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Deborah Stern United Mine Workers of America

James L. Weeks United Mine Workers of America

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SUBSTANCE TESTING vs. WORKERS' RIGHTS: LITIGATION AND COLLECTIVE BARGAINING STRATEGIES TO PROTECT THE PRIVATE-SECTOR EMPLOYEE

Deborah Stern* Dr. James L. Weeks**

I. INTRODUCTION

On December 23, 1987, WJLA-Washington, D.C., "News 7," aired a story in which it had arranged to have the longtime and well-respected consumer lobbyist Esther Peterson, who has celebrated her eighty-first birthday, submit to a urine test after eating a poppy seed bagel. The urine specimen was sent to a laboratory for analysis. The result showed that Esther Peterson had tested positive for cocaine use. When the pronouncement was made, the newscasters had a good laugh, Esther Peterson had a good laugh, and the viewing public had a good laugh. The report, however, was not at all funny. Rather, it illustrated the frightening consequences that drug testing can have on ordinary law-abiding citizens. The Esther Peterson story was not simply about laboratory misidentification or mishandling of specimens, an ever-present problem in drug testing cases, but about the underlying, fundamental inability of urinalysis to correctly distinguish between unlawful drugs and ordinary foods.

In the District of Columbia, female job applicants to the local police force were required to submit urine samples for drug screening as part of the application process. If a sample tested negative, that is, showed no trace of drug use, it was marked with a red "F", for female, and then secretly tested for pregnancy.¹

^{*} Member of the UMWA Legal Staff, Washington, D.C.; B.A. 1978, George Washington University; J.D. 1981, George Washington University National Law Center.

^{**} Deputy Administrator for Occupational Health, UMWA, Washington, D.C.; B.S. 1965, University of California at Berkley; Sc.D. 1981, Harvard University School of Public Health.

^{1.} Wash. Post, Nov. 5, 1987, at A-1, col. 1.

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Suggestions that employers not only engage in drug testing of employees, but genetic testing (using blood samples) as well, in order to screen out applicants and employees who are prone to heart disease, Huntington's and Alzheimer's diseases, and metabolic disorders, thereby reducing health insurance and other employment burdens, have also been heard.²

Outrageous? Incredible? A violation of our basic right to dignity and privacy? Absolutely. Yet, employer demands that employees provide them with their urine for screening are occurring on a daily basis and are on the increase. Corporate America has become fixated on the idea that urine samples hold the key to establishing a productive, efficient work force. The "enlightened management" programs of the 1970's appear to be giving way to a "Big Brother" mentality as big business becomes preoccupied with this latest and most dangerous fad — substance testing of workers. Drug screening is gaining popularity in spite of all of the evidence that drug screening cannot show when a drug was ingested or inhaled, cannot show present impairment, and often cannot distinguish between drugs which are unlawful or which may affect motor skill or mental alertness, and drugs (or foods!) which are lawful or do not create such hazards.

The threat that substance testing poses to the individual's reputation, character, standing in the community, wage-earning potential, privacy, dignity, and peace of mind is self-evident. Yet workers are having to battle their employers in the courtroom and at the bargaining table to protect these fundamental rights. Those employed by federal or state government have looked to the protection of the United States Constitution or their state constitutions to limit employer demands that they submit to drug and alcohol tests.³ Pri-

^{2.} Rowe, Russell-Einhorn, & Weinstein, New Issues in Testing the Work Force: Genetic Diseases, 38 LAB. L.J. 518 (1987).

^{3.} See, e.g., Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976); Treasury Employees v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986), vacated, 816 F.2d 170 (5th Cir. 1987); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986), cert. denied, 107 S. Ct. 577 (1987); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986): Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) rev'd, 833 F.2d 335 (D.C. Cir. 1987); Patchogue-Medford Congress v. Bd. of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986), aff'd, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987). https://researchrepository.wvu.edu/wvlr/vol90/iss3/8

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vate-sector employees generally are not able to assert federal constitutional guarantees, and in many cases state constitutional guarantees, against their employers.⁴ They are not, however, weaponless in resisting employer-mandated substance screening programs. Private-sector employees may resort to state tort actions for, among other things, defamation, invasion of privacy, intentional and/or negligent infliction of emotional distress, wrongful discharge, and negligence. Consistent with the principles of federal preemption under Section 301 of the Labor Management Relations Act,5 employees covered by collective bargaining agreements are generally confined to settling disputes with their employers through the contractually established grievance-arbitration procedure. However, if the unionized worker can show employer conduct which raises issues • that do not look to the collective bargaining agreement for resolution, or which are "outrageous" or "particularly abusive," or if the individual asserts rights which are protected by state law or public policy extended to all employees regardless of union affiliation, he or she might successfully avoid federal preemption and bring a state tort action against the company. Employees, both union and non-union, may seek protection from substance testing under the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, the Federal Vocational Rehabilitation Act, the Mine Safety and Health Act, the Occupational Health and Safety Act, and state workers compensation, civil rights and anti-discrimination laws, where the manner of employer substance testing violates the guarantees established by the particular statute.

Employees represented by a labor organization may find further protection in the collective bargaining process. The General Counsel of the National Labor Relations Board has recently confirmed that an employer has the duty to bargain over drug screening programs. The duty of the employer to negotiate, coupled with its duty to provide relevant information, can provide unions with powerful tools to curb company abuse of workers' rights in this area.

^{4.} Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Burdeau v. McDowell, 256 U.S. 465 (1921).
5. Labor Management Relations Act, § 301, 29 U.S.C. § 185 (1982) [hereinafter LMRA].
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The purpose of this article is, first, to familiarize the reader with the various types of substance tests currently available, and the strengths and weaknesses of each to better enter into dialogue over their use. Understanding how each of the testing methods work and their reliability (or lack thereof) is essential to protecting workers from false accusation. Next, the article discusses litigation strategies available to private-sector employees and/or unions which represent them. Considerable attention is given to state tort actions and the impact of federal preemption — the potential of tort actions to yield large damage awards make this area of litigation a particularly worthy deterrent against employer excess in substance testing. Finally, closing the article is a discussion of the duty to negotiate and provide information under the National Labor Relations Act and suggestions for bargaining over substance testing programs and employee assistance programs which treat substance abuse.

Substance testing and employee rights is a rapidly emerging area. The information provided herein will no doubt be augmented by new cases and collective bargaining tactics. It is hoped, however, that the discussion will highlight how fraught with complications drug testing programs are. Although drug and alcohol use in the workplace is reprehensible and intolerable, the evidence shows that where employers rely on testing to address the problem, particularly where there is no larger program providing for rehabilitation, the potential for damaging the lives of the men and women that comprise the workforce is great, while the potential for intelligently and effectively combating drug abuse is minimal.

II. CURRENT TECHNOLOGY FOR SUBSTANCE TESTING

A. Background on Techniques

Screening of workers for drug use was made technically and economically possible with the development of simple, rapid, inexpensive, and fairly reliable screening tests to measure the presence of drug metabolites in urine. Gas chromatographic methods were developed in 1973⁶ and immunologic methods, such as the currently

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^{6.} Agurell, Gustafsson, Holmstedt, Leander, Lindgren, Nilsson, Sandberg & Asberg, "Quantitation of delta-1-tetrahydrocannabinol in Plasma from Cannabis Smokers, 25 J. PHARMACY & PHARhttps://researchites.com/solide/com/solid

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popular screening tests, the enzyme multiplied immunoassay technique ("EMIT"), and the radio immunoassay ("RIA"), came soon after.⁷ EMIT and RIA are popular among employers testing employees for drug use because of their affordable cost, only five to ten dollars per test. When a screening test is positive, the more reliable gas chromatography combined with mass spectroscopy is often used for confirmation purposes, and may cost up to four hundred dollars per test. In order to understand the proper interpretation and use of these tests, it is necessary to describe them briefly.

The EMIT and RIA tests both employ the same chemical reaction to detect the presence of drug metabolites (the chemical byproducts which the body releases when it breaks down a drug) in urine.⁸ The urine sample is added to a solution containing antibodies to be tested for a broad spectrum of drug metabolites. If the drug metabolites, which stimulate the antibody, are present in the urine, they combine with the antibody, forming what is known as an insoluble antigenantibody complex and precipitate out of the urine sample. The principle difference between EMIT and RIA is the method of detection of this reaction.

With RIA, the antibody contains a radioactive isotope, frequently iodine, which emits a known amount of radiation and is easily detected. If there are drug metabolites in the urine, the radioactive isotope is taken out of solution with the antigen-antibody complex. Thus, the more drug metabolite in the original solution, the less radioactivity in the solution after the antibody has been added.

EMIT works somewhat differently and involves three basic steps. First, a common enzyme is added to the urine sample which binds to any drug metabolite. If there are no drug metabolites, it remains dissolved in the urine. Second, a drug antibody is added to the solution and forms the antigen-antibody complex which precipitates out of solution, taking the enzyme with it. Third, the solution is

7. J. CHAMBERLAIN, ANALYSIS OF DRUGS IN BIOLOGICAL FLUIDS 115-131 (1985). Bisseminated by The Research Repository @ WVU, 1988 867

then tested for enzyme activity, a relatively easy test to perform. The more drug metabolites in the urine sample, the less enzyme activity in the solution. If there are none, the enzyme will be active.

Although these tests sound different, they both employ the same biochemical mechanism — the formation of an antigen-antibody complex. And both tests are only as good as the reaction. A false positive will occur whenever the test indicates a positive reaction where in fact there is no drug metabolite in the urine sample. This can occur because drug antibodies often cross-react with molecules that are similar to the drug metabolites. Cross-reacting molecules can come from the person's diet or prescription and non-prescription medication (poppy seeds and codeine can give false positive for cocaine, for example). In order to take account of this problem, a properly conducted testing program should consider all possible sources of cross-reactivity, including medications the persons is using and the presence of certain food items in the diet. By necessity, this creates a situation where medical and other information that might otherwise be confidential to the employee will have to be disclosed to the employer or testing service.

Another way to control the problem of false positives is to conduct a second test on the same sample. In order for such a confirmation test to be valid, it must employ a different analytical technique. If a repeat of the same type of test were done, it merely duplicates the reaction that gave rise to the false positive. With EMIT and RIA, a confirmation test which depended on an antigen-antibody reaction would probably also give false positive and therefore, a false confirmation.⁹

The most common analytical procedure used to confirm immunologic tests is gas chromatography¹⁰ combined with mass spectroscopy,¹¹ commonly known as GC/MS. This is in fact two different analytic procedures combined to complement one another.

https://relearcRospossiterySurveredue/vM/Ir@ust200/isv2/8 note 10, at 158-59.

^{9.} Id. at 125.

^{10.} J. CHAMBERLAIN, *supra* note 7, at 83-94; J. ROBERTS, R. STEWART & M. CASERIO, ORGANIC CHEMISTRY 153-56 (1971).

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Chromatography is a method of identifying the ingredients in mixtures by separating the mixture into its constituent parts. A simple form of chromatography sometimes used to test urine samples for drug metabolites is thin layer chromatography ("TLC").¹² With this procedure, a small portion of an unknown mixture (*e.g.*, a urine sample) is placed on a thin layer of silica gel spread on a glass plate (hence the name, thin layer chromatography), and the edge of the plate is stood in a suitable organic solvent. As the solvent creeps up the plate, much the same way kerosene creeps into a lantern wick, it dissolves the unknown mixture and spreads it. Since some ingredients in the mixture are more soluble than others, they will creep up the plate at different rates. The resulting pattern enables a technician to identify whether certain chemicals (*e.g.*, drug metabolites) are present in the urine sample. This method uses relatively inexpensive materials, is simple and accurate, but is labor intensive.

Gas chromatography is similar. Instead of a thin layer on a plate and a solvent, it uses a suitable packing material in a tube (called a column) and a carrier gas.¹³ The unknown mixture is injected into the column, is heated to a carefully monitored temperature sufficient to evaporate the mixture into a gas (hence the name, gas chromatography), which is carried through the column by the carrier gas. The carrier gas passes through the column and carries the unknown mixture with it. Different ingredients are separated, depending on their relative solubility. The different ingredients come out of the column at different times, are detected by any of several detectors, and a graph (chromatogram) is produced on a strip-chart, with peaks and valleys. Each peak corresponds to a different ingredient, and its size is proportional to the amount in the mixture. This enables both qualitative and quantitative analysis. As in the above, since both TLC and GC employ the same chemical property, namely, the solubility of the drug metabolite, it would not be valid to use GC to confirm a positive test identification by TLC (or viceversa).

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^{12.} J. CHAMBERLAIN, supra note 7, at 78-82.

^{13.} *Id.* at 83-94; J. ROBERTS, R. STEWART & M. CASERIO, *supra* note 10, at 153-56. Disseminated by The Research Repository @ WVU, 1988

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Mass spectroscopy is an analytical procedure that separates ingredients in a mixture on the basis of the mass of each molecule in the mixture (hence the name, mass spectroscopy).¹⁴ An electron beam is used to bombard the urine sample, giving each molecule an electric charge. The resulting charged molecules are then accelerated by an opposite electrical charge into a curved tube and subjected to a magnetic field. As they are accelerated through the curved tube, the heavier particles separate from the lighter ones (by centrifugal force), and the final beam is directed into a collector. Since each molecule has a unique mass it makes a unique pattern in the collector, enabling highly specific analysis. The amount of each molecule present in an unknown solution is proportional to the electrical charge.¹⁵

Theoretically, either gas chromatography or mass spectroscopy could be used alone for both qualitative and quantitative analysis. GC is an efficient separator of ingredients in a mixture, while the MS is a good identifier; hence they complement each other.¹⁶ Thus, when immunologic tests are combined with chromatographic and mass spectroscopic techniques, compounds can be accurately and reliably identified, since it is very unlikely that any two compounds would bind to the same antibody, have the same solubility and the same mass. It should be noted, however, that no matter what the technology of the particular test may be, it cannot assure against human error, such as mislabeling or mishandling the specimen.

B. Reliability

Are these tests reliable? In order to answer this question, it is important first to clarify the meaning of certain technical terms used both by analytical chemists and public health practitioners who use screening tests. It is common to evaluate tests in terms of their precision, accuracy, sensitivity, specificity, limit of detection and cutoff point. When laboratories are subjected to proficiency testing, each of these parameters is measured. Some of these terms, and

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^{14.} J. ROBERTS, R. STEWART & M. CASERIO, supra note 10, at 158-59.

^{15.} J. ROBERTS, R. STEWART & M. CASERIO, supra note 10, at 158.

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other, are also used by public health practitioners in order to evaluate screening tests in practice, but they have somewhat different meanings, which could be the source of some confusion. Therefore, we consider it important to clarify the meaning of these terms.

Precision is a measure of the agreement of the results between replicate measurements.¹⁷ Accuracy, on the other hand, is a measure of the agreement between the best estimate from an analytical procedure and a known value.¹⁸ For example, if on a target range shots are aimed at a "bull's eye," the shots are precise as to the location they hit but are inaccurate because they missed the intended target. The mean value of an accurate test would be very close to the actual value.

To the analytical chemist, sensitivity is the ability of an analytical procedure to distinguish between different concentrations of a chemical being analyzed.¹⁹ It is often used interchangeably with the limit of detection, but there is a subtle difference. The limit of detection is a measure of the lowest concentration the procedure can detect.²⁰ The cutoff point, on the other hand, is the value selected above which a test is considered positive and below which it is considered negative.²¹ In theory, the lowest feasible cutoff point is the limit of detection. The closer one gets to the limit of detection, the greater is the risk of false positives. Therefore, the cutoff point is selected at a higher concentration than the limit of detection. The selection of a cutoff point is often driven more by practical considerations²² than anything to do with a person's physical or mental condition.

In analyzing a screening test, as opposed to the laboratory procedure, sensitivity is defined as the ability of the screening test to detect true positives, e.g., those persons who in fact have drug metabolites in their urine.²³ It would be affected not only by the analytical sensitivity, but also by all other sources of error as well —

23. A. Morrison, Screening in Chronic Disease 10 (1985).

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^{17.} Id. at 161-75.

^{18.} Id.

^{19.} Id.

^{20.} Id.

^{21.} Id.

^{22.} E.g., the need to limit the number of false positives.

external contamination, clerical error, improper calibration, etc. The most sensitive test would detect 100% of all of the true positives.

Specificity to the analytical chemist is the ability of a method to determine the compound it claims to measure and nothing else. The specificity of a screening test, on the other hand, is the ability of the test to detect true negatives, *e.g.*, those persons who in fact do not have drug metabolites in their urine.²⁴ Like sensitivity, specificity is not only affected by analytical specificity but by other sources of error as well. The most specific test would never indicate a false positive.

While it is common to describe screening tests in terms of their sensitivity and specificity, a better measurement of test reliability is the "predictive value positive" ("PV+").²⁵ This measurement has no analog in the laboratory procedure. The PV+ is the proportion of all positive tests that are in fact true positives. The higher the PV+, up to 100%, the better the test. In practice, a test will only show those persons who test positive — it will not show those who test false positive. Confirmation testing may produce some surprising results. The PV+ depends not only on the specific characteristics of the test, but also on the prevalence (*e.g.*, the proportion) of drug metabolites in the population being tested. Even when using tests with high sensitivity and specificity, if the prevalence of drug metabolites in urine is low, the test's ability to detect "true positives" will also be low.²⁶

An illustration should help explain this point.²⁷ Suppose the sensitivity and specificity of a substance test are both 99%. If 2% of a particular workforce uses drugs (these are reasonable estimates), the predictive value positive is 67% (that is, a third of the positive tests will be false positives). This occurs because even with a high specificity (99%), if the vast majority of a population do *not* have drug metabolites in their urine (in this case, 98%), even a small

27. See also id. https://researchrepository.wvu.edu/wvlr/vol90/iss3/8

^{24.} Id.; Rothstein, Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law, 63 CHI.[-]KENT L. REV. 683, 695-99 (1987).

^{25.} A. MORRISON, supra note 23, at 19.

^{26.} Rothstein, supra note 24.

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error in identifying true negatives could produce a large number of false positives.²⁸

When drug screening tests are used in drug rehabilitation programs, the prevalence of drug metabolites is much higher. Using the same illustrative values of sensitivity and specificity as above, if the prevalence of drug metabolites is 25%, the PV + is 97%, or 3%false positives. When screening tests are applied outside of a health care setting on populations where the prevalence of drug use is low, not only do we have the potential for more than ten-fold increase in error (from 3% to 33%), the consequences of error are grave because the tested person's job is at stake. Therefore, the use of a single unconfirmed screening test as the basis for any personnel action should be summarily rejected.

This is not to say, however, that a confirmed test is therefore valid. Confirmation tests control only one source of error — those that occur in the analytical procedure. Other errors can and should be controlled either with frequent checks of the laboratory instrument combined with regular proficiency testing and fastidious adherence to proper administrative procedure. Fastidious attention to administrative procedure (such as carefully monitored storage, documented chain of custody, and protecting samples from contamination) is not merely a technicality; it is important as a means of preventing error. These problems are sufficiently important that a recent text on drug testing devoted an entire chapter to quality control and good laboratory practice.²⁹

This is not a mere matter of principle. Empirical evaluation of laboratory performance is clear cause for concern. One evaluation conducted by the Centers for Disease Control of the U.S. Public Health Service sent "blind" samples with known concentration of drug metabolites to thirteen laboratories that regularly service methadone maintenance facilities and that therefore, routinely test urine samples for drug use. Depending on the drug (marijuana was not

29. J. CHAMBERLAIN, supra note 7, at ch. 8.

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^{28.} Wells, Halperin & Thun, The Predictive Value of Screening for Illicit Drugs in the Workplace, 78 AM. J. PUB. HEALTH _____(1988).

included), this investigation found very high error rates, particularly for false negatives but also for false positives.³⁰

A similar published investigation conducted by the American Association for Clinical Chemistry, a professional association representing many laboratories in the U.S., reported different results. Out of 1,832 samples containing known amounts of drug metabolites that were sent to 47 laboratories, only one false positive was reported and 14 false negatives. Marijuana, cocaine and four other drugs were included in the samples. This was not a "blind" investigation, however, since samples were shipped in special glass bottles rather than in the usual plastic containers, and therefore, were known to the laboratory staff to be part of a proficiency testing effort. Moreover, the labs that participated in the study were selected to include those that already participated in the AACC's quality control program and that had the technical capability to perform both screening and confirmatory testing. Thus, some of the more error-prone laboratories could have been selected out. This study was specifically designed to counter negative publicity concerning routine drug testing of workers and illustrates that in order to obtain reliable results. samples should only be sent to labs that regularly participate in outside quality control programs and that have the capability of performing their own confirmatory testing.³¹

A more focused evaluation concerned field testing of EMIT and RIA testing of marijuana metabolites confirmed with GC/MS. This investigation, conducted by the U.S. Army, found a false positive rate of 4% and a false negative rate of 10%. This corresponds to a sensitivity of 90% and a specificity of 96%.³² These rates are somewhat higher than those reported by the test manufacturers and represent actual field conditions rather than those obtainable from an ideal laboratory. The consequences for PV + are significant. With sensitivity of 90% and specificity of 96%, if the population prev-

^{30.} Hansen, Caudill, & Boone, Crisis in Drug Testing: Results of a CDC Blind Study, 253 J. A.M.A. 2382 (1985).

^{31.} Frings, White, & Battaglia, Status of Drugs-of-Abuse Testing in Urine: An AACC Study, 33 CLINICAL CHEMISTRY 1683 (1987).

^{32.} Abercrombie & Jewell, Evaluation of EMIT and RIA High Volume Test Procedures for THC Metabolites in Urine Utilizing GC/MS Confirmation, 10 J. ANALYTICAL TOXICOLOGY 178 (1986). https://researchrepository.wvu.edu/wvlr/vol90/iss3/8

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alence is 2%, the PV + is 31%, *i.e.*, 69% of positive tests are false positives.

C. Value

Even if a test for drug metabolites is valid, however, does a positive test really provide valuable information? In order to answer this question, it is important to discuss briefly what happens to drugs (or any substance) in the body so that we will know what is being tested and what it means. Whenever a drug enters the body, it provokes a series of chemical reactions and in turn is acted on by the body's own chemistry. The most common reactions (called metabolism) occur when food is digested and transformed into the ultimately useful chemicals that are needed to sustain life.

Drugs that alter the state of mind are classified as psychoactive drugs. Alcohol, cocaine, marijuana, amphetamines, and others are all psychoactive drugs and while that drug is present in the person's body, the person's state of mind is altered. This could affect his or her response time, attentiveness, mood, consciousness, and so on.

When drugs are acted on by the body's own chemistry, the drug is broken down into metabolites that are eliminated in the feces, urine, or exhaled breath. Drug metabolites may, or may not, themselves be psychoactive substances. The metabolic rate varies from individual to individual and from drug to drug. Depending on the metabolic rate and other factors, a drug metabolite may be present even when the original psychoactive drug has been rendered completely inactive. An important point concerning drug tests is that they are unable to detect exclusively the presence of the psychoactive drug; non-psychoactive metabolites are detected also. Therefore, they do not and cannot give *any* unambiguous indication of whether the person was under the influence of the tested drug at the time the urine sample was given. They do not measure impairment; they only indicate use.

Considering the importance of this point, we will discuss it in some detail as it relates to the two most commonly tested drugs, marijuana and cocaine. The psychoactive chemical in marijuana is known as delta-9-tetrahydrocannabinol (delta-9-THC). It is metab-Disseminated by The Research Repository @ WVU, 1988 13

olized first into 11-OH-delta-9-THC (which is also psychoactive) then into 11-nor-delta-9-THC and 9-carboxy-THC. The first two compounds are metabolized within an hour. The last two metabolites reach measurable concentrations in blood serum within an hour after smoking and may be detected up to four weeks later in the urine of chronic users. Approximately two-thirds are eliminated in the feces; the remainder, in the urine. Neither 11-nor-delta-9-THC, nor 9-carboxy-THC are psychoactive. EMIT and RIA detect the presence of all these compounds, yet the latter two are much more likely to be found, unless a urine sample is taken within an hour after the person consumes marijuana.³³

A similar situation holds with cocaine. Cocaine itself is the psychoactive substance. It is metabolized almost completely from three to six hours after consumption. Some of its psychoactive effects could be caused by its metabolites. One of its major metabolites is benzoylecgonine which can be found in blood serum up to 24 hours following consumption. Benzoylecgonine is not psychoactive; EMIT and RIA both detect this metabolite.³⁴

III. DRUGS, ALCOHOL, AND OCCUPATIONAL INJURIES

An important motivation in promoting drug testing is the assumption that drug use is a contributing factor to occupational injuries. The logic is clear enough: The use of alcohol — a mindaltering substance — is known to be a contributing factor to injuries and fatalities. Therefore, use of drugs — also mind-altering substances — must, by analogy, contribute to occupational injuries. Such reasoning by analogy arises because of the absence of *any* empirical investigations concerning drug use and occupational injuries. The logic continues: If we can find the drug users (with drug

27 J. PHARMACY & PHARMACOLOGY 784 (1985). https://researchrepository.wvu.edu/wvir/vol90/iss3/8

^{33.} See Schwartz & Hawks, Laboratory Detection of Marijuana Use, 254 J. A.M.A. 788 (1985); Urine Testing for Detection of Marijuana: An Advisory, 32 MORBIDITY & MORTALITY WEEKLY REP. 469 (1983).

^{34.} See Jatlow, Van Dyke, Barash & Byck, Measurement of Benzoylecgonine and Cocaine in Urine: Separation of Various Cocaine Metabolites Using Reversed-Phase High Performance Liquid Chromatography, 152 J. CHROMATOGRAPHY 115 (1978); Misra, Nayak, Block, & Mule, Estimation and Disposition of [3H] Benzoylecgonine and Pharmacological Activity of Some Cocaine Metabolites, 27 J. PHARMACY & PHARMACOLOGY 784 (1985). Los responses

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testing), we can reduce the risk of injuries on the job. While the logic appears sound, it is seriously flawed and is not supported by empirical findings. We will examine both the logic and data.

To begin, we should summarize the evidence concerning alcohol consumption and injuries and distinguish between acute alcohol intoxication and chronic alcohol abuse. Acute alcohol intoxication is well known to be strongly associated with many different causes of fatalities such as automobile crashes, burns, drownings, falls, and poisonings.³⁵ Chronic alcohol abuse is also associated with risk of fatal injuries though it is unclear whether this is because chronic alcohol abuse itself is a contributing factor to injuries.

One logical inference to draw from these facts is that if acute and chronic alcohol intoxication are known contributing factors to a wide spectrum of injuries, that wide spectrum should include occupational injuries. Is this in fact the case? There are few investigations of this question. Three studies of occupational fatalities in which victims were examined at autopsy for alcohol intoxication (a blood alcohol concentration ["BAC"] greater than 0.10%) revealed that from 2% to 5% of occupational fatalities not involving moving vehicles were associated with BAC greater than 0.10%.³⁶ From 6% to 14% of fatalities in which a moving vehicle was involved had BAC greater than 0.10%,³⁷ In contrast, in 40% of all motor vehicle fatalities, victims have BAC greater than 0.10%.³⁸

^{35.} See Brenner, Alcoholism and Fatal Accidents, 23 Q. J. STUD. ON ALCOHOL 517 (1967); Dietz & Baker, Drowning: Epidemiology and Prevention, 64 AM. J. PUB. HEALTH 303 (1974); J. FELL & T. KLEIN, THE NATURE OF THE REDUCTION IN ALCOHOL IN U.S. FATAL CRASHES (Society of Automotive Engineers Technical Paper Series No. 860038, 1986); P. HABERMAN & M. BADEN, ALCOHOL, OTHER DRUGS AND VIOLENT DEATH (1978), Sikes, Alcohol and Fatal Injuries—Fulton County, Georgia, 1982, 32 MORBIDITY & MORTALITY WEEKLY REP. 573 (1983); Tashiro & Pipscomb, Mortality Experience of Alcoholics, 24 Q. J. STUD. ON ALCOHOL 203 (1963); Waller, Nonhighway Injury Fatalities-I. The Roles of Alcohol and Problem Drinking, Drugs, and Medical Impairment, 25 J. CHRONIC DISEASES 33 (1972).

^{36.} See Parkinson, Gauss, Peper & Elliott, Traumatic Workplace Deaths in Allegheny County, Pennsylvania, 1983 and 1984, 28 J. OCCUP. MED. 100 (1986); Copeland, Fatal Occupational Accidents-The Five-Year Metro Dade County Experience, 1979-1983, 30 J. FORENSIC SCI. 494 (1985); Baker, Samkoff, Fisher & Van Buren, Fatal Occupational Injuries, 248 J. A.M.A. 692 (1982). 37. Id.

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There has been some attempt to document the contribution of alcohol or drug use in the mining industry (coal and metal/nonmetal), but with little success. The Federal Mine Safety and Health Administration fatality reports from 1979 to 1985 were examined to find instances where alcohol or drugs were apparent contributing factors. Out of 1,272 fatalities³⁹ in this period, nine (0.7%) were associated with alcohol or drug use confirmed at autopsy.⁴⁰ Consistent with findings reported above, the majority occurred with moving vehicles. Only one person was tested for drug use, with a negative result, and there was circumstantial evidence of drug use in one other. Acute alcohol intoxication was documented in seven of the nine victims.⁴¹ Therefore, one logical connection — that acute alcohol intoxication is a significant contributing factor to occupational fatalities — is not supported by empirical research.

The author could find only three investigations of the association of either acute or chronic alcohol abuse and non-fatal occupational injuries in the published scientific literature. One of them⁴² found that chronic alcoholics had about twice the risk of occupational injury compared to others. Another⁴³ found the same magnitude of risk for persons who consumed, on the average, about five drinks per day and no association with chronic abuse. A third study⁴⁴ reviewed consecutive traumatic injury admissions to a hospital emergency room and examined them for BAC. Of the 1,045 injuries that occurred at work, 12.5% had measurable (*i.e.*, some evidence of) BAC compared to 56% among traffic accident injuries and 11.2%

^{39.} Data on the number of fatalities in the mining industry (coal and metal/non-metal mines) were obtained from the MINE SAFETY & HEALTH ADMINISTRATION, MINE INJURIES AND WORKTIME QUARTERLY REPORT (closeout ed. 1979-85).

^{40.} Id. Individual fatality reports, prepared by the Mine Safety and Health Administration, were obtained for fatalities in which there were evidence of drugs or alcohol abuse. A total of nine such reports were obtained for the period 1979 through 1985.

^{41.} Id., see also Criteria for Evaluating Drug Testing of Miners, Presentation of Dr. James Weeks, 18th Annual Inst. on Coal Mine Health, Safety & Research, Va. Poly. & St. U. (Aug. 25, 1987) (proceedings in press).

^{42.} Observer & Maxwell, A Study of Absenteeism, Accidents, and Sickness Payments in Problem Drinkers in One Industry, 20 Q. J. STUD. ON ALCOHOL 302 (1959).

^{43.} Hingson, Lederman & Walsh, Employee Drinking Patterns and Accidental Injury: A Study of Four New England States, 46 Q. J. STUD. ON ALCOHOL 298 (1985).

^{44.} Wechsler, Kasey, Thum & Demone, Alcohol Level and Home Accidents, 84 PUB. HEALTH https://1042aftempository.wvu.edu/wvlr/vol90/iss3/8

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among a control group of persons admitted elsewhere in the hospital.

Thus there is a small positive association between acute alcohol intoxication use and non-fatal occupational injuries. The one investigation that considered the effects of chronic alcohol abuse and injuries found a two-fold increase in risk. Therefore the logical connection — that alcohol is a contributing factor to occupational injuries — is weakly supported. If one is to reason by analogy, then the premise that drugs contribute to occupational injuries must have an equally weak foundation.

The assumption that finding drug users with drug testing will reduce occupational injuries is also flawed. Because of the nature of drug tests, *i.e.*, their ability to detect only prior use rather than impairment, they cannot distinguish between casual use, chronic abuse, or acute intoxication. The choice of terms is important: they only measure *use* of drugs, they do not measure *abuse*. According to surveys published by the National Institute on Drug Abuse, so-called recreational users outnumber chronic users by 5:1.⁴⁵

To summarize, drug testing involves highly technical, but not necessarily highly reliable, procedures. An employer that utilizes drug screening of employees, given the risk of wrongly accusing innocent employees, and the probability of false positives or negatives, cannot be assured that it will accurately reveal those employees who use drugs. Additionally, the evidence that drug use causes injuries or safety hazards simply is not there. An employer who insists on getting into the murky subject of substance screening cannot be certain that it will gain much in productivity or safety. It can assume, however, that it will cause its employees to undergo test procedures which yield only questionable information.

IV. POTENTIAL EMPLOYER LIABILITY FOR SUBSTANCE TESTING OF Employees

An employer who institutes a substance testing program is not merely concerned with a productive, safe workplace. That goal can be achieved by exercising managerial authority to discharge or dis-

cipline employees who do not meet the company's productivity requirements or who perform in an unsafe manner. Rather, by instituting a substance testing program, the employer takes it upon itself to determine the underlying reason for the worker's lack of productivity or safe work habits. In the case of random or massive substance testing, the employer seeks information concerning employee substance use for its own sake, without necessarily having reason to test. Most significantly, the reliability of current testing methods is far from assured, due both to technical problems with the tests and human error. Thus, there is the ever-present possibility that screening will fail to detect those persons who are unlawful substance users and falsely accuse innocent persons who do not unlawfully use drugs.

The assault which substance testing mounts against the privacy and dignity of the adult men and women who make up the workforce creates fertile ground for litigation. Tort actions may arise where inaccurate testing results lead to character assassination, defamation, invasion of privacy, emotional distress, and wrongful discharge. Even if a screening program manages to respect the fundamental human rights of the workers, it must also be carried out in a manner which does not violate the multitude of federal and state laws which protect workers from employment discrimination because of race, sex, ethnic origin, religion, gender, handicap, or union affiliation. It cannot violate the Federal Mine Safety and Health Act or Occupational Safety and Health Act. And discharge for drug or alcohol use may result in eligibility for workers' compensation benefits if the employee developed the dependency as a result of employment-related injury or stress. When an employer subjects its employees to mandatory substance testing, it opens itself up to potential liability in these various areas of law.

A. State Tort Liability

Due to the invasive nature of substance testing, and the often underlying accusation that the employee being tested is a substance abuser, employer drug and alcohol screening programs will most assuredly give rise to private state tort actions. The tort actions most https://www.byedemaployces/iagainst their employers are for 18

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wrongful discharge, invasion of privacy, defamation, and/or intentional/negligent infliction of emotional distress. As illustrated below, successful tort actions have vielded considerable damage awards rendered by sympathetic juries.

When an employee is discharged for alleged substance abuse, he or she may be faced not only with disclosure of the accusation to fellow co-workers or management personnel, but disclosure to prospective employers as the individual searches for a new job. If the charge is untrue, is communicated to someone other than the discharged employee, and tends to harm his reputation or lower his standing in the estimation of the community, the individual may have grounds for bringing a defamation action in state court.⁴⁶ Even if the employer communicates the defamatory statement to the employee only, if the employee, in seeking out new employment, is compelled to communicate the defamatory statement to the prospective employer, the discharging employer may be held liable for defamation.47

In a relatively early case to emerge in the drug testing controversy, Houston Belt & Terminal Ry. v. Wherry,48 an employee discharged after testing "positive" for drugs successfully sued his employer for defamation in Texas state court. Upon sustaining an injury on the job. Wherry underwent a drug test ordered by the company. The analysis showed traces of methadone use in an amount insufficient to evidence drug abuse. The company physician reported to management the drug testing result, and the superintendent who received the report subsequently circulated a memorandum among several company officials advising that Wherry had tested positive for methadone use, and that methadone was a synthetic drug com-

48. Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743 (Tex. Ct. App. 1976), appeal dismissed, 434 U.S. 962 (1977). Disseminated by The Research Repository @ WVU, 1988 I

^{46.} Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876 (Minn. 1986). West Virginia courts have recognized a private cause of action for defamation where the injurious false statement is negligently published to a third party and is not privileged. Crump v. Beckley Newspaper, Inc., 320 S.E.2d 70 (W. Va. 1984).

^{47.} Lewis, 389 N.W.2d 876; McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980); Grist v. Upjohn Co., 16 Mich. App. 452, 168 N.W.2d 389 (1969); First State Bank v. Ake, 606 S.W.2d 696 (Tex. Ct. App. 1980); Colonial Stores v. Barrett, 38 S.E.2d 306 (Ga. Ct. App. 1946).

monly used to assist withdrawal from heroin addiction.⁴⁹ A second urinalysis was run which indicated that Wherry showed the presence of a compound in his system resembling methadone, but that the compound was not in itself methadone or any other illicit drug. Although Wherry was officially discharged for being an unsafe employee, the company informed the Veteran's Administration, from whom Wherry had sought assistance in challenging the dismissal, that Wherry had been fired for violating its rule against the use of intoxicants and narcotics. Based on the report circulated to company officials and the accusation of drug use made to the Veteran's Administration, Wherry brought a state tort action for *inter alia* defamation against Houston Belt and individual management personnel.

The jury returned a verdict in favor of Wherry against both the company and particular company officials. On appeal, the Texas Civil Court of Appeals vacated the judgment against the individual defendants, but sustained the judgment rendered against Houston Belt. The appellate court held that the jury properly found that the report published to various company officials, and the statements made to the Veteran's Administration implied, falsely, that Wherry was a heroin or methadone user. Like the West Virginia courts.⁵⁰ the Texas Civil Court of Appeals required the plaintiff to show that the defendant had published the defamatory statements negligently and that actual injury resulted.⁵¹ Finding that both elements had been satisfied, the appellate court sustained the jury's award of \$150,000 to Wherry based on the injury to his character or reputation, the mental anguish he suffered, and the financial injury to his occupation because of the company's false accusation of narcotics use.52

More recently, the United States Court of Appeals for the First Circuit upheld a jury award of \$448,200 in damages to an employee discharged by his employer for illicit use of drugs. In O'Brien v. Papa Gino's,⁵³ employee O'Brien was required to submit to a pol-

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^{49.} Id. at 746.

^{50.} See Crump, 320 S.E.2d 70.

^{51.} Wherry, 548 S.W.2d at 752.

^{52.} Id. at 753.

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ygraph test upon being confronted by his supervisor with the rumor that he used illegal drugs. After the polygraph test indicated that his denial of using drugs was untrue, O'Brien was discharged. O'Brien filed a complaint against Papa Gino's in state court⁵⁴ alleging, *inter alia*, that the company had defamed him by stating that his discharge was due to unlawful drug use, and had invaded his privacy by forcing him to submit to a polygraph test.⁵⁵ O'Brien based the allegations on evidence that his discharge was motivated not *only* by the results of the polygraph test, but by a grudge held against him for failing to promote the son of his supervisor, and that the polygraph test required him to respond to questions unrelated to his employment and private in nature.

The First Circuit upheld the jury's finding that the company, by concealing that one reason for O'Brien's discharge was his failure to promote the supervisor's son, defamed him by failing to state the entire truth in dismissing him.⁵⁶ The court rejected the employer's defense that the statement given for O'Brien's discharge, even if only partially true, was conditionally privileged because it was made in the context of their employment relationship. Rather, the court found that Papa Gino acted with malice because it was aware that the stated reason of drug use as the cause for discharge was not entirely true, thereby forfeiting any privilege it could otherwise claim.⁵⁷

As the O'Brien and Wheery cases illustrate, an employer who confuses a positive drug test with sure and certain evidence of employee drug use risks liability for defamation. Although the employment relationship may confer a qualified privilege upon the employer to make statements about the employee related to job performance and other employment matters, the qualified privilege may be lost if the employer's accusation of drug abuse is made with

^{54.} The complaint was filed in Hillsborough County Superior Court of the State of New Hampshire, and was subsequently removed by the defendant to federal court.

^{55.} O'Brien, 780 F.2d at 1071.

^{56.} Id. at 1073.

^{57.} Id. at 1074.

malice or ill will, or with the knowledge that the statement does not reflect the entire truth.⁵⁸

Drug screening, by its very nature, gives the employer access to information about not only the illegal drugs an employee might be taking, but lawful prescription or over-the-counter medications which may not affect job performance. Thus, not only does substance testing invade the individual's privacy as to matters which might be arguably relevant to his employment, such as the use of narcotics which impair motor skills, but also reveals information that may have no relation to employment issues, such as the use of prescribed medication for blood pressure, heart disease, or depression.

This intrusiveness invites tort litigation for invasion of privacy. In O'Brien v. Papa Gino's,⁵⁹ the jury returned a damage award against the employer for almost a half a million dollars due, in part, to its finding that the polygraph examination administered to test O'Brien for drug use was highly offensive to a reasonable person and invasive of O'Brien's privacy.⁶⁰ A legally protected interest in privacy has long been recognized in West Virginia, which, if unlawfully invaded, may result in an award of damages.⁶¹ In the case of *Roach v. Harper*,⁶² the Supreme Court of Appeals of West Virginia recognized that:

'the right of privacy' has been defined as the right of an individual to be let alone, to live a life of seclusion, or to be free from unwarranted publicity . . . The right of privacy is closely related to many other subjects of law, e.g., libel and slander, literary property, wrongful search and seizure, compulsory physical examination and eavesdropping . . . Though different in some respects from such subjects, the right of privacy is an individual right that should be held inviolate.

61. See Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959). https://re&aR999005H8798WJG3eWJ/Wa/18690100/1833/89 564 (1958).

^{58.} See also Lewis, 389 N.W.2d 876, in which the Minnesota Supreme Court held that where an employer's defamatory statements against a discharged employee were motivated by ill will, the qualified privilege had been abused and was therefore lost as a defense.

^{59.} O'Brien, 780 F.2d 1067.

^{60.} Id. at 1072. On appeal, the First Circuit rejected the employer's contention that by accepting employment under the terms of the company's Personnel Manual, which forbade drug use, O'Brien had "contracted away" his right to privacy and had impliedly acquiesced to investigation of drug use. The court noted that even if implied consent could be found, the jury may have determined that by utilizing a polygraph examination to screen for drug use, the company exceeded the scope of any permission O'Brien had given.

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To hold otherwise, under modern means of communication, hearing devices, photography, and other technological advancements, would effectively deny valuable rights of freedoms to the individual.⁶³

The West Virginia legislature has been sufficiently concerned with protecting the privacy of employees to enact a statute prohibiting the use of employer-administered polygraph tests.⁶⁴ Consistent with the principle that employees, whether union or "at-will, possess a right of privacy vis-a-vis their employer," the West Virginia Supreme Court has rejected the notion that an employer may investigate or police the moral conduct of its employees, unless the conduct in question directly affects the job responsibilities of the employee.⁶⁵ In *Golden v. Board of Educ. of the County of Harrison*,⁶⁶ the Court held that the discharge of a high school guidance counselor for "immorality" improperly intruded upon the teacher's right of privacy, absent a showing that the alleged "immoral conduct" affected the counselor's fitness to perform her job, or had become the "subject of such notoriety" as to significantly impair her ability to discharge her professional responsibilities.⁶⁷

In accord is the Texas Court of Appeals which in *K-Mart Corp.* Store No. 7741 v. Trotti,⁶⁸ recognized the right of private-sector employees to be free, for reasons of privacy, from employer search of personal possessions.⁶⁹

65. Cordle, 325 S.E.2d 111.

66. Golden v. Board of Educ., 169 W. Va. 63, 285 S.E.2d 665 (1981).

67. Id. at 69, 285 S.E.2d at 669.

69. Id. at 636-36. The appellate court reversed the lower court and remanded on the grounds, inter alia, that the trial court had failed to include, in its definition of invasion of privacy to the jury, the instruction that the intentional intrusion upon the plaintiff's solitude or seclusion must have Disserting the by office the second of the second

^{63.} Id. at 876, 105 S.E.2d at 569.

^{64.} W. VA. CODE § 21-5-5(d) (1984). An employer may not require or request, either directly or indirectly, that an employee or job applicant submit to a polygraph, lie detector, or similar examination to measure physiological reactions to evaluate truthfulness. The statute makes it unlawful for an employer knowingly to allow the results of a polygraph or related test administered outside of West Virginia to determine whether to hire a job applicant or continue employing an individual. The polygraph statute embodies the state's understanding that economic necessity (that is, the need to obtain and retain employment) may compel an employee to relinquish his right to privacy and submit to the offending examination. Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984). The statute makes exception for employees who manufacture, distribute or dispense drugs, or who are employed by the law enforcement agencies or military forces of West Virginia.

^{68.} K-Mart Corp. v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984), review denied, 686 S.W.2d 593 (Tex. 1985).

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By analogy, substance testing is no less invasive than a polygraph test, a locker search, or an employer's investigation into the morals of its employees. It seeks information which an individual may prefer to remain confidential. Further, because an employer already has the authority to dismiss or discipline an employee who fails to perform adequately or safely, its insistence on determining the reasons for the employee's performance problems raises particularly sensitive privacy problems.

An employer's accusation of substance abuse, the demand that he or she provide a urine sample, and the potential dissemination of such personal information to co-workers or supervisors, may place the employee under such emotional stress, and subject the individual to such harassment and humiliation, as to give rise to an action for intentional or negligent infliction of emotional distress.⁷⁰ Numerous courts have accepted the principle that an employer may be liable, under the theory of tortious infliction of emotional distress, for conduct toward an employee that is outrageous or sufficiently abusive to cause the individual to suffer mental anguish.⁷¹ The related tort of outrage is established where the plaintiff suffers emotional distress from the defendant's outrageous conduct.⁷²

The Supreme Court of Alabama, in *Rice v. United States Ins.* $Co.,^{73}$ held that an employee who alleged a pattern of employer harassment to pressure her to take disability leave, which resulted in her suffering a miscarriage, stated a cause of action for intentional infliction of emotional distress. In *Moniodis v. Cook*,⁷⁴ the Maryland

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^{70.} See, e.g., Paradis v. United Technologies, 672 F. Supp. 67 (D. Conn. 1987) (state court is appropriate forum in which employee may bring action for emotional distress based on employer's harassment of him and retaliation against him for his refusal to divulge names of co-workers using drugs after he had completed employee assistance program.)

^{71.} Four elements establish the tort of intentional infliction of emotional distress: (1) The defendant intentionally or recklessly inflicted severe emotional distress or was certain or was substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed "all possible bounds of decency" and must be regarded as atrocious, and utterly intolerable in a civilized community; (3) the actions of the defendants caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable man could be expected to endure it. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

^{72.} Id.

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state court upheld a jury award of compensatory and punitive damages, in the amount of \$1,300,000, to an employee who brought a suit against her employer for, inter alia, intentional infliction of emotional distress resulting from the company's demand that she submit to a polygraph examination, in violation of state statute, or face transfer and diminished work hours. The court found that evidence that the employee subsequently, and consequently, suffered from extreme nervousness after the polygraph incident (notwithstanding her pre-existing nervous condition), took increased doses of medication, and found daily tasks difficult to perform, supported a jury conclusion that the company's conduct "went far beyond the realm of 'petty oppressions' and amounted to a complete denial of [the individual's] dignity as a person" sufficient to cause her severe distress.75 Other courts have also recognized state actions brought by employees alleging emotional distress inflicted by an employer, e.g., where a company nurse brought suit after her manager yelled and screamed at her in the presence of other employees and accused her of thievery in the course of the discharge;⁷⁶ where an employee alleged that her employer, knowing of her weakened condition due to surgery and pending divorce proceedings, publicly and falsely accused her of dishonesty and theft, thereby aggravating her existing condition and causing her to suffer mental anguish, grief, humiliation and worry;^{π} where a discharged attorney alleged that his law office summarily dismissed him, ejected him from his office, and denied him access to his personal files and belongings;78 where company security guards interrogated an employee in a small, windowless room for over three hours based on scant evidence that the individual had stolen merchandise;⁷⁹ and where an employee alleged that the company harassed and humiliated him before others in retaliation for his refusal to falsify work reports.⁸⁰

- 76. Meierer v. DuPont, 607 F. Supp. 1170 (D.S.C. 1985), rev'd, 792 F.2d 1117 (4th Cir. 1986).
- 77. Rhodes Sun Electric Corp., 121 L.R.R.M. (BNA) 2203, 2204 (D.N. Ill. 1985).

79. Smithson v. Nordstrom, Inc., 63 Or. App. 423, 664 P.2d 1119 (1983).

^{75.} Id. at 18, 494 A.2d at 221.

^{78.} Moeller v. Fuselier, Ott & McKee, 115 L.R.R.M. (BNA) 2600 (Miss. 1984).

^{80.} Milton v. Illinois Bell Tel. Co., 101 Ill. App. 3d 75, 427 N.E.2d 829 (1981). Cf. Rawson v. Sears, Roebuck & Co., 530 F. Supp. 776 (D. Colo. 1982) (Allegation that employer "willfully, wantonly, and maliciously fired" employee and would not allow him to resign "with dignity" did Disseminated by The Research Repository @ WVU, 1988 25

The mental pain and suffering caused by an employee discharged for positive substance test or accused of drug or alcohol abuse will undoubtedly give rise to an increasing number of actions alleging tortious infliction of emotional distress. Where an employer requires an unconsenting employee to submit to substance screening without probable cause, disciplines or discharges an employee who has no history of drug abuse or job performance problems solely for a positive drug test, or fails to keep confidential an employee's substance test results or participation in a substance rehabilitation program, it faces the likelihood that the employee will bring the emotional distress action before a sympathetic jury.

In addition to the torts of defamation, invasion of privacy, and infliction of emotional distress, an employer who fails to accurately maintain employee records related to substance testing or rehabilitation may risk liability for negligence.⁸¹ A laboratory that fails to accurately analyze a urine sample and reports a "false positive," or confuses the identities of urine samples and attributes a positive result from one employee's urine sample to another employee, is potentially liable for failure to exercise its duty of due care.⁸² If the mistaken test analysis causes the employee to be disciplined, discharged, or otherwise suffer reduced employment status, the laboratory may be faced with the injured employee's cause of action for tortious interference with business relationships.⁸³

B. The Federal Preemption Doctrine

Unlike at-will employees, employees covered by a collective bargaining agreement will, as a general rule, be required to settle their disputes with the signatory employer under the grievance-arbitration procedure established by the labor agreement. Resolution of any

not, without more, state a cause for intentional infliction of emotional distress. Allegations must set forth pattern of employer conduct intended to cause, or recklessly causing, severe emotional distress).

^{81.} See, e.g., Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974) (recognized a duty of an employer to use due care in keeping and maintaining employment records).

^{82.} Id.

^{83.} See Heheman v. E.W. Scripps Co., 661 F.2d 1115 (6th Cir. 1981), cert. denied, 456 U.S. 991 (1982); Moeller, 115 L.R.R.M. (BNA) 2600; Haupt v. International Harvester Co., 582 F. Supp. https://www.catfinkel/s/clDG/Rs 3/28es 618 (D.C. Super. Ct. 1987).

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continuing dispute over the arbitrator's award, or the meaning and interpretation of the labor agreement's terms, lies with the federal courts whose jurisdiction derives from Section 301 of the Labor Management Relations Act ("LMRA")84

Section 301 of the LMRA establishes the jurisdiction of United States District Courts over "suits for violation of contracts between an employer and a labor organization representing employees in an industry effecting commerce . . ." and provides the framework from which the courts fashion federal law to govern disputes arising out of collective bargaining agreements.⁸⁵ Section 301 was enacted to ensure that federal labor law developed uniformly and that employer-union contracts were not subjected to inconsistent local rules, or competing state and federal legal systems.⁸⁶ The concern for a single forum for interpretation of collective bargaining agreements saw the development of the federal preemption doctrine, whereby suits alleging violations of labor contracts were preserved to the federal courts, pursuant to Section 301 of the LMRA.⁸⁷

In the more recent case of Allis-Chalmers v. Lueck,88 the United States Supreme Court held that an employee's state-law tort action against his employer and its insurer for bad faith delay in making disability payments, which were disbursed in accordance with the terms of a collective bargaining agreement, was preempted by federal labor law; resolution of the tort claim was substantially dependent upon analysis of the labor agreement.⁸⁹ The court held that not only does the LMRA preempt suits brought in state court alleging violations of a collective bargaining agreement, but it also preempts suits alleging matters that rely upon the relationships created by a collective bargaining agreement.⁹⁰ Thus, ruled the Court, state-law rights and obligations which do not exist independently of the collective bargaining contract, and can therefore be waived or altered by agree-

87. Id.

00. Id. at 210 (citing Bowen v. United States Postal Service, 459 U.S. 212, 224-25 (1983)). 27

^{84.} LMRA § 301 29 U.S.C. § 185 (1982).

^{85.} Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

^{86.} Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

^{88.} Allis-Chalmers v. Lueck, 471 U.S. 202 (1985).

^{89.} Id. at 221.

ment of the parties, are preempted under Section 301. If the evaluation of the state tort claim is "inextricably intertwined with consideration of the terms of the labor contract," or if "state tort law purports to define the meaning of the contractual relationship," the state action will be preempted.⁹¹

The Court was careful to point out that not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is preempted:

Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly § 301 does not grant the parties to a collective bargaining agreement the ability to contract what is illegal under state law. In extending the preemptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.⁹²

The Supreme Court's willingness in *Allis-Chambers* to distinguish tort claims "inextricably intertwined" with consideration of terms of the collective bargaining agreement from tort claims which raise "non-negotiable state-law rights of employers or employees independent of any right established by contract"⁹³ is consistent with its long-standing recognition that the existence of a collective bargaining agreement and the availability of labor arbitration, in and of itself, will not necessarily bar an individual employee from bringing a cause of action based on rights arising under state law "designed to provide minimum substantive guarantees to individual workers."⁹⁴ In the most recent case of *Caterpillar, Inc. v. Cecil Williams*,⁹⁵ the Supreme Court, in a unanimous opinion delivered by Justice Brennan, held that complaints filed by unionized bargaining unit em-

^{91.} Id. at 216-17.

^{92.} Id. at 211-12 (footnotes omitted).

^{93.} Id. at 213.

^{94.} Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 737 (1981). See also Atchison, Topeka & Santa Fe Ry. v. Buell, 107 S. Ct. 1410 (1987); McDonald v. West Branch, 466 U.S. 284 (1984); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

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ployees in state court, alleging that the employer's plant closing breached individual oral and written employment contracts promising indefinite employment, did not state causes of action under Section 301 of the LMRA and were therefore, not removable to federal court.⁹⁶ In so holding, the Supreme Court reiterated the right of employees covered by a collective bargaining agreement to assert legal rights arising independent of the labor contract, and rejected Caterpillar's contention that Section 301 required that all matters related to the employment relationship between unionized employees and the employer be resolved through the bargaining process, within the framework of federal law.⁹⁷

As a general rule, courts recognize that an employee's state court claim against an employer will not be preempted by Section 301 of the LMRA where the employer's conduct is "particularly abusive" or "outrageous".⁹⁸

Just several days prior to *Williams*, the Supreme Court issued Fort Halifax Pkg. Co. v. Coyne, 107 S. Ct. 2211 (1987), wherein it held that a course of action brought by employees under a state statute, requiring payment of compensation by an employer relocating or terminating operations, was not preempted by the National Labor Relations Act because the minimum labor standards established under the state law did not intrude impermissibly upon the collective bargaining process.

98. In Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977), the United States Supreme Court held that the National Labor Relations Act did not preempt a tort action for intentional infliction of emotional distress under California law, where the plaintiff alleged a pattern of union harassment and humiliation for complaining about discriminatory hiring hall referrals. The Court reasoned that although relief for alleged discriminatory conduct could be found under the NLRA, relief for the "outrageous and particularly abusive" manner of conduct could properly be sought in state court for emotional distress. The Court cautioned, however, that the state tort action was not the proper vehicle to attack or redress the underlying discrimination. *Id.* at 305.

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^{96.} Id. at 2426. The federal district court had held that removal of the state actions was appropriate in light of the existence of a collective bargaining agreement, and dismissed the complaints when the plaintiff-employees refused to amend them to state a cause under the LMRA. The United States Court of Appeals for the Ninth Circuit reversed, holding that the actions were improperly removed because the state law claims were not grounded, either directly or indirectly, upon rights or liabilities created by the collective bargaining agreement.

^{97.} Id. at 2432 n.10. The individual agreements between the employees and Caterpillar were entered into before the employees became members of the bargaining unit. The determination that the state causes of action were not preempted was based not on their "pre-bargaining unit" status, however, but rather on the Court's finding that resolution of matters raised under the alleged individual agreements was not "substantially dependent on analysis of a collective bargaining agreement." Indeed, the Court noted that the plaintiff-employees, as "bargaining unit members at the time of the plant closing, possessed substantial rights under the collective agreement, and could have brought suit under § 301. As masters of the complaint, however, they chose not to do so." Id. at 2431.

The United States District Court for the District of Connecticut recently held in *Paradis v. United Technologies*⁹⁹ that a state tort action for intentional infliction of emotional distress may be brought by a unionized employee against an employer for harassing him in the course of a drug-related investigation. The case arose when the employee, Bruce Paradis, confided in company officials that he suffered from drug addiction and entered the company's confidential employee assistance program. Although United Technologies had assured employees that they would not be retaliated or discriminated against for having previously abused drugs or alcohol, when Paradis requested to be transferred to avoid confronting former employees with whom he had used drugs, the company began a campaign of harassment, and finally discharge, to pressure Paradis to divulge their identity.¹⁰⁰

Paradis responded by filing an action in Hartford Superior Court (which United Technologies removed to federal district court) alleging defendant's infliction of emotional distress by extreme and outrageous behavior, tortious wrongful discharge in contravention of public policy, invasion of privacy and the right to free speech in violation of state statute, fraud, deceit, and intentional or negligent misrepresentation.¹⁰¹

Judge Peter C. Dorsey, writing for the District Court, likened the preemption doctrine to a line spectrum which on one end is balanced by "claims indisputedly linked to the bargaining agreement," and "claims completely independent of and unrelated to the collective bargaining agreement" on the other.¹⁰² A large grey area lay in between these two ends of the spectrum, Judge Dorsey opined, identified by the Supreme Court in *Allis-Chalmers* as those cases to be tested by whether the claim "exist[s] independent of any rights established by the contract" or "is inextricably intertwined with con-

^{99.} Paradis v. United Technologies, 672 F. Supp. 67 (D. Conn. 1987).

^{100.} Id. at 68.

^{101.} Id.

^{102.} Id. at 69. The court cited a claim of unjust termination, brought by an employee covered by a collective bargaining agreement containing a just cause provision, as illustrative of a claim "indisputedly linked" to the contract, and a claim by an employee alleging assault by the employer https://www.complexely/wwdeweigh@Oaisd3/%related to" the contract. Id.

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sideration of the terms of the contract."¹⁰³ Employing the "line spectrum" analysis, the Court found that Paradis' claim of wrongful discharge in violation of public policy stated a claim governed by the just cause provision of the contract, and was, therefore, intimately bound up with the collective bargaining agreement.¹⁰⁴ However, the claim that the company disciplined and discriminated against him for exercising his right to privacy and free speech under Connecticut law was held to assert rights guaranteed to employees by the state, existing wholly separate from those rights provided by the labor contract, and therefore, was not preempted. Paradis' claim of emotional distress caused by the employer's harassment of him for refusing to divulge the names of other drug users was also held to exist independent of the collective bargaining agreement, which did not address or redress such conduct,¹⁰⁵ and was therefore, not preempted. The Court distinguished, however, Paradis' claim for emotional distress caused by the act of discharging him, which asserted matters encompassed by the collective bargaining agreement, and held it to be preempted and properly removed to federal court.¹⁰⁶ The Court ruled that the remaining claims of estoppel, fraud, deceit and misrepresentation fell within the grey "Allis-Chalmers" area of the spectrum, and the question of their preemption and the propriety of their removal from state court depended upon the specific facts upon which the claims relied. Because Paradis alleged that the emplover breached promises it made to him independent of the collective bargaining agreement, they were not preempted.¹⁰⁷

106. Id. at 69-70.

107. Id. at 71 (citing Williams, 107 S. Ct. 2425).

In deciding the preemptive effect of the LMRA on the various claims asserted in the *Paradis* complaint, the district court was mindful of the disagreement among the circuits in applying the doctrine to state court claims and carving out standards to determine where exceptions exist. *Id*. (citing Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102, 105 (2d Cir. 1987)). *Id*. at 70 (citing Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1473 (9th Cir. 1984) (discussing confusion in the labor preemption area)). *Id*. at 71 n.7 (citing Martin v. Associated Truck Lines, 801 F.2d 246 (6th Cir. 1986); Bale v. General Tel. Co., 795 F.2d 775 (9th Cir. 1986); Gibson v. A.T.T. Technologies, 782 F.2d 686 (7th Cir. 1986), *cert. denied*, 106 S. Ct. 3275 (1986) (claims of misrepresentation and fraud preempted under § 301 of the LMRA); Anderson v. Ford Motor Co., 803 F.2d 953 (8th Cir. Disseminated by The Research Repository @ WVU, 1988

^{103.} Id. (citing Allis-Chalmers, 471 U.S. at 213).

^{104.} Id. at 69-70.

^{105.} Id. at 71. (citing Tellez v. Pacific Gas & Elec., 817 F.2d 536 (9th Cir. 1987). cert. denied, 108 S. Ct. 251 (1987)).

An employer's accusation against an employee of drug use gave rise to the Ninth Circuit case of Tellez v. Pacific Gas and Electric Co.¹⁰⁸ in which a unionized employee. Tellez, brought state tort claims against the employer for intentional infliction of emotional distress. negligent infliction of emotional distress, and defamation, for circulating a letter among company managers accusing him of purchasing cocaine on the job. Prior to bringing the cause of action, Tellez had filed a grievance over the company's decision to suspend him for allegedly purchasing drugs, and obtained from the arbitrator an order expunging the suspension record from his personnel file and awarding him back pay.¹⁰⁹ The state tort claims, which attacked the contents of the letter and its circulation among various company managers, were removed to the United States District Court for the Northern District of California, which entered summary judgment for the company on the ground that the tort claims were preempted by Section 301 of the LMRA.¹¹⁰ On appeal, the Ninth Circuit reversed, finding that Tellez's state court claims sought redress for employer conduct which was not addressed, and could not be remedied, by any provisions of the collective bargaining agreement.¹¹¹In holding that Tellez' claim for intentional infliction of emotional distress was not preempted, the Ninth Circuit observed that the labor agreement in that case contained no terms under which an arbitrator could determine whether the company had acted outrageously in circulating the letter, nor any remedy for such behavior even assuming an arbitral finding could be made.¹¹² In so concluding, the Court distinguished earlier Ninth Circuit cases of Truex v. Garrett Freight Lines, Inc.¹¹³ and Olguin v. Inspiration Consol. Copper Co.,¹¹⁴ in which it had held that a unionized employee's state tort claim for intentional infliction of emotional distress was preempted by

112. Id. at 539.

https://ieseareniepositeritation_cents/wyiPapers6969rss348 F.2d 1468, 1475 (9th Cir. 1984).

^{1986).} cert. denied, 107 S. Ct. 3242 (1987); Miller v. Fairchild Indus., 668 F. Supp. 461 (D. Md. 1987) (misrepresentation and fraud claims not preempted by § 301)).

^{108.} Tellez v. Pacific Gas & Elec. Co., 817 F.2d 536 (9th Cir. 1987), cert. denied, 108 S. Ct. 251 (1987).

^{109.} Id. at 537.

^{110.} Id.

^{111.} Id. at 538.

^{113.} Truex v. Garrett Freight Lines, 784 F.2d 1347, 1350 (9th Cir. 1985).

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Section 301 where the collective bargaining agreement specified when and how discipline could be administered, and addressed the employment and work conditions being challenged.¹¹⁵

If the company's conduct is outrageous or particularly abusive, it may give rise to a state tort claim which survives preemption, even if the conduct took place during a disciplinary investigation under the terms of the collective bargaining agreement. In *Penrith v. Lockheed Corp.*,¹¹⁶ the United States District Court for the Central District of California would not preempt a state tort claim for intentional infliction of emotional distress where the plaintiff-employee alleged that company security guards, in the course of searching his vehicle, uncovered a shotgun and aimed it at him, causing fright. Also, the complaint alleged that the company's "employee assistance program" personnel divulged confidential information about the plaintiff in a manner that was particularly abusive, that is, malicious, oppressive, and done with a conscious disregard for his rights and feelings.¹¹⁷

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^{115.} Tellez, 817 F.2d at 539. See also Scott v. Machinists Automotive Trades Dist. Lodge No. 190, 827 F.2d 589 (9th Cir. 1987) (terminated employee's state tort claims for intentional infliction of emotional distress and defamation were preempted by Section 301 of the LMRA, where emotional distress claim attacking supervisor's conduct concerned working conditions and disciplinary procedures covered by labor agreement, and defamation claim attacking statements made in employer's disciplinary investigation. Tort claims relied on matters inextricably intertwined with the contract's grievance machinery). Id. at 594. The Scott court distinguished the Tellez case, as the allegedly defamatory statements in Tellez were not made in the course of the collective bargaining agreement's mandated grievance procedure and the contract did not address disciplinary formalities. Id.

^{116.} Penrith v. Lockheed Corp., 1 Individ. Empl. Rts. Cas. (BNA) 760 (C.D. Cal. 1986).

^{117.} Id. at 762. However, the Court stressed that any state court challenge to the disciplinary investigation or administration of the employee assistance program, itself, would be preempted. Accordingly, the Court held that the collective bargaining agreement, under § 301, preempted plaintiff's state tort claims for false arrest and imprisonment, assault and battery, invasion of privacy, negligence, negligent hiring, wrongful discharge, and intentional infliction of emotional distress to the extent that the claims raised matters grievable under the contract.

See also Keehr v. Consolidated Freightways, 825 F.2d 133 (7th Cir. 1987) (state tort claims against employer for invasion of privacy and intentional infliction of emotional distress not preempted where underlying conduct complained of is particularly abusive and resolution of claim is not dependent on interpretation of collective bargaining agreement. The Seventh Circuit rejected the company's argument that Keehr's claims were preempted because he could have filed a grievance against the supervisor for using abusive language. *Id.* at 136. The court opined,

[[]t]he mere fact that [Keehr] might be able to grieve [the supervisor's] conduct under procedures provided in the collective bargaining agreement is not sufficient in itself to conclude that [his] tort claims are preempted. The crucial issue under *Allis-Chalmers* is not whether a claim can be taken through the grievance process but whether the state law tort claim

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A unionized employee's state tort claim may also survive a preemption defense where the clam implicates public policy. In *Messenger v. Volkswagen of America, Inc.*,¹¹⁸ the United States District Court for the Southern District of West Virginia held that a unionized employee's state tort action of retaliatory discharge for filing a workers' compensation claim would not be preempted by Section 301 on the ground that the wrong which the tort action sought to redress was not the act of discharging, but the employer's contravention of public policy in carrying out the discharge.¹¹⁹ Thus, if the unionized employee can persuade the court that the state claim brought in connection with employer substance testing asserts matters of important public policy, which should not be frustrated by the exercise of a collective bargaining agreement, the claim might survive preemption.¹²⁰

Id. at 137 (upheld jury award of \$50,000 in punitive damages)); Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985) (state tort claim for defamation against employer for suspending employee for suspected drug use preempted unless employee could show that employer acted with malice); Cooper v. Communication Workers, 2 Individ. Empl. Rts. Cas. (BNA) 881, 883 (D.D.C., 1987) (unionized employees' cause of action against employer for intentional infliction of emotional distress not pre-empted where complaint alleged facts indicating that employer's conduct was outrageous).

118. Messenger v. Volkswagen of America, Inc., 585 F. Supp. 565 (S.D.W. Va. 1984).

119. Id. at 570. There is considerable disagreement among the various jurisdictions as to the right of an employee covered by a collective bargaining agreement to bring a state court action for retaliatory discharge for filing a workers' compensation claim. Some courts recognize that the public policy embodied in such an action should protect all workers, and the retaliatory discharge claim may not be preempted by the presence of a collective bargaining agreement. See, e.g., Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981); Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120 (3d Cir. 1986): Baldracchi, 814 F.2d 102. Other jurisdictions hold that a retaliatory discharge action brought, under a workers' compensation statute, is not available to employees who have the protection of a collective bargaining agreement containing a "just cause" provision. See, e.g., Johnson v. Hussman Corp., 805 F.2d 795 (8th Cir. 1986); Lingle v. Norge Div. of Magic Chef, 823 F.2d 1031 (7th Cir. 1987), cert. granted, 108 S. Ct. 226 (1987) (specifically rejecting state court decision of Gonzalez v. Prestress Eng'g Corp., 115 Ill. 2d 1, 503 N.E.2d 308 (1986) holding that workers' compensation statute's prohibition against retaliatory discharge effectuated public policy applicable to all workers, regardless of union status); Clark v. Momence Pkg. Co., 637 F. Supp. 16 (C.D. Ill. 1985); Cox v. United Technologies, 240 Kan. 95, 727 P.2d 456 (1986).

120. See also Paige v. Kaiser, 826 F.2d 857 (9th Cir. 1987) (claims brought under state laws which exist to protect all workers, irrespective of their coverage by a labor agreement, may not be preempted by Section 301 of the LMRA); Garibaldi v. Lucky Food Stores, 726 F.2d 1367, 1375 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985) (unionized employee's action for wrongful termination in violation of public policy, based on allegation that employer discharged him for refusing to deliver spoiled milk to customers and for reporting employer's demand to local health department, not pre-empted by § 301. Action did not simply attack discharge as wrongful, but attacked employer's unhttps://researchrepository.wvu.edu/wvlr/v0190/JSS378

being asserted purports to give meaning to the term of the labor contract.

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Even where the state court claim brought by a unionized employee does not implicate public policy or alleged employer conduct that is outrageous or particularly abusive, if the state action alleges matters that do not derive from, or depend upon, interpretation of the underlying collective bargaining agreement, it may escape the preemptive effect of Section 301. Thus, in *Tellez v. Pacific Gas & Electric Co.*,¹²¹ the Ninth Circuit allowed an employee covered by a collective bargaining agreement to bring a state claim against his employer for circulating a letter accusing him of purchasing narcotics, where the contract contained no provision which addressed the employee's right to be free from publication of defamatory statements.

The question of whether a state cause of action is preempted by Section 301 of the LMRA is fact-intensive. As a general rule, courts are reluctant to allow individuals covered by a collective bargaining agreement to assert rights against their employers outside of the contract's grievance arbitration procedure.¹²² Job applicants, or new hires who are not yet covered by a collective bargaining agreement, will most likely find courts receptive to state tort actions to redress injuries caused by drug and alcohol testing because their claims are

derlying violation of state law as motivation for discharge.

A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and the employee. The remedy is in *tort*, distinct from any contractual remedy an employee might have under the collective bargaining agreement. It furthers the state's interest in protecting the general public—an interest which transcends the employment relationship.

Id. at 1375; Bureau of Lab. Stds v. Fort Halifax Pkg. Co., 510 A.2d 1054 (Me. 1986), aff'd 107 S. Ct. 2211 (1987) (National Labor Relations Act will not preempt unionized employee's state law action for severance pay pursuant to state statute, notwithstanding the existence of a collective bargaining agreement which failed to provide for severance pay. State has the authority to enact a law of general application reflecting public policy determination to protect its citizens from economic dislocation, regardless of their union status. Contra Smith v. Greyhound Lines, 614 F. Supp. 558 (W.D. Pa. 1984), aff'd, 800 F.2d 1139 (3d Cir. 1986) (state tort claim for wrongful discharge arising out of employer-administered polygraph test, available only to at-will employees, and may not be brought by employee covered by a collective bargaining agreement).

^{121.} Tellez, 817 F.2d 536.

^{122.} See, e.g., Truex, 784 F.2d 1347, Dougherty v. Parsec, Inc., 824 F.2d 1477 (6th Cir. 1987); Kirby v. Allegheny Beverage Co., 811 F.2d 253 (4th Cir. 1987); Mann v. Georgia Pac. Corp. 651 F. Supp. 580 (E.D. Ark. 1986); Jeffers v. Convoy, 650 F. Supp. 315 (D. Minn. 1986); Cooper, 2 Individ. Empl. Rts. Cas. (BNA) 881.

least likely to be arbitrable.¹²³ A union seeking to bring state action in its own name, on behalf of members injured by substance testing, may find the courts less receptive to such actions and more ready to insist that the union settle the matter through the labor arbitration forum established by the contract.¹²⁴ The bargaining unit employee who brings a state tort action on his or her own behalf against the employer for drug or alcohol screening, or the related investigation, may successfully overcome the preemptive effect of Section 301 if he or she asserts matters of outrageous or particularly abusive employer conduct, matters that do not look to the collective bargaining agreement or the bargaining relationship for resolution, or matters that implicate public policy or assert rights under state law applicable to all employees, regardless of union status. Because a tort action may yield considerable monetary damages, it is a potent shield against employer abuse. In protecting workers from injury to character, reputation, privacy, mental and emotional well-being, and livelihood, unions may find it useful to educate their representatives and members as to this strategic area of the law, and assist them in preparing the appropriate litigation.

C. Liability Under Discrimination Statutes

A variety of federal and state statutes protect workers from employer discrimination. The National Labor Relations Act prohibits an employer from discriminating against employees with respect to hire or tenure, or condition of employment, because of their union membership or activity.¹²⁵ Title VII of the Civil Rights Act of 1964 protects individuals against employer discrimination on the basis of race, color, religion, sex, or national origin.¹²⁶ The Federal Vocational Rehabilitation Act prohibits employment discrimination against the handicapped by the federal government, federal contractors and subcontractors, and employers or employment programs receiving

125. 29 U.S.C. § 158(a)(3) (1982).

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^{123.} Allis-Chalmers, 417 U.S. 202; Anderson, 803 F.2d 953; Varnum v. Nu-Car Carriers, 804 F.2d 638 (llth Cir. 1986); reh'g denied, 808 F.2d 1524, cert. denied, 107 S. Ct. 2181 (1987).

^{124.} See, e.g., Association of W. Pulp & Paper Workers v. Boise Cascade Corp., 644 F. Supp. 183 (D. Or. 1986).

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federal financial assistance.¹²⁷ Most states have enacted their own statutes extending similar protections to their citizens.¹²⁸

The National Labor Relations Act ("NLRA") makes it unlawful for an employer to discharge or discriminate against employees for engaging in union activity.¹²⁹ If a company policy or work rule, neutral on its face, is enforced more stringently against union representatives or activists, it will violate the NLRA.

In NLRB v. Jacob E. Decker & Sons¹³⁰ the Board held, and the United States District Court for the Fifth Circuit affirmed, that the discharge of an employee for possession of marijuana violated the National Labor Relations Act, where the purpose of the discharge was to retaliate against the individual for his support of the union and was not consistent with the company's treatment of other employees with records of drug use.¹³¹ Presumably, a substance screening program which is imposed disparately upon union representatives or activists will be unlawful.

A drug screening program or drug policy which is not promulgated with a discriminatory intent and is not discriminatorily applied will most likely not violate Title VII. Disparate application of a substance-abuse policy may, however, violate the statute.¹³² The United States Supreme Court applied the prohibitions against racial and ethnic discrimination under Title VII¹³³ to an employer-promulgated drug screening program in *New York City Transit Auth. v. Beazer.*¹³⁴ In that case, the New York City Transit Authority main-

134. New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979). The United States Court of Appeals for the Second Circuit affirmed the decision of the United States District Court for the Southern District of New York, that the Authority's refusal to employ persons who use methadone violated the equal protection clause of the fourteenth amendment. 399 F. Supp. 1032 (S.D.N.Y 1975), aff'd, 558 F.2d 97 (2d Cir. 1977). In a supplemental opinion allowing the recovery of attorneys fees, Disseminated by The Research Repository @ WVU, 1988

^{127. 29} U.S.C. § 701-96; (1982).

^{128.} See infra notes 143-152.

^{129.} Radio Officers Union v. NLRB. 347 U.S. 17, 43 (1954).

^{130.} NLRB v. Decker & Sons, 636 F.2d 129 (5th Cir. 1981), enforcing 244 N.L.R.B. 875 (1979).
131. See also Laredo Coca Cola Bottling Co., 258 N.L.R.B. 491, 501 (1981) (refusal to reinstate striker convicted of marijuana possession did not violate National Labor Relations Act, even if policy to deny employment to drug users did not exist prior to strike, where employer offered reinstatement to other strikers and did not enforce new policy in a discriminatory manner).

^{132.} Drayton v. City of St. Petersburg, 477 F. Supp. 846, 885 (M.D. Fla. 1979).

^{133. 42} U.S.C. § 2000(e)(2) (1982).

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tained a policy of excluding from employment individuals testing positive for narcotics use. Consistent with the policy, the Authority refused employment to persons on a methadone maintenance program. Notwithstanding statistical evidence that approximately sixtyfive percent of all methadone-maintained persons in New York City were black and Hispanic, and that eighty percent of the employees referred to the Transit Authority's medical consultant for suspected violation of its drug policy were black or Hispanic, the Supreme Court rejected the finding of the District Court that the statistics proved a violation of Title VII.¹³⁵ The Court noted that even if the statistical evidence were capable of establishing a prima facie case of discrimination, the Authority would have successfully rebutted by demonstrating that the narcotics rule carried out "legitimate employment goals of safety and efficiency requirling the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of a majority of all methadone users."¹³⁶ Although the Court rejected the contention that the narcotics policy discriminated against blacks and Hispanics, it did not reject the proposition that such employment policy could, under the appropriate facts, disparately impact on a protected group.

The Federal Vocational Rehabilitation Act of 1973 prohibits discrimination by the federal government, federal contractors or subcontractors, or any program or activity receiving federal assistance against a handicapped individual whose disability does not render him or her unable to perform the work at issue.¹³⁷ Generally, an employer will not be subject to the statute unless it receives some

137. 29 U.S.C. § 794 (1982). See Walker v. Attorney Gen. of United States, 572 F. Supp. 100 http://research.repository.wvu.edu/wvlr/vol90/iss3/8

the district court further held that the Authority's narcotics policy violated Title VII. 414 F. Supp. 277 (S.D.N.Y. 1976). The Supreme Court, in addition to ruling on the Title VII claim, held that the employment policy did not violate the equal protection clause of the fourteenth amendment on the ground that the policy was rationally related to the Authority's perception that as long as an individual was undergoing methadone treatment, the uncertainties associated with the rehabilitation of heroin addicts persisted. 440 U.S. at 591-594.

^{135.} Beazer, 440 U.S. at 584 n.25. The Supreme Court faulted the usefulness of the statistics in proving a violation of Title VII, because although the figures might demonstrate a discriminatory effect of the Authority's narcotics policy on blacks and Hispanics, plaintiffs had failed to present a discriminatory purpose in promulgating or effectuating the policy.

^{136.} Id. at 587 n.31.

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subsidy or funds from the federal government.¹³⁸ Tax exemptions or credits will not, by themselves, bring an employer within the jurisdiction of the Rehabilitation Act.¹³⁹

Handicapped individuals, as defined by Section 7(7)(B) of the Act,¹⁴⁰ do not include persons whose current use of alcohol or drugs prevents them from performing the duties of their job or whose drug or alcohol use creates a direct threat to the property or safety of others. Persons who are active drug or alcohol users will not find protection under the Rehabilitation Act as handicapped individuals if the substance dependency interferes with their work performance, particularly if they refuse to stop drinking or taking drugs and undergo treatment.¹⁴¹ However, individuals who have recovered from drug or alcohol dependency have successfully sued their employers for discrimination under the statute.¹⁴²

The majority of states have passed legislation protecting employees from discrimination based on handicap by private-sector employers. Alabama,¹⁴³ Colorado,¹⁴⁴ Kentucky,¹⁴⁵ Ohio,¹⁴⁶ Pennsylvania,¹⁴⁷ and Tennessee.¹⁴⁸ Illinois¹⁴⁹ and West Virginia¹⁵⁰ have enacted statutes which specifically recognize drug and alcohol de-

143. Ala. Code § 21-7-8 (1975).

144. Colo. Anti-Discrimination Act of 1957, Colo. Rev. STAT. §§ 24-34-401 to -406 (1973); Colo. Substantive Rules Prohibiting Discrimination on Account of Physical Handicap 60.1-60.2 (1980), reprinted in 8A Fair Empl. Prac. Manual (BNA) 453:1111 (1988).

- 148. Tenn. Code Ann. §§ 8-50-103 to -104 (1980).
- 149. Ill. Rev. Stat. ch. 68, para. 1-101 to 2-105 (Supp. 1987).
- 150. W. Va. Human Rights Act, W. VA. CODE §§ 5-11-1 to -19 (1987).

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^{138.} Doe v. Region 13 Mental Health-Mental Retardation Comm., 704 F.2d 1402 reh'g denied, 709 F.2d 712 (5th Cir. 1983); Martin v. Delaware Law School, 625 F. Supp. 1288 (D. Del. 1985).

^{139.} Chaplin v. Consolidated Edison Co., 628 F. Supp. 143 (S.D.N.Y. 1986).

^{140. 29} U.S.C. § 706(7)(B) (1982).

^{141.} Crewe v. Office of Personnel Mgmt., 834 F.2d 140 (8th Cir. 1987); McCleod v. City of Detroit, 39 Fair Empl. Prac. Cas. (BNA) 225 (E.D. Mich. 1985).

^{142.} Tench v. Walters, 765 F.2d 599 (6th Cir. 1985), cert. granted, 107 S. Ct. 1368 (1987); Traynor v. Walters, 606 F. Supp. 391 (S.D.N.Y. 1985); rev'd, 791 F.2d 226 (2d Cir. 1986), cert. granted, 107 S. Ct. 1368 (1987); Athanas v. Board of Educ., 28 Fair Empl. Prac. Cas. (BNA) 569 (N.D. Ill. 1980); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978).

^{145.} Ky. Rev. Stat. Ann. §§ 207.130-207.240 (Michie/Bobbs-Merrill 1982).

^{146.} Ohio Rev. Code Ann. tit. 41, § 4112.01-4112.11 (Anderson 1980).

^{147.} Pa. Human Relations Act, 43 Pa. Cons. Stat. Ann. § 951-963 (1964 & Supp. 1987).

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pendency as handicaps protected under their discrimination laws.¹⁵¹ Several other state courts have interpreted their handicap discrimination statutes as protecting substance-dependent individuals from discrimination.¹⁵²

D. Liability Under Health and Safety Statutes

Section 105(c) of the Federal Mine Safety and Health Act¹⁵³ prohibits an employer from discriminating against any miner, or miner's representative, for exercising his or her rights under the statute, including the filing of complaints. The Occupational Safety and Health Act¹⁵⁴ contains similar prohibitions against employer discrimination. A coal operator, or other employer, who administers drug or alcohol tests in a discriminatory manner, for instance, by selecting for testing safety representatives or workers who aggressively pursue their right to a safe work environment, risks liability under the statute.¹⁵⁵

Where a worker is discharged because of drug or alcohol use, the individual may qualify for workers' compensation benefits if he or she can show that the substance use constitutes an industrial illness within the meaning of the particular state statute.

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^{151.} Illinois law recognizes drug and alcohol abuse as handicaps where the person demonstrates that the "condition" arises from or constitutes the equivalent of a disease or functional disorder. Illinois Interpretive Rules on Handicap Discrimination in Employment, ILL. ADMIN. CODE tit. 56, § 2500.20(c) (1984), reprinted in 8A Fair Empl. Prac. Manual (BNA) 453:2741 (1988).

Under West Virginia law, drug and alcohol use may constitute a protected handicap where the person can demonstrate a medically verifiable addiction. West Virginia Interpretive Rules Governing Discrimination on the Handicapped, § 2.04 (1982), *reprinted in* 8A Fair Empl. Prac. Manual (BNA) 457:3068f (1988).

^{152.} Hazlett v. Martin Chevrolet. Inc., 25 Ohio St. 3d 279, 469 N.E.2d 478 (1986); Consolidated Freightways v. Cedar Rapids Civil Rights Comm'n., 366 N.W.2d 522 (Iowa 1985): *Athansas*, 28 Fair Empl. Prac. Cas. (BNA) 569.

^{153. 30} U.S.C. §§ 801-962 (1982).

^{154. 29} U.S.C. § 660(c) (1982).

^{155.} The Secretary of Labor recently issued a complaint under § 105(c) of the Mine Safety & Health Act against Jim Walters Resources for instituting a drug screening program which selected safety committeemen for random testing. Jim Walters Resources, Inc. v. Mine Safety & Health Rev. Comm'n, No. 87-7484 (11th Cir. Aug. 7, 1987). After Jim Walter Resources discharged two safety committeemen for failing to provide urine samples, the Secretary of Labor sought their temporary reinstatement with back pay. The Administrative Law Judge so ordered, and the Mine Safety and Health Commission affirmed. The order of temporary reinstatement has been appealed by the company

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In West Virginia, a worker is entitled to compensation for occupational diseases developed in the course of, or as a result of, employment.¹⁵⁶ A pre-existing condition will not necessarily bar an employee from recovery workers' compensation under West Virginia law if the disease can be shown to have developed to its present state as a result of the employment.¹⁵⁷ In Hall v. State Workmen's Comp. Comm'r,¹⁵⁸ the West Virginia Supreme Court of Appeals upheld an award of workers' compensation to the widow of a worker whose suicide was shown to be related to mental depression arising from an injury sustained in the course of employment.¹⁵⁹ The Court adopted the "chain of causation" rule whereby an employee's suicide which arises in the course of, and results from, covered employment is compensable under the state workers' compensation statute.¹⁶⁰ Arguably, a worker who forms a drug or alcohol dependency arising from an injury sustained in employment will have a compensable claim for the dependency.

At least one court has held that alcoholism resulting from jobrelated stress qualifies as an occupational disease compensable under the state's workers' compensation laws. In *California Microwave, Inc. v. Workers' Comp. Appeals Bd.*,¹⁶¹ the California Workers' Compensation Appeals Board awarded benefits to an employee who became totally disabled as a result of alcoholism caused by jobrelated tension. The employee introduced evidence that the workload was unduly burdensome, that his request to the company for additional staff was refused, and that the stress caused by those working conditions results in his increased alcohol consumption, culminating over time in organic brain damage.¹⁶² Significantly, the fact that he was a recovered alcoholic when he began employment with the company, that is, that he had a pre-existing alcoholic condition, did not bar his recovery.

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^{156.} W. VA. CODE § 23-4-1 (1985).

^{157.} Jordan v. State Workmen's Comp. Comm'r, 156 W. Va. 159, 191 S.E.2d 497 (1972).

^{158.} Hall v. State Workmen's Comp. Comm'r, 303 S.E.2d 726, 730 (W. Va. 1983).

^{159.} Id. at 728.

^{160.} Id. at 730.

^{161.} California Microwave, Inc. v. Workers' Comp. Appeals Bd., 45 Cal. Comp. Cas. 125 (Ct. App. 1980).

^{162.} Id. at 126.

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If an employer-administered substance test results in the discharge of an employee, that individual may have a viable claim for workers' compensation if he or she can show that the alcohol or drug consumption qualifies as an occupational disease or illness. To do that, the employee most likely will have to introduce evidence of causation between employment conditions (including prior injuries sustained in the course of employment), and the substance use. The argument should be particularly persuasive where the drug dependency is medicinal, that is, is the result of drugs prescribed by a physician to ease pain due to an injury sustained at work, or drugs to ease nervous tension caused by the employment environment. The same theory may be put forward to argue that an employee absent from work to undergo treatment and rehabilitation should be covered by the anti-discrimination provision of the workers compensation statute, prohibiting the employer from retaliating against a worker due to occupational injury or disease.¹⁶³

V. PROTECTING THE RIGHTS OF EMPLOYEES THROUGH COLLECTIVE BARGAINING

Employees who are represented by a union not only have litigation avenues to resort to when faced with mandatory drug testing programs, but may protect their rights at the collective bargaining table, as well. Through the negotiation process, unions can limit the ability of employers to test workers, protect them from false accusation, and develop rules that provide their members with a set of reasonable expectations in connection with employer testing demands. Most importantly, collective bargaining gives the union and employer the opportunity to protect everyone's interest in a safe and productive workplace by developing employee assistance programs to help employees overcome a variety of problems which affect job performance, whether emotional, situational, or drug and alcohol related. The following sections discuss the duty of the parties to negotiate in good faith, and programs arrived at by various unions

^{163.} But see Boise Cascade Corp., 644 F. Supp. at 185 (mandatory drug testing program of employees injured or involved in accidents does not violate Oregon Workers' Compensation statute prohibiting discrimination against employees who apply for benefits, where program disciplines for https://www.applying.for.applyin

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and companies which intelligently approach the issue of drugs in the workplace.

A. The Duty to Bargain

The General Counsel of the National Labor Relations Board has issued a memorandum on drug and alcohol testing¹⁶⁴ which takes the position that drug testing for both current employees and job applicants is a mandatory subject of bargaining. The General Counsel believes that generally, implementation of a drug testing program is a substantial change in working conditions, even where physical examinations are permitted under the collective bargaining agreement and/or previously have been given, and even if established work rules preclude the use or possession of drugs in the plant. The Board will apply to drug testing cases its established policy that a union waiver of its bargaining rights must be clear and unmistakable. Finally, normal Board deferral policies to labor arbitration, as set forth in *Dubo Mfg. Corp.*¹⁶⁵ and *Collyer Insulated Wire*,¹⁶⁶ will apply to these cases, but that where Section 10(j) injunctive relief is warranted, the Board may exercise its discretion not to defer.

According to the General Counsel's memorandum, an employer will not succeed in unilaterally implementing a drug testing program under the guise of the contract's labor management clause, or any other provision of the contract which does not deal squarely with the drug testing program at issue.¹⁶⁷

Applying general principles of waiver developed under the National Labor Relations Act ("Act"), if the issue of substance testing was not discussed during contract negotiations and is not embodied in the contract, the employer will not be permitted to unilaterally institute a program during the term of the contract without bargaining.¹⁶⁸ If, during contract negotiations, the union and company

^{164.} NLRB Gen. Couns. Mem. 87-5 (Sept. 8, 1987), reprinted in Daily Lab. Rep. (BNA) No. 184, at D-1 (Sept. 24, 1987) [hereinafter NLRB Gen. Couns. Mem.].

^{165.} Dubo Mfg. Corp., 142 N.L.R.B. 431 (1963), supplemented by 148 N.L.R.B. 1114 (1964), enforced, 353 F.2d 157 (6th Cir. 1965).

^{166.} Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

^{167.} NLRB Gen. Couns. Mem., supra note 164, at D-1.

^{168.} NLRB v. Jacobs Mfg. Co., 196 F.2d 680 (2d Cir. 1952).

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discuss substance testing, but the subject is not included in the resulting collective bargaining agreement, the Board will find that the union has not waived its right to bargain during the term of the agreement unless it "consciously yielded" its position.¹⁶⁹ The union will have consciously yielded its position in bargaining only if the matter of dispute was "fully discussed or consciously explored."¹⁷⁰

If the union has been put on notice during negotiations that the company intends to implement a substance screening program, it will be incumbent upon it to request bargaining or a waiver may be inferred.¹⁷¹ Simply protesting the change without demanding to bargain may constitute waiver by inaction.¹⁷² However, the employer's notice must be clear and unequivocal. If the employer has not openly declared its intent to change the status quo, the union will not be expected to demand bargaining in response to the mere possibility that the company might take action in the future.¹⁷³

Waiver by past practice may be found where the practice "clearly encompass[es] the program at issue."¹⁷⁴ Thus, the past practice of requiring applicants or current employees to submit to physical examinations that have not included drug testing will not create a waiver.¹⁷⁵ Similarly, a work rule prohibiting the use or possession of drugs on company premises will also not constitute past practice sufficient to waive the bargaining obligation. Even where the union

^{169.} New York Mirror, 151 N.L.R.B. 834 (1965).

^{170.} Press Company, Inc., 121 N.L.R.B. 976 (1958).

^{171.} Love's Barbeque Restaurant, 245 N.L.R.B. 78 (1979).

^{172.} NLRB Gen. Couns. Mem., supra note 164, at D-2.

^{173.} In Vogt Mach, Co., 105 L.R.R.M. (BNA) 1088 (1980) the Board held that an employer violated the Act when, after executing the contract, it unilaterally discontinued its practice of allowing employees to eat in a particular lunch room. The collective bargaining negotiations did not amount to a waiver, the Board found, even though employees had expressed their fears to the union during negotiations that the employer would take such action. Because the company had not announced its intention to unilaterally alter the status quo, the Board held that the union was not under an obligation to request bargaining simply based on "the employees' speculations and conjectures," but was entitled to await the company's actions. The Board noted that the union had not been given clear and unequivocal notice of the employer's proposed changes and therefore did not consciously relinquish lunch room privileges. *Id.* at 1089.

^{174.} NLRB Gen. Couns. Mem., supra note 164, at D-2. 175. Id.

has agreed to drug testing "for cause," the employer may not unilaterally implement random testing.¹⁷⁶

Thus, if the company does not raise the issue of drug testing or treatment at the bargaining table, the union will not be under an obligation to do so, and its failure to raise the issue will not constitute a waiver of the right to bargain over the subject in the future. If the company simply raises the issue of drug testing in an ambiguous manner which does not indicate its intention to make drug testing, or rehabilitation, a condition of employment, the union again has no duty to bargain over the matter. However, if the company raises drug testing or treatment in concrete terms, particularly if it voices an intent to implement a program, the union will have the duty to bargain in order to avoid creating the inference of a waiver.

The NLRB General Counsel has recognized that drug testing creates a substantial change in working conditions where it carries the potential for discipline or discharge. This is so even where there is an existing physical examination program because drug testing "substantially changes the nature and fundamental purpose of the existing physical examination."¹⁷⁷ As the General Counsel's Memorandum explains:

Generally, a physical examination is designed to test physical fitness to perform the work. A drug test is designed to determine whether an employee or applicant uses drugs, irrespective of whether such usage interferes with the ability to perform. In addition, it is our view that a drug test is not simply a work rule rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broken. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the employee being tested or raise questions of test procedures, confidentiality, laboratory integrity, etc.¹⁷⁸

Finally, the General Counsel's determination that the duty to bargain over drug testing extends not only to bargaining unit employees but to new hires and applicants as well is rooted in long-

^{176.} Id. Compare Gulf Coast Automotive Warehouse, 256 N.L.R.B. 486 (1981) wherein the Board held that the employer was not obligated to bargain over the requirement that employees submit to polygraph tests where the company had an established practice of administering the tests.

^{177.} NLRB Gen. Couns. Mem., supra note 164, at D-2.

standing Board law.¹⁷⁹ The General Counsel's Memorandum cites numerous cases in which the Board has found the duty to bargain about conditions of attaining employment, including *Pattern Makers' Assn. of Detroit*¹⁸⁰ (holding that the obligation to bargain attached to the subject of referral procedures utilized in a hiring hall arrangement), and *Lockheed Shipbldg. & Constr. Co.*,¹⁸¹ (holding that the employer violated Section 8(a)(5) of the National Labor Relations Act by unilaterally implementing a medical screening program for the purpose of denying employment to new hires).

Commensurate with the duty to negotiate over a mandatory subject of bargaining is the duty to furnish related information.¹⁸² Given the complexity of structuring a substance testing or employee assistance program, a union negotiating either of these programs will most likely seek, and be entitled to, information regarding procedures testing or rehabilitation procedures, adequacy of facilities, and competency of the personnel engaged in testing or counseling.

More specifically, if the employer proposes instituting substance testing of current employees, new hires, or applicants, the union may consider requesting information as to:

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^{179.} The duty to bargain over conditions for denying employment to applicants should be distinguished from the duty to bargain over conditions for employing permanent strike replacements. In LTV Aerospace & Defense Co., 124 L.R.R.M. (BNA) 1398 (1986), the NLRB Division of Advice directed the dismissal of Section 8(a)(5) and 8(a)(1) charges filed by the United Autoworkers alleging that the employer unlawfully failed to bargain over the administration of drug testing to strike replacements. Relying on previous case law, the Division of Advice asserted that "it is well-settled Board law that an employer need not bargain with an incumbent union with respect to the terms and conditions of employment under which permanent strike replacements are to be hired." The Memorandum noted, however, that the company had not implemented the drug screening plan as to all applicants, but only as to strike replacements, and that it had made clear to the union its willingness to bargain over the plan's application to both current and prospective employees. *Id.* at 1399.

^{180.} Pattern Makers' Ass'n of Detroit, 233 N.L.R.B. 430, 435-36 (1977), enforced in relevant part, 622 F.2d 267 (6th Cir. 1980).

^{181.} Lockheed Shipbldg. & Constr. Co., 273 N.L.R.B. 171 (1984). The Board modified the Administrative Law Judge's order that the employer bargain over implementation of the screening program for applicants and/or new employees, on the ground that the union had reached an earlier understanding with the employer that the company could use medical screening for the purpose of establishing baseline data for new employees and for the purpose of properly placing new employees in jobs consistent with their medical limitations. Accordingly, the Board limited the order to bargaining over administration of the screening process for the purpose of denying employment to applicants or terminating new hires.

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(1) the types of tests the company would seek to utilize and all data or studies compiled by the company in connection with each test's rate of accuracy and cost;

(2) the type of test the company would seek to utilize for confirmation purposes and its rate of accuracy and costs;

(3) the safeguards the company would employ to ensure that the privacy of the individual employee is preserved;

(4) the basis for the company's belief that the work force suffers from drug or alcohol-related performance problems (if it holds such a view), including hard data supporting that belief;

(5) any studies or surveillance undertaken by the company of bargaining unit employees suspected of substance abuse, including supervisory or managerial reports;

(6) the training which supervisors have undergone, or would undergo, to make judgments concerning work performance problems which are drug-related;

(7) any data the company has compiled with respect to work place injuries and/ or accidents, absenteeism, or other job-related problems which the company believes relate to substance abuse, and the basis for its belief that substance abuse is the cause;

(8) any studies or copies of other substance testing programs which the company has used as a model or guide for its proposed program;

(9) the procedures the company would employ to ensure proper labeling and chain of custody of samples;

(10) the procedure the company would employ to obtain test samples (e.g., if a urine sample were taken would the employee urinate while observed or unobserved? If observed, who would be the observer? Where would the test be administered?); and

(11) the identity of medications, prescription or otherwise, which the employer considers to interfere with work performance.

Because the employer will most likely send test samples to a laboratory for analysis, the union's information request may seek to determine:

(1) the identity of the lab the company would utilize;

(2) the number of years the lab has operated;

(3) the annual volume of drug testing it performs;

(4) the number of tests annually which have resulted in "false positive" or "false negative" results;

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substances;

(6) whether the lab splits samples for confirmation testing, the type of test utilized for confirmation testing, and the method employed for storing the split sample;

(7) the minimum concentration of each substance the lab deems "positive" for each type of test employed;

(8) the procedures used to differentiate between test results which indicate substance use and those which indicate impairment as a result of substance use;

(9) the procedures used to differentiate between test results that show the time at which the substance was ingested or inhaled;

(10) the lab's quality control program, including the procedures it utilizes to ensure proper labeling and chain of custody and the safeguards it maintains to prevent tampering;

(11) the identity, education, and training of the lab's employees;

(12) the procedures employed by the lab to ensure the confidentiality of the samples' identity and the test results; and

(13) whether the lab permits the individual employee access to his or her sample for the purpose of obtaining independent confirmation of test results.

If the employer has proposed instituting a substance-abuse rehabilitation program (which may be referred to as an "employee assistance program" or "EAP"), the union may also consider seeking information regarding:

(1) the identity of the organization or facility to which the employer would refer employees for assistance;

(2) the proximity of the treatment facility to the workplace (is it easily accessible to employees?);

(3) the availability of out-patient and in-patient treatment and aftercare programs;

(4) the length of time the facility or organization has been operational, the number of persons it treats annually, and its rate of success;

(5) the availability of family counseling;

(6) the identity, education, and training of the facility's personnel; and

(7) the safeguards employed by the facility to ensure patient privacy and confidentiality. 183

The employer's failure to bargain over a drug-testing program may result in the Board ordering the company to revoke all aspects

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of any program which it has instituted without bargaining and to bargain in good faith to agreement or to impasse. The Board may order reinstatement or recission of discipline, with backpay, for any employees discharged or disciplined for refusing to submit to the offending test.¹⁸⁴

The principles of NLRB deferral to labor arbitration, enunciated in Collyer and Dubo, will be applied to cases charging violation of the Act in connection with drug testing programs. However, because deferral to arbitration is within the Board's discretion under Section 10(a) of the Act, 10(i) injunctive relief may not be sought unless a complaint has issued. Thus, where 10(j) relief is appropriate, the General Counsel's office will not defer to the arbitration process.¹⁸⁵ The General Counsel has determined that "a Section 10(i) order enjoining an employer from subjecting current unit employees to unlawful, unilaterally implemented drug-testing programs may be warranted where such implementation is demonstrably undermining the union's ability to function effectively as the employees' bargaining representative . . . " or " . . . where implementation of the drug testing program is unlawfully, discriminatorily applied - for example, to union officers or other officers involved in grievance adjustments."186 Injunctive relief may also be appropriate where "a Board order in due course will be unable to undo or provide an effective remedy for employees' compelled submission to unlawful drug testing." For example, injunctive relief may be warranted where an employer "unlawfully implement(s) a highly invasive, random or universal drug testing program under which all or a substantial number of the employer's current employees would be imminently affected."187 Section 10(j) relief may be sought, if appropriate, upon

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^{184.} The Memorandum of the General Counsel instructs the Regions to seek the aforementioned remedies in complaints issued pursuant to unlawful, unilateral implementation of drug testing programs. The General Counsel opines, however, that "it is not clear that such a remedy would be appropriate for any employee disciplined or discharged for testing positive under a drug test," and instructs the Regions to submit such cases to the NLRB Division of Advice. NLRB Gen. Couns. Mem., *supra* note 164, at D-3.

^{185.} Id.

^{186.} Id.

^{187.} Id.

request of the union or other charging party or upon the Region's own initiative.¹⁸⁸

B. Negotiating a Substance Testing Program and/or an Employee Assistance Program

The Mining Industry Committee on Substance Abuse recognizes drug and alcohol dependency as treatable illnesses, and urges the mining industry to approach substance abuse as it would any other safety or health issue.¹⁸⁹ The Committee focuses on employee assistance programs as the primary means of reducing substance abuse while returning the individual abuser to safe and gainful employment.

An approach to substance abuse which does not include treatment and rehabilitation does the individual employee, the family, and the community a disservice. By simply discharging an individual who suffers from drug or alcohol dependency, the employer renders a productive member of society (albeit a substance abuser) potentially dependent upon unemployment compensation and welfare programs. Because of the damage done to the individual's reputation and standing in the community, such a discharge may leave him or her without future opportunity for gainful employment, potentially fracturing the family unit as the stress of the circumstances takes its toll. This further burdens community and local government resources. Thus, logic suggests that substance testing and/or rehabilitation programs be negotiated as part of the employees' health and welfare package. Ideally, the cost of treatment under the employee assistance program agreed upon should be covered by the employee's health insurance plan.

At the outset, it is important to distinguish substance testing from substance rehabilitation. A testing program, standing alone, will not treat the illness of drug or alcohol abuse and will not help the employee achieve greater productivity or safer working habits. Nor is

188. Id.

^{189.} MINING INDUS. COMM. ON SUBSTANCE ABUSE, MINING INDUSTRY ALCOHOL AND DRUG REhttps://www.edu/wvlr/vo190/iss3/8

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substance rehabilitation dependent on substance testing. It is not the positive test that creates the employee's need for assistance, for the test result, by itself, will not differentiate between the casual user and the substance-dependent individual. Rather, it is the perceptions of the employee and the employer that the individual's work performance problem is related to substance dependency that establishes the need for an assistance program which can treat and rehabilitate the illness.

Because the employer's interest in employees who are "drug free" and "alcohol free" can only legitimately exist in conjunction with its interest in a productive and safe workplace, the union may wish to negotiate a program which recognizes not only drug and alcohol abuse as sources of work performance problems but also recognizes other emotional and behavioral problems for which assistance may be extended. Not only does such a broad program achieve the goals of productivity and safety, but it also requires the employer to deal fairly with all employees who suffer from treatable problems which affect job performance. For example, suppose employee Joe Smith is experiencing decreased productivity, tardiness, and a general lack of alertness due to substance dependency, while employee John Doe is experiencing similar job-related problems due to depression or nervous tension. An employee assistance program which provides employees counseling, treatment, and continued employment for their substance abuse but not for other emotional or situational problems essentially would penalize John Doe for not being a drug abuser or alcoholic.

A number of labor organizations have successfully negotiated employee assistance programs which treat a broad range of substance-related, emotional, and behavioral problems in a manner which promotes both the employer and the employee's interests and which protects the employee's right to privacy and dignity. Of the unions which have agreed to employer substance screening, many have negotiated programs which carefully restrict the employee's right to invade the employee's personal life, protect the employee's right to confidentiality, and guard the employee against false accusation.

Illustrative of a thoughtfully developed employee assistance program, one which carefully focuses on helping employees overcome Disseminated by The Research Repository @ WVU, 1988 51

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numerous types of problems which might interfere with their ability to perform on the job, is the United Autoworkers-Ford Assistance Plan, a collectively bargained-for program established jointly by the UAW and Ford Company in 1984. The Plan, which is strictly confidential and voluntary, is administered on a national level by an equal number of union and management representatives who comprise a National Committee. The National Committee develops and steers the treatment programs which are administered by an equal number of union and management representatives on the individual plant level.

The UAW-Ford Assistance Plan features a "problem resolution" component and a "problem avoidance" component.¹⁹⁰ The problem resolution program provides assistance to workers who are dealing with existing personal difficulties. The problem avoidance program helps workers deal with potential difficulties that may affect their ability to perform productively and safely. Both programs are available to employees at no cost to themselves. Employees enter the Plan either through self-referral or "job referral" by the local union and management representatives who have met with the worker to discuss his or her deteriorating job performance and have secured the individual's voluntary agreement to obtain treatment. Where the local Plan representatives confront a worker with poor job performance, they may discuss the work-related problem with the employee, but they are not authorized to diagnose or attempt to solve the employee's underlying personal problem. This function is properly reserved to the Assistance Plan. Participation in the Plan may not adversely affect an employee's status. Rather, his or her employment status continues to be determined according to the same standards imposed on the bargaining unit, generally.

Specifically, trained staff members assist employees with alcohol and drug abuse problems and other emotional or physical problems such as hypertension, stress, cigarette dependency, mental illness, and family crisis. Drug and alcohol dependency are recognized as health problems which may be successfully treated. The Plan has

^{190.} UAW-Ford Employee Assistance Plan (Mar. 22, 1985). https://researchrepository.wvu.edu/wvir/voi90/iss3/8

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been so successful that some plant programs experience sixty to eighty percent participation from self-referrals. The programs not only provide for rehabilitation but also for the critical aftercare necessary to help the employee achieve stability.

Although the Plan is designed to treat employees suffering from substance dependency, it does not have substance testing as a prerequisite or part of the program. Rather, its purpose is to assist employees who perform poorly on the job for a variety of reasons. Most importantly, it is *not* the employer, but the Assistance Plan, with its privacy, its confidentiality, and its trained counselors, which identifies the underlying cause of the worker's deteriorating job performance. Thus, the company's objective of maintaining a productive, dependable work force is achieved without intruding upon the employee's privacy, dignity, and reputation.¹⁹¹

Local No. 715 and Local 535, Service Employees International Union, AFL-CIO, have also negotiated an employee assistance program with the County of Santa Clara, California. The plan is available to bargaining unit members on a purely voluntary, confidential basis and treats employees for not only drug and alcohol dependency but also for a range of emotional and behavioral problems which impact on the worker's ability to perform on the job. The program is funded by the County at an annual rate of \$10,000. Although the program allows a supervisor to confront an employee with evidence of deteriorating job performance, management may not diagnose the underlying cause. The program specifically provides that an employee may not be disciplined or discharged for refusing to enroll in the program. Rather, discipline and discharge may result only in response to the employee's failure to improve his or her job performance. If an employee does agree to obtain treatment, he or she may use accumulated sick, vacation, and compensatory leave for the absences necessary to participate in the program. Like the UAW-Ford Assistance Plan, the union and the employer jointly monitor the program. Drug testing is not a prerequisite or component of treatment.¹⁹²

^{191.} Id.

^{192.} See Service Employees Int'l Union, Guide to Fighting Unfair Drug Testing Programs Dissential 1986 by The Research Repository @ WVU, 1988

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Other unions, including Local 1635, American Federation of State, County and Municipal Employees (City of Rochester, New York),193 and United Rubber Workers Union (Firestone Tire and Rubber Company) have negotiated employee assistance programs which treat not only substance abuse, but also a broad range of personal problems which deter workers from conducting themselves in a productive and safe manner. The programs are confidential and are designed to improve workers' job performance. All the abovementioned programs satisfy the employer's objective of helping workers achieve productive, reliable work habits. What they do not do is allow the companies to privately police the lives of their employees. It is this critical aspect of the treatment programs, the employer's respect for the privacy and dignity of the individual employee, and its recognition of what information it is entitled to and what information should be directed to trained counselors in a confidential environment, that makes the plans examples for both union and industry. An approach to substance abuse rehabilitation that does not recognize the limitations of an employer's right to intrude into the personal life of the worker will not be well-received by the adult men and women who comprise the work force and, therefore, will not succeed.

Although drug testing is not a necessary part of an employee assistance program, where employers are demanding substance testing programs, unions are responding by demanding that such tests be administered only under carefully proscribed circumstances.

The United Mine Workers of America has voiced its objections to random drug testing and questioned the legitimacy of drug testing generally for the same reasons we have discussed. The UMWA does support, however, voluntary employee assistance programs which assure the individual participant's privacy and confidentiality.¹⁹⁴

The American Federation of State, County, and Municipal employees has affirmed its opposition to random or massive drug test-

^{193.} See Employee Assistance Programs: Making Them Work for Members, 4 Am. Fed'n State, County & Mun. Employees No. 3 (1984).

^{194.} Criteria for Evaluating Drug Testing of Miners, Presentation of Dr. James Weeks, 18th https://ds.astchnefug.org/light.org

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ing of workers. Even where employer drug testing of an employee is administered "for cause," AFSCME is opposed to its use as a method for dealing with drug abuse. Instead, the union has insisted that employers emphasize treatment and prevention.¹⁹⁵

The Association of Flight Attendants (AFA) has also issued a statement opposing drug screening of flight attendants except where the employer has "particularized probable cause."¹⁹⁶ AFA has expressed doubts about the validity of drug testing, generally, and has urged airline carriers to develop employee assistance programs which address not only substance abuse but other problems which may cause unsatisfactory work performance, as well. Like many other unions. AFA rejects the notion that drug testing is a prerequisite to drug treatment or that management has the authority to diagnose the personal problems of its workers.

The International Machinists and Aerospace Workers has published a guide to help its local representatives combat unfair drug testing.¹⁹⁷ The guide recommends that a negotiated drug testing program permit testing of employees only where there is probable cause to believe that substance abuse is the reason for impaired safety or job performance. The guide also demands that the laboratory be carefully investigated for its accuracy in test results, that confirmation testing be conducted on a "split sample" whenever a positive test result is obtained, and that gas chromatography/mass spectrometry be the method utilized for confirmation. Further, testing procedures should be clearly communicated to employees. The IAM insists that drug testing be part of a larger program of rehabilitation

^{195.} AM. FED'N STATE, COUNTY & MUN. EMPLOYEES, QUESTIONS AND ANSWERS ABOUT DRUG TESTING IN THE WORKPLACE (1986).

^{196.} Ass'n of Flight Attendants, Explanation of Opposition to DOT/FAA Drug Testing PROPOSAL 3, 10-14 (1987).

^{197.} INT'L ASS'N OF MACHINISTS & AEROSPACE WORKERS, DRUG TESTING IN THE WORKPLACE, UNION REPRESENTATIVES' GUIDE TO ISSUES AND STRATEGIES TO COMBAT UNFAIR DRUG TESTING (1986). See also K. CONLAN, Workplace Drug Testing: A Union Reference Guide for Policy Making 8-10 (1986), which makes similar recommendations for negotiating a substance abuse program, but contains additional suggestions such as subjecting all aspects of the program to the arbitration process, providing employees with independent access to test results and laboratory procedures utilized to perform the analysis, placing the burden of verifying correct specimen ownership identification with the employer, and preserving to the union the right to demand a change in testing methods or laboratory where information exists which challenges the accuracy of either. Disseminated by The Research Repository @ WVU, 1988

and that discipline for substance abuse be imposed in progressive steps.

As these unions have shown, an employer's authority to test employees for substance use can be limited through the bargaining process. Although negotiating a "probable cause" standard may deter an employer from arbitrary or discriminatory selection of employees for testing, the term "probable cause" will only provide workers with meaningful protection if it is well-defined and easily understood by a court or arbitrator. By carefully drawing parameters around the phrase "probable cause," "reasonable suspicion," or other similar limiting language, both the employer and the union will save themselves endless dispute over its proper interpretation. In addition, employees will have a reasonable expectation of the circumstances under which they can be required to submit to testing.

By making all aspects of a substance abuse program, from testing through referral for rehabilitation, subject to the contractual grievance-arbitration procedure (or perhaps a specialized, expedited procedure), the union can monitor and check, on an ongoing basis, the company's potential for violating the rights of its members.

Finally, the drug testing program and employee assistance program agreed upon at the bargaining table need not be included in the body of the collective bargaining agreement itself. Rather, it may be memorialized in a memorandum of understanding, a letter between the parties, or some other side agreement. Because the area of substance testing and substance rehabilitation by employers is an emerging one, matters agreed upon presently may be better discarded or modified in the future. Most likely, it will be easier to eliminate and alter previous agreements between the union and the company where those agreements have not become part and parcel of the collective bargaining agreement. Given the volume of litigation, the developing technology, and the "trial baloon" stage of many current testing programs, it may be prudent to negotiate in a manner which leaves optimum flexibility for change in the coming years.

VI. CONCLUSION

The concern for a safe and efficient workplace, free of the hazhttps://eseature.por.ialcohol_abuse_may_iscreate, is shared by employers,56

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unions, and workers alike. There is much disagreement and debate over the manner in which to achieve that goal. Testing seems, on its face, to provide employers with a tool to eliminate substance abuse and create a beneficial work environment. Closer analysis reveals that drug testing may create more problems than it solves. Drug testing is so technically flawed and so vulnerable to human error that it is of questionable value in providing accurate information about the workforce. Because the tests cannot show the time that the drug was consumed or impairment caused by the drug, as a practical matter, it establishes the employer as a private police force which uses testing to investigate whether an individual consumes drugs at any time. The policing aspect of testing is particularly sinister because it takes place outside of the democratic process, away from the watchful eye of the citizenry which normally checks such authority in the voting booth and in the halls of local government. The potential for false accusation against employees who do not use illicit drugs is significant and should make employers extremely cautious about using the less expensive, and less reliable, tests on the market, such as EMIT and RIA. A cautious approach should also be encouraged by the potential liability an employer exposes itself to each time it demands that an employee submit to drug screening.

If an employer is truly interested in helping workers to overcome drug and alcohol related problems, employee assistance programs can be developed which address a broad spectrum of problems. The success the United Autoworkers and Ford Motor Company have had at Ford plants speaks to the constructive impact that assistance plans can have on worker safety and productivity. More importantly, they illustrate that drug testing is not a necessary component of a program that seeks to achieve a "drug free" workplace.

The increasing number of employers who subject their employees to drug tests predictably will see a corresponding increase in lawsuits, grievance/arbitration proceedings, and other responses by employees and their unions in an effort to protect their rights and interests. It is likely that the eagerness to drug test will be dampened by these efforts and that the testing craze will give way to a more rational, thoughtful approach to the issue of employee substance abuse. Dur-Disseminated by The Research Repository @ WVU, 1988

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ing this period of evolution, however, workers and unions which are conversant with various litigation and collective bargaining strategies will be better able to hold at bay company demands which do not respect the worker.