owed no duty to a pedestrian who was hit by an intoxicated employee, because the employer's retention of the employee had no connection with the death of the pedestrian); *Chesterman v. Barmon*, 82 Or. App. 1, 727 P.2d 130 (1986) (holding that an employer owed no duty to the plaintiff and therefore was not liable for negligently retaining an employee who raped the plaintiff after forcing his way into her house while hallucinating from the effects of drugs), *review granted*, 302 Or. 614, 733 P.2d 449 (1987).

832. See, e.g., *Kassman v. Busfield Enters., Inc.*, 131 Ariz. 163, 167, 639 P.2d 353, 356 (Ct. App. 1981); *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238, 1240 (Fla. 2d DCA 1980), *petition for review denied*, 392 So. 2d 1374 (Fla. 1981); *CK Sec. Sys., Inc. v. Hartford Accident & Indem. Co.*, 137 Ga. App. 159, 161-62, 223 S.E.2d 453, 455 (1976); *Ponticas v. KMS Invs.*, 331 N.W.2d 907, 913 (Minn. 1983); *Welsh Mfg. Div. of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436, 440-41 (R.I. 1984).

833. 474 A.2d 436 (R.I. 1984). For a further discussion of *Welsh*, see Comment, *Employer Liable for Negligent Hiring After cursory Investigation of a Prospective Employee*—*Welsh Manufacturing v. Pinkerton's, Inc.*, 19 SUFFOLK U.L. REV. 371 (1985).

834. *Id.* at 438.

835. *Id.* at 442.

836. *Id.* at 442-43. Because the guard was responsible for guarding gold, the court classified the position as "sensitive." *Id.*

traffic controllers, and drug enforcement officials.⁸³⁷

The burden on employers to conduct background investigations is also a relevant factor in determining whether a particular background investigation was reasonable.⁸³⁸ In *Evans v. Morsell*,⁸³⁹ the Court of Appeals of Maryland found that a tavern owner did not have a duty to investigate the criminal record of a job applicant, because requiring an employer to obtain a police report would be too burdensome.⁸⁴⁰ The implementation of a drug-testing program for job applicants may be similarly burdensome for employers, because setting up a reliable program may be costly and time consuming.⁸⁴¹ Yet for employers who already require a preemployment physical examination, an additional laboratory test may not be unduly burdensome. Furthermore, as easier, less expensive, and less intrusive drug-testing methods become available to employers,⁸⁴² the burden of testing will decrease, and courts may ultimately find it reasonable to require an employer to drug test job applicants for certain positions before hiring them.

B. *Negligent Retention*

The elements necessary to maintain a cause of action for negligent retention are similar to those for negligent hiring, with one primary difference. In a negligent hiring action, the plaintiff must prove that an employer knew or should have known that the job applicant was unfit for employment when the applicant was hired.⁸⁴³ In a negligent retention action, the plaintiff must prove that an employer knew or should have known that an employee was unfit during the course of employment.⁸⁴⁴ In the context of employee drug testing, an action for negligent retention may arise in two situations. First, an employer who should know that an employee is using drugs on the job may have a duty to test that employee. Second, an employer who knows that an employee has tested positive may have a duty to

837. Employers frequently require drug testing of job applicants for these types of positions. See *supra* note 27.

838. See, e.g., *Evans v. Morsell*, 284 Md. 160, 167-68, 395 A.2d 480, 484 (1978); *Stevens v. Lankard*, 31 A.D. 2d 602, 603, 297 N.Y.S.2d 686, 688 (N.Y. App. Div. 1968), *aff'd*, 25 N.Y.2d 640, 306 N.Y.S.2d 257 (1969).

839. 284 Md. 160, 395 A.2d 480 (1978).

840. *Id.* at 167-68, 395 A.2d at 484.

841. For a discussion of drug-testing methods and techniques, see *supra* notes 42-66 and accompanying text.

842. See, e.g., Cox, *Analysis of Hair Traces Drug Use*, Nat'l L.J., July 27, 1987, at 3 (reporting a new testing method that analyzes hair strands to detect drug use).

843. See *Minnesota Developments*, *supra* note 827, at 1303-04 n.7.

844. See *id.*

take reasonable action to protect others from the hazards associated with the presence of drug-impaired employees on the job.

At least one court has recognized that an employer has an affirmative duty to make diligent inquiry about an employee's fitness when he should have known that the employee was unfit for employment. In *Vanderhule v. Berinstein*,⁸⁴⁵ an employee assaulted a customer at the bowling alley where he was employed.⁸⁴⁶ Before the assault, the employer had observed the employee making irrational remarks and exhibiting unusual behavior on the job.⁸⁴⁷ A New York state appellate court held that the employer had a duty to investigate whether the employee was mentally unstable after observing such unusual behavior.⁸⁴⁸ An employer who has observed an employee exhibiting drug-related behavior may similarly have a duty to drug test that employee to determine whether the employee has been using drugs that might cause dangerous behavior on the job.

An employer also has a duty to take reasonable action to protect others from harm when it has actual knowledge of an employee's unfitness. In *Plains Resources, Inc. v. Gable*,⁸⁴⁹ the Supreme Court of Kansas held that an employer negligently retained an employee who the employer knew intended to sabotage an oil drilling site.⁸⁵⁰ Similarly, an employer who has learned that an employee has tested positive for drug use may be liable for negligent retention if it fails to discharge or suspend the employee to prevent him from harming others. By allowing the employee to remain on the job, the employer has created an unreasonable risk of harm to fellow employees and to the public.⁸⁵¹

C. Negligence

Under a negligent retention theory, the duty to drug test is based on an employer's individualized suspicion of drug use by an employee.

845. 285 A.D. 290, 136 N.Y.S.2d 95 (1954).

846. *Id.* at 290, 136 N.Y.S.2d at 95.

847. *Id.* at 294-95, 136 N.Y.S.2d at 101.

848. *Id.* at 295, 136 N.Y.S.2d at 101.

849. 235 Kan. 580, 682 P.2d 653 (1984).

850. *Id.* at 589-92, 682 P.2d at 661-63.

851. To prove that an employer failed to act upon a positive test result, a plaintiff must show that the employee tested positive. A plaintiff may not be able to meet this burden of proof because employee test results are confidential under the federal drug-testing statute, which encompasses drug testing of all federal workers, and under some state drug-testing statutes. See Supplemental Appropriations Act, Pub. L. No. 100-71, § 503(e), 101 Stat. 468, 471 (1987); McGovern, *supra* note 59, at 1513-17 (listing state drug-testing legislation mandating confidentiality of test results). Disclosure also may be regulated under the Constitution of the United States. See *supra* notes 219-57 and accompanying text.

A similar duty based upon general negligence principles may arise when an employer has a generalized suspicion that a widespread drug problem might exist in the workplace. For example, when Conrail learned that the cause of a catastrophic train accident was employee on-duty marijuana use,⁸⁵² it arguably had a duty to begin mandatory drug testing, because it was on notice that a widespread employee drug problem might exist. If Conrail failed to drug test employees, especially those in safety-sensitive positions, it may have exposed passengers to unreasonable risks of harm.

Under general principles of tort law, an employer is negligent if it fails to use reasonable care to guard against foreseeable and unreasonable risks relating to the employer's enterprise.⁸⁵³ Courts balance the utility of the conduct against the probability and gravity of the harm in determining whether a jury may properly find that a risk was unreasonable.⁸⁵⁴ Within the utility calculation, a court must consider the burden on an employer to take specific measures to prevent foreseeable risks of harm.⁸⁵⁵ In the Conrail example, the cost and inconvenience of drug testing, and the privacy interest of employees would be factors in a court's determination of whether the utility of Conrail's failure to test outweighed the foreseeable risks of harm without testing. Because the gravity of the harm was appreciable, it appears that the foreseeable risk of harm would have outweighed the cost of testing Conrail employees in sensitive positions.

D. *Negligence Per Se and Strict Liability*

Federal regulations and proposed regulations mandate drug testing in certain industries.⁸⁵⁶ For example, the Federal Railroad Administration has issued regulations authorizing employers to drug test when a supervisor suspects that a railroad employee is under the influence of drugs.⁸⁵⁷ The violation of these and similar regulations

852. See *supra* note 4 and accompanying text.

853. See, e.g., *Lannon v. Taco Bell, Inc.*, 708 P.2d 1370, 1373 (Colo. Ct. App. 1985), *aff'd*, 744 P.2d 43 (Colo. 1987). See generally W. PROSSER & R. KEETON, *supra* note 766, at 169-73 (discussing unreasonable risk of harm).

854. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *Shewmake v. Badger Oil Corp.*, 654 F. Supp. 1184, 1187-88 (D. Colo. 1987).

855. *Shewmake*, 654 F. Supp. at 1187-88.

856. See, e.g., 53 Fed. Reg. 8368, 8374 (1988) (to be codified at 14 C.F.R. §§ 61, 63, 65, 121, 135) (Federal Aviation Administration proposed regulations requiring drug testing of commercial airline pilots, flight engineers, flight navigators, repairmen, flight attendants, and certain other employees); 49 C.F.R. § 219.301(b)(1), (c)(2) (1987) (authorizing drug testing of railroad employees).

857. See 49 C.F.R. § 219.301(b)(1), (c)(2) (1987).

may constitute negligence per se, or perhaps grounds for strict liability.

The doctrine of negligence per se creates a presumption of negligence that is rebuttable by evidence of a legally sufficient excuse.⁸⁵⁸ To establish an action for negligence per se, a plaintiff must show that (1) the injured party was a member of the class of persons intended to be protected under the statute; (2) the injury was one that the statute was designed to prevent; (3) the defendant violated the statute; and (4) the violation of the statute was the proximate cause of the injury.⁸⁵⁹ Of these elements, the most frequently litigated issues are whether the statute was designed to protect a class of individuals of which the plaintiff is a member and whether the statute was designed to protect against the risk of harm that has occurred. The railroad regulations are expressly intended to protect railroad passengers from physical injury due to drug related accidents. The regulations state that their purpose is to "prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."⁸⁶⁰ Assuming that other elements of the cause of action are met, a plaintiff who is injured in a railroad accident resulting from employee drug use may have a cause of action for negligence per se against the federal employer.

Regulations may even impose statutory strict liability on employers. Strict liability differs from negligence per se in one important respect. In a negligence per se action, liability is based upon ordinary negligence principles and is established by a violation of a statute.⁸⁶¹ In a statutory strict liability action, liability is not based on fault.⁸⁶² For example, in *Zerby v. Warren*,⁸⁶³ a retailer sold glue to a

858. See *Reyes v. Vantage Steamship Co.*, 558 F.2d 238, 242 (5th Cir. 1977), *modified*, 609 F.2d 140 (5th Cir. 1980); see also RESTATEMENT (SECOND) OF TORTS § 288A(1) (1965) ("An excused violation of a legislative enactment or an administrative regulation is not negligence."). Five excused violations do not constitute negligence per se:

(a) the violation is reasonable because of the actor's incapacity; (b) he neither knows nor should know of the occasion for compliance; (c) he is unable after reasonable diligence or care to comply; (d) he is confronted by an emergency not due to his own misconduct; (e) compliance would involve a greater risk of harm to the actor or to others.

RESTATEMENT (SECOND) OF TORTS § 288A(2) (1965) (a)-(e). See generally W. PROSSER & R. KEETON, *supra* note 766, at 227-29 (discussing excused violations).

859. See *Fox v. Bartholf*, 374 So. 2d 294, 295-96 (Ala. 1979); see also RESTATEMENT (SECOND) OF TORTS § 286 (1965) (listing required conditions before a court will utilize a statute to set the standard of care). Some jurisdictions treat violations of a statute as only evidence of negligence. See, e.g., *Cowan v. Wheeler*, 76 Ill. App. 3d 259, 264-65, 395 N.E.2d 32, 36 (1979).

860. 49 C.F.R. § 219.1(a) (1987).

861. See *Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn. 1981).

862. *Id.*

minor in violation of a state statute.⁸⁶⁴ After the minor purchased the glue, he and another boy inhaled the fumes from the glue and one of the boys subsequently died.⁸⁶⁵ The court held that the retailer was strictly liable for the death of the minor.⁸⁶⁶

E. *The Duty to Control*

A person generally does not have a duty to control the conduct of another,⁸⁶⁷ but a special relationship may give rise to such a duty.⁸⁶⁸ In *Otis Engineering Corporation v. Clark*,⁸⁶⁹ the Supreme Court of Texas held that an employer had a duty to control the conduct of his employee, even outside of the scope of employment, because he knew that the employee had been consuming alcohol.⁸⁷⁰ In *Clark*, widowers of victims of an automobile accident brought a wrongful death action against an employer for failing to control the employee who was responsible for the accident.⁸⁷¹ The employer knew that the employee had consumed alcohol while on duty on the day of the accident and on prior occasions.⁸⁷² Nevertheless, the employer escorted the intoxicated employee to the parking lot and allowed him to drive home.⁸⁷³ The court held that the employer had a duty to control his employee, because he knew that the employee's use of alcohol might pose an unreasonable risk of harm to others.⁸⁷⁴ A court may similarly find an employer liable for failing to control an employee who has tested positive for drugs. The positive drug test result would furnish the employer with the requisite knowledge that the employee might create an unreasonable risk of harm to others because of possible impairment on the job.

F. *The Duty to Provide a Safe Working Place*

An employer had a duty at common law to promulgate and enforce rules for the conduct of employees in order to make the workplace safe.⁸⁷⁵ This common law duty is codified in various state and

863. 297 Minn. 134, 210 N.W.2d 58 (1973).

864. *Id.* at 137-38, 210 N.W.2d at 61.

865. *Id.* at 137, 210 N.W.2d at 61.

866. *Id.* at 140, 210 N.W.2d at 58.

867. *See* *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983).

868. *Id.*

869. 668 S.W.2d at 307.

870. *Id.*

871. *Id.* at 308.

872. *Id.*

873. *Id.* at 309.

874. *Id.* at 311.

875. *See* *Horan v. Cold Spring Constr. Co.*, 441 N.Y.S.2d 311, 313 (Sup. Ct. 1981).

federal statutes.⁸⁷⁶ Consistent with this duty, many employers have enacted specific rules forbidding the use of drugs in the workplace. Because an employer has a duty to enforce safety rules, an employer may have a duty to drug test employees to ensure that employees comply with both company rules prohibiting drug use on the job and general health and safety statutes. For example, in *Horan v. Cold Spring Construction Co.*,⁸⁷⁷ the plaintiff alleged that the employer was aware of the widespread consumption of alcohol by its employees and failed to take action to eradicate the alcohol problem.⁸⁷⁸ The New York Supreme Court held that the complaint stated a claim for breach of the employer's duty to provide workers with a safe workplace.⁸⁷⁹ Under *Horan*, an employer who knows or should know about employee drug use and fails to drug test employees to eliminate or reduce such use may be liable for a breach of the duty to provide workers with a safe workplace.

IX. A TEMPORAL FRAMEWORK FOR RECONCILING DRUG-TESTING ISSUES

Employers in the public and private sectors have instituted drug-testing programs as a panacea for high absenteeism rates, low productivity, and unsafe working conditions. Although drug testing has been effective in combating these workplace problems, employers should recognize the limitations and vast legal implications of drug testing before embarking on a drug-testing program.

A. *The Inception of Drug Testing*

In the public sector, drug testing at its inception implicates the right of privacy,⁸⁸⁰ and the prohibition against unreasonable searches and seizures in the fourth amendment to the Constitution.⁸⁸¹ If the risk of disclosure of personal information is high, public employees may refuse to submit to drug testing and sue to enjoin the program on the grounds that it violates their right of privacy. The fourth amendment is implicated by drug-testing programs that mandate mass or random testing of all employees in the absence of reasonable individualized suspicion. The current division of the courts as to whether drug testing in the absence of individualized suspicion is reasonable

876. See, e.g., Occupational Safety and Health Act of 1970, 29 U.S.C. § 654 (1982); CAL LABOR CODE § 6400 (West Supp. 1988).

877. 441 N.Y.S.2d 311 (Sup. Ct. 1981).

878. *Id.* at 314.

879. *Id.*

880. See *supra* notes 219-57 and accompanying text.

881. U.S. CONST. amend. IV; see *supra* notes 84-150.

under the fourth amendment leaves the constitutionality of these programs in doubt.⁸⁸² The legitimate interests of government employers in safety and security militate against requiring individualized suspicion for drug testing of employees in certain sensitive positions,⁸⁸³ but courts have yet to draw the line. A drug-testing program limited to employees in sensitive positions presents the most compelling case for upholding the constitutionality of drug testing absent individualized suspicion.⁸⁸⁴ But the line becomes blurred for positions that merely involve, for example, access to confidential information.

Assuming that, in some cases, reasonable individualized suspicion is a requisite element of a drug-testing program, it is uncertain how courts will define this term. The requirement of reasonable individualized suspicion may even become a legal conclusion. For example, the courts are already divided as to whether a serious accident constitutes reasonable individualized suspicion of drug use by the responsible employee.⁸⁸⁵ If one carries the rationale underlying this approach to its extreme, a court may find individualized suspicion whenever an employee deviates from a predetermined range of behavior. A presumption in the law that accidents, or even slight deviations from operating rules,⁸⁸⁶ must be the product of employee drug use is a dangerous proposition. Moreover, because the standard of individualized suspicion is necessarily imprecise and fact-specific, the potential for an employer to abuse his discretion in applying the standard is great. In some cases, the employer's abuse of discretion may go unchecked or unnoticed because of the inherent unreliability and inaccuracy of certain drug-testing methods and procedures,⁸⁸⁷ and the

882. See *supra* note 141. The Supreme Court of the United States should articulate a fourth amendment standard for drug testing of public employees when it reviews *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

883. Sensitive positions are those affecting public safety and security, including police officers, firefighters, airline pilots, and school bus drivers.

884. Thus, mass or random drug testing of Conrail employees may be reasonable after the Conrail catastrophe. See *supra* text accompanying notes 1-5.

885. Compare *Railway Labor Executive's Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988) (invalidating regulations mandating drug testing of all members of a train crew involved in an accident, because accidents by themselves do not create reasonable suspicion of drug use) with *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (holding that accidents create reasonable suspicion of drug use by bus drivers).

886. See *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988) ("*R.L.E.A.*"). In *R.L.E.A.*, the Ninth Circuit invalidated regulations that authorized railroads to require drug testing of employees who had violated railroad operating rules. See *id.*

887. For a discussion of drug testing methods, see *supra* notes 42-65 and accompanying text.

fact that no drug-testing method can measure drug intoxication.⁸⁸⁸ As a result, reasonable suspicion—a standard that was designed to protect individuals from government intrusion—may become a weapon for employers to harass and discriminate against employees.

Thus, for employees, the issue of reasonable individualized suspicion is a double-edged sword. In the absence of reasonable individualized suspicion, mandatory drug testing seriously intrudes upon the dignity and privacy interests of all employees in positions that are subject to a drug-testing program. Yet, at least mass or random drug testing is objectively systematic in its application. Under the reasonable individualized suspicion standard, the invasiveness of drug testing reaches fewer employees, but because the employer determines who will be tested, the potential for arbitrary and discriminatory selection is high.

Employees in the private sector do not enjoy the constitutional protections of their counterparts in the public sector. Unionized employees' interests are protected prior to the implementation of a drug-testing program because drug testing is a mandatory subject of collective bargaining.⁸⁸⁹ Nonunionized private employees must rely on common law tort actions to protect their interests during mandatory drug testing.⁸⁹⁰ Employers may be subject to tort liability for intrusion upon private affairs and intentional infliction of emotional distress.⁸⁹¹ Unlike fourth amendment claims, common law tort actions typically arise only after an employee has been drug tested. Tort remedies are inherently retrospective in nature and therefore provide more limited protection than the fourth amendment.

Paradoxically, in certain situations, employers may have an affirmative duty to test job applicants and employees for drugs.⁸⁹² In the union setting, this duty is separate from any collective bargaining agreement between management and labor, because collective bargaining agreements cannot preclude third party tort claims.⁸⁹³ This duty to test bears a significant relationship to the reasonable suspicion requirement of the fourth amendment, because an employer has a duty to test only those employees or job applicants who pose a foreseeable and unreasonable risk of harm to others. The question remains as to whether the foreseeable risk in tort law and reasonable

888. See *supra* note 44 and accompanying text.

889. See *supra* notes 383-99 and accompanying text.

890. See *supra* notes 690-823 and accompanying text.

891. See *supra* notes 746-74, 799-810 and accompanying text.

892. See *supra* notes 824-79 and accompanying text.

893. Individuals such as consumers may seek redress against employers for injuries that are caused by an employer's breach of a duty to test.

suspicion in constitutional law are based on equivalent facts or probabilities of harm.

B. *The Consequences of Drug Testing*

Drug tests reveal information on illicit drug use by employees and personal physiological information such as pregnancy and epilepsy.⁸⁹⁴ Employers in possession of information on illicit drug use often present it as evidence of drug abuse by an employee even when that information is unreliable or inaccurate. The possible consequences from possession of drug-testing information may threaten more than employment security if the employer improperly discloses the information to coworkers or other third parties. In effect, employees face not only the potential loss of livelihood after a positive test result, but also invasions of privacy from the disclosure of personal information.

1. THE IMPACT OF DISCLOSURE

For nonunionized employees in the private sector, no cause of action accrues for disclosure until *after* the information is revealed and the damage has already occurred.⁸⁹⁵ This fact precludes nonunionized employees in the private sector from bringing actions for defamation until after positive test results or personal information have been disclosed to coworkers or other third parties. Government employees and unionized employees, however, need not wait until after disclosure, but may invoke certain protections to prevent the potential damage from disclosure before personal information is revealed. The Constitution of the United States protects public employees from invasions of privacy from disclosure by affording them an opportunity to challenge a drug-testing program at its inception.⁸⁹⁶ Similarly, the collective bargaining process protects unionized employees in the private sector from invasions of privacy and potential disclosure of personal information.⁸⁹⁷ An employer cannot unilaterally implement a drug testing program without bargaining with the union.⁸⁹⁸ The union representative should bargain over the specifics of drug testing to ensure that the proffered program is one that is acceptable to the union prior to its implementation in the

894. *National Treasury Employees*, 816 F.2d at 175-76.

895. *See R.L.E.A.*, 839 F.2d at 592.

896. For a discussion of employee protections in the public sector, see *supra* notes 65-355 and accompanying text.

897. *See Daily Lab. Rep. (BNA) No. 184*, at D-1 (Sept. 24, 1987).

898. *See supra* note 363.

workplace.⁸⁹⁹ One of the specifics of the program may be safeguards to reduce the risks of disclosure to both the employer's personnel and to third parties.⁹⁰⁰ In essence then, public sector workers and unionized employees in the private sector are not saddled with the breach requirement prior to raising the disclosure issue as a cause of action.

Private nonunionized employees, however, do not have the protection of the right of privacy and do not have collective bargaining rights.⁹⁰¹ They cannot attack a drug-testing program based on the threat of disclosure at the inception of the program. Although these private nonunionized employees have no Constitution or its equivalent in the form of a collective bargaining agreement, they can resort to an appeal to the courts, juries, and legislatures. The courts offer protection through common law privacy and tort theories. Juries, as a representative body of the community, may also protect private employees because they may have compassion for employees and render substantial verdicts in their favor. Of course, the sympathy of the jury is dependent on the facts of the case and the strengths of the competing interests. Thus, the types and frequency of jury verdicts may be favorable to the employee in a *Luck* scenario,⁹⁰² and unfavorable to employees on a Conrail set of facts.⁹⁰³ Finally, any trend of jury verdicts in favor of either employees or employers or popular movement from lobbyists or voters, may cause state legislatures to enact statutes that limit or favor drug testing. The judicial system is a limited forum for private employees in preventing the disclosure of personal information because it cannot force employers to adopt safeguards that minimize the risk of disclosure at the inception of a drug-testing program. Instead, courts are likely to wait for legislative action toward the goals of limiting private invasions. Thus it is toward the legislative forum that private nonunionized employees must direct their efforts to gain full protection from mandatory drug testing.

2. SUBSEQUENT PERSONNEL ACTIONS

Employees who have tested positive for drug use after mandatory drug testing are subject to a wide range of responses by their employers. Employers may require employees to enroll in an employee assistance program as a condition of continued employment.

899. *See supra* note 420 and accompanying text.

900. *See supra* notes 219-56 and accompanying text.

901. For a discussion of nonunionized rights in the private sector, see *supra* notes 648-823 and accompanying text.

902. *See supra* notes 6-11 and accompanying text.

903. *See supra* notes 1-5 and accompanying text.

Employees may also be subject to temporary or permanent reassignment from their current positions to less sensitive positions following positive drug tests. Most private employees who are not unionized also risk immediate dismissal after testing positive for drug use.⁹⁰⁴ Determining whether and to what extent an employer may take adverse personnel action in response to an employees' positive drug test requires reconciling the conflicting interests of employers and employees. An employer has an interest in maintaining a safe and secure working environment for their employees and the public. Conversely, employees possess the right to be free from unwarranted intrusion into their private lives. Employees also have additional interests in fair personnel procedures and in continued employment.

Personnel actions that occur after drug testing implicate several legal issues. Under Title VII of the Civil Rights Act of 1964,⁹⁰⁵ employers may not take adverse personnel action after drug testing if a disparate impact on members of minority groups would result and the drug use is not job related. The Rehabilitation Act of 1973⁹⁰⁶ insulates employees who are addicted to drugs from discharge or demotion if they would be able to perform safely in their positions with reasonable accommodation of their handicaps. The protection provided to employees from adverse personnel action under Title VII and the Rehabilitation Act is limited in scope, however, because of the employer's legitimate interests in safety or security,⁹⁰⁷ which can override the employment and privacy interests of individual employees who use drugs.

Government employers must conform to the strictures of procedural due process of law when disciplining employees who have received positive drug results.⁹⁰⁸ The right to procedural due process of law provides constitutional protection for public employees in the disciplinary process that follows mandatory drug testing. The

904. Unionized employees who have included drug testing in a collective bargaining agreement with management have defined their rights and duties regarding treatment of employees who have tested positive for drug use. For a discussion of drug testing within the context of collective bargaining, see *supra* notes 356-535 and accompanying text.

905. 42 U.S.C. §§ 2000e to 2000e-17 (1982). For a discussion of the Civil Rights Act of 1964 in the context of mandatory drug testing, see *supra* notes 538-69 and accompanying text.

906. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C. (1982 and Supp. II 1984)). For a discussion of the Rehabilitation Act of 1973 in the context of mandatory drug testing, see *supra* notes 570-647 and accompanying text.

907. For a discussion of the fourth amendment in the context of mandatory drug testing, see *supra* notes 84-150 and accompanying text.

908. For a discussion of procedural due process in the context of mandatory drug testing, see *supra* notes 264-323 and accompanying text.

concepts embodied in procedural due process implicitly recognize both the legitimate need for drug testing under certain circumstances and the concomitant potential for abusive personnel practices. Although procedural due process does not bar adverse personnel actions based on drug testing, it does require that an employer follow minimum procedures when depriving government employees of their constitutionally protected interest in employment. For positions such as firefighters and police officers, an employer's safety or security concerns may override an individual's interests in employment, but even in these cases an employer does not enjoy complete discretion. Procedural due process provides some measure of protection to government employees in all positions.

The flexibility of procedural due process is illustrated by its application in drug-testing cases. Due process regulates the discretion that governmental employers may exercise in subsequent personnel actions; it does not bar such actions altogether, and it is not hostile to the interests of employers. Thus, due process will not prevent employers from meeting their common law duty to initiate adverse personnel action based on positive reports of drug use.⁹⁰⁹ Employers may take interim measures such as reassignment, prior to dismissal, to protect governmental interests in safety or security.

The procedural due process analysis that has been applied in cases involving employees disciplined for positive drug test results⁹¹⁰ may shape the law of procedural due process for governmental employees who are disciplined in the future, if courts apply such precedent to other issues in governmental employment. If so, courts should exercise caution in their application of procedural due process involving drug testing to other, less urgent, matters of personnel management.

Employees may seek protection under several state common law tort theories during the disciplinary process, such as the implied covenant of good faith and fair dealing,⁹¹¹ and intentional infliction of

909. Employers may have a common law duty to initiate personnel action against employees who have tested positive for drug use. For a discussion of this common law duty, see *supra* notes 824-79 and accompanying text.

910. See, e.g., *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986) (firefighters); *Capua v. Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (firefighters and police officers); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986) (school bus attendant), *rev'd and vacated in part*, 833 F.2d 335 (D.C. Cir. 1987); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (electric utility workers).

911. The implied covenant of good faith and fair dealing is a common law exception to the employment at will doctrine. For a discussion of the implied covenant of good faith and fair dealing in the context of mandatory drug testing, see *supra* notes 734-42 and accompanying text.

emotional distress.⁹¹² These actions are available to employees under certain circumstances as redress for injuries caused by the conduct of employers following drug testing. Based on these theories, juries have recently returned huge damage awards against employers to punish their conduct following mandatory drug testing.⁹¹³ In awarding damages, juries have sent a message that the people of the state disapprove of employers' methods of drug testing and disciplining employees, and that their actions fall short of acceptable behavior in the drug-testing context.

The implied covenant of good faith and fair dealing can be a tool with which courts can regulate the entire process of drug testing, beginning with the test itself and continuing through the administrative personnel process. This tort remedy, which is based on an exception to the widely recognized doctrine of employment at will, has been of limited utility because it is available in only a few states. As courts review offensive employer conduct in drug-testing cases, however, they may become motivated to create exceptions to the employment at will doctrine and increasingly recognize the implied covenant of good faith.

For private employees, the tort action of intentional infliction of emotional distress is analogous to the constitutional protection of procedural due process, because it can limit the discretion that employers may exercise following drug testing. As employees increasingly take their claims to court, juries will more clearly define the contours of a reasonable and rational response by an employer to their employees' positive drug tests.

Ironically, employers may have a common law duty to take some kind of restrictive action against employees testing positive for drug use. This duty is based on theories of negligent retention, negligence, duty to control, and duty to provide a safe workplace. The proliferation of employee assistance programs in the workforce, however, evidences a trend in employment relations toward rehabilitation of employees who use drugs instead of summary dismissal. EAP's may therefore provide a vehicle for employers to fulfill their common law duty to take action against employees using drugs, while at the same time preserving their workforce for continued or future productivity.

912. For a discussion of the intentional infliction of emotional distress tort action in the context of mandatory drug testing, see *supra* notes 799-810 and accompanying text.

913. An employee who refused to submit to a mandatory drug test was recently awarded \$485,000 in damages, including almost \$200,000 in punitive damages, after a jury found that the employer had breached the implied covenant of good faith and fair dealing and was liable for intentional infliction of emotional distress. *Luck v. Southern Pac. Transp. Co.*, 843,230 (Cal. Super. Ct. Nov. 6, 1987) (judgment on special verdict).

X. CONCLUSION

The magnitude of the drug problem has caused employers to initiate drug-testing programs to identify drug-impaired workers and deter illicit drug use in the public and private sectors. Yet drug-testing methods cannot determine levels of intoxication, and therefore cannot determine the degree of impairment of a worker. Drug-testing programs bring strong interests of employers and employees into conflict. Drug testing as a means of furthering employers' interests in a safe and productive work environment interferes with the employees' privacy interests. As such, the implementation of an employee drug-testing program may subject the employer to numerous legal claims based on constitutional and statutory protections, collective bargaining rights, and common law tort theories.

Employers cannot completely eliminate the use of illicit drugs by employees, although they may deter some employee drug use through well crafted drug-testing programs. Employers can maximize the reliability and accuracy of their drug-testing programs, and avoid the legal minefields in drug testing, by developing a well tailored drug-testing program that requires reasonable individualized suspicion. The employer should train supervisors to recognize the signs and symptoms of illicit drug use as part of this reasonable suspicion standard. The employer must assess his own workplace situation and reason through each scenario before implementing a drug-testing program. Conversely, the employer's interests of national security, public safety, and law enforcement may militate against the requirement of reasonable suspicion. In determining whether the reasonable suspicion standard is appropriate, courts should consider the nature of the position, and the sector of society in which the work is performed, as well as the privacy and employment interests of employees. A drug-testing program must therefore take into consideration the competing interests of both the employer and the employee in order to be effective and withstand judicial scrutiny.

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