University of Richmond Law Review

Volume 23 | Issue 1 Article 4

1988

Firing Employees for Refusing to Submit to Urinalysis: The Case for a Uniform Standard of Reasonable Individualized Suspicion

Gloria L. Freye
University of Richmond

NOTES

FIRING EMPLOYEES FOR REFUSING TO SUBMIT TO URINALYSIS: THE CASE FOR A UNIFORM STANDARD OF REASONABLE INDIVIDUALIZED SUSPICION

I. INTRODUCTION

Submitting to an employer's demand for a urinalysis test to detect ingestion of drugs means laying your privacy, reputation, career, livelihood and possibly your freedom[1] on the line. The chances of being asked to submit to a urinalysis[2] or a polygraph test[3] pursuant to employment are well within the realm of possibility. Virginia Electrical Power Company ("Virginia Power"), the fifth largest employer in Virginia,[4] utilizes both urinalysis and polygraphs as investigative tools.[5] Thus, it is foreseeable

---

1. Brief for Appellee at 39, McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa), *aff'd*, 746 F.2d 785 (8th Cir. 1985). NATIONAL INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., PUB. NO. 86-1442, EMPLOYER DRUG SCREENING 9 (1986) [hereinafter EMPLOYER DRUG SCREENING].

Edison Electric Institute company policy expressly states: "Law enforcement officials will be notified whenever illegal drugs are found." BNA SPECIAL REPORT, ALCOHOL AND DRUGS IN THE WORKPLACE: COSTS, CONTROLS, AND CONTROVERSIES 22 (1986) [hereinafter SPECIAL REPORT].

2. One-fourth of Fortune 500 companies use compulsory and random urine testing to detect traces of illegal drugs in their employees. Such companies include General Motors, Greyhound, E.F. Hutton, IBM, Mobil, the New York Times, as well as the Teamsters and United Auto Workers unions. Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 921 (1987). Almost 30% of Fortune 500 companies use pre-employment drug screening. SPECIAL REPORT, *supra* note 1, at 27.

3. The American Polygraph Association at its 1985 annual meeting estimated that 2.3 million people had undergone polygraph examinations. *Biographs in the Workplace: The Use of "Lie Detectors" in Hiring and Firing: Hearings on H.R. 1524 and 1924 Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor*, 99th Cong., 1st Sess. 29 (1985) [hereinafter *Hearings*].

4. Virginia Power employs approximately 13,101 employees based in Richmond. Richmond News Leader, July 18, 1988, at B-4, col. 1.

5. Every employment applicant to Virginia Power must submit a urinalysis report, whether the position applied for is legal counsel, high voltage linesman or nuclear plant inspector. The Nuclear Regulatory Commission ("NRC") does not require drug testing of Virginia Power's nuclear plant employees, relying instead on the nuclear industry to police its own operations. If the NRC, a public agency, were to mandate drug testing the question

that a situation may develop where an employee is fired for refusing to submit to a urinalysis test. This Note focuses on issues that arise when an employee, whether in the public or private sector, is discharged for refusing to submit to a urinalysis. In particular, this Note will analyze the constitutional issues raised by mandatory drug testing, especially as this practice affects public sector employees, and possible causes of action available to private sector employees who have been discharged for failure to submit to mandatory testing.

II. The Urinalysis — Polygraph Comparison

Virginia courts have not yet considered a suit by an employee challenging his termination for refusing to submit to a urinalysis.[6] The Virginia General Assembly has also remained silent on the issue of drug testing in the workplace.[7] However, the use of polygraph examinations in the workplace raises issues similar to those regarding urinalysis, particularly the issue of admissibility. Virginia does regulate the qualification and licensing of polygraph examiners.[8] While there are no Virginia cases dealing with an employee's refusal to submit to a polygraph, such cases have been decided in other jurisdictions.[9] Virginia courts have ruled on the admissi-

---

arises whether the action comes under the color of state action, thereby triggering the constitutional protections currently available to public employees. *See infra* notes 24-25 and accompanying text.

Virginia Power company policy prohibits the use, possession, or dealing of illegal drugs on company property or during company business hours. Telephone interview with Scott Robinson, Virginia Power legal services, in Richmond, Va. (Aug. 27, 1987).

Violation of this policy will result in termination. Illegal off-duty involvement with drugs is also considered a violation of company policy subject to termination, if the involvement adversely affects the company or its employees. Virginia Power employees are not to be under the influence of any substance, legal or illegal, which impairs their ability to perform their duties. Virginia Power, Alcohol & Drug Abuse (Revised July 15, 1986) (employees' Health and Safety Information pamphlet).

6. The Virginia Court of Appeals recently considered a case involving employment drug testing. The decision, however, was restricted to whether a positive drug test result constituted disqualification for unemployment benefits pursuant to Va. Code Ann. § 60.1-58(b) (1950) (repealed 1987). Blake v. Hercules, Inc., 4 Va. App. 270, 356 S.E.2d 453 (1987).

7. The only reference to urine tests in the Virginia Code is found in Virginia Rule 3A:11, which, provides the accused in the prosecution of a felony in a circuit court the right to discover written reports of urine tests that are within the possession of the Commonwealth. Va. Sup. Ct. R. 3A:11(b)(l)(ii).

8. Va. Code Ann. §§ 54-916 to -922 (Repl. Vol. 1982). Virginia is among 26 states that impose licensing requirements on polygraph examiners. *Hearings, supra* note 3, at 52 (statement of Robert F. Harbrent, Pres. of Food & Allied Service Trade Dept., AFL-CIO). Designed as a protection against abuse, these statutes appear to have a legitimizing effect, i.e., indicating to the public that the polygraph is a legally and scientifically acceptable method of detecting deception. The states that license polygraph examiners have a greater number of companies using polygraphs. *Id.*

9. *E.g.*, Smith v. American Cast Iron Pipe Co., 370 So. 2d 283 (Ala. 1979) (refusal to take polygraph deemed failure to cooperate); State v. Century Camera, Inc., 309 N.W.2d 735

bility of polygraph evidence in criminal cases, providing insight into the Virginia courts' perception of such "scientific evidence."[10] The intent of this Note is to examine both federal and state cases on polygraph and urinalysis testing, to analogize urinalysis testing to polygraph testing and use the resulting synthesis to predict how Virginia courts might assess the issues surrounding an employee's dismissal for refusing to submit to a urinalysis.

A. *Problems with the Tests*

The goals of urinalysis testing are to deter employee drug use,[11] to increase employee productivity and to promote job safety.[12] Whether urinalysis actually achieves these goals is at the heart of the controversy. Critics of both drug and polygraph testing point to erroneous test results,[13] the inability of urinalysis tests to measure actual impairment,[14]

(Minn. 1981) (employee compelled to take polygraph violates statute); Kamrath v. Suburban Nat'l Bank, 363 N.W.2d 108 (Minn. Ct. App. 1985) (post-traumatic stress syndrome resulted from mandated polygraph); Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984) (dismissal for failure to submit to polygraph violates public policy).

10. Robinson v Commonwealth, 231 Va. 142, 341 S.E.2d 159 (1986) ("polygraph examinations are so thoroughly unreliable as to be of no proper evidentiary use" *Id.* at 156, 341 S.E.2d 167); Taylor v. Commonwealth, 3 Va. App. 59, 348 S.E.2d 36 (1986) ("To conclude that an unreliable test can yield results which are definite and conclusive is a *non sequitur.*" *Id.* at 62, 348 S.E.2d at 38).

11. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 208 (1986).

12. *Id.* at 210.

13. Much of the criticism is directed toward the defective nature of the tests. The most commonly used field test kits are the Enzyme Multiplied Immunoassay Technique ("EMIT") and the Abuscreen Test. For an explanation of the principles underlying the various methods of biochemical urinalysis, see Comment, *Admissibility of Biochemical Urinalysis Testing Results for the Purpose of Detecting Marijuana Use*, 20 WIS. L. REV. 391 (1984). Both the EMIT and the Abuscreen are considered effective screening devices but not conclusive tests because of the false positive results which may occur. *Id.* at 394. The manufacturers of these tests expressly instruct consumers to submit every positive test to a second confirmatory test, despite their alleged 99% accuracy rate. SPECIAL REPORT, *supra* note 1, at 30.

A consistently recommended method of confirming drug use is the gas chromatography mass spectrometry ("GC/MS") technique. EMPLOYER DRUG SCREENING, *supra* note 1, at 7. GC/MS is a much more costly method because the testing requires a laboratory setting with technicians trained to operate the expensive, highly sensitive instrument which separates unidentified compounds. *Id.* at 6-7. GC/MS has been assessed as 100% accurate in the detection of marijuana use. Moyer, Palmer, Johnson, Charlesen & Ellefson, *Marijuana Testing—How Good Is It?*, 62 MAYO CLINIC PROC. 413, 417 (1987). Subsequent confirmation testing of positive results may cost as much as $80 per sample. The high cost may explain why some employers opt not to use GC/MS confirmation. SPECIAL REPORT, *supra* note 1, at 30.

Other evaluators report the rate of "false positives" to be as high as 25%. *The Many Tests For Drug Abuse*, N.Y. Times, Feb. 24, 1985, § 3, at 17, col. 1. False positives occur when the urinalysis indicates the presence of a targeted drug when it is not actually present.

the inability of polygraphs to detect deception,[15] and the hostile, distrust-

---

False negative errors, indicating the absence of a particular drug when it is actually present, have been found to occur more frequently than false positives. Hansen, Caudill & Boone, *Crisis in Drug Testing*, 253 J. A.M.A. 2382 (1985).

Compounding the error rate is the fact that tests administered by trained laboratory technicians have been found to yield a range of zero to sixty-six percent rate of false positives. McGovern, *Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1459 (1987) [hereinafter McGovern]. These tests were conducted under the *controlled* conditions of a laboratory. Similar blind studies on the error rates of tests performed in the field by non-technicians are needed.

14. Urinalysis merely detects the presence of a suspect drug. SPECIAL REPORT, *supra* note 1, at 29. Urine tests cannot detect "how recently the drug was used, how exposure occurred, or how the drug affected work performance." Herman & Bernholz, *Negligence in Employee Drug Testing*, 92 CASE & COM. 3, 4 (July-Aug. 1987).

Nor are urine tests precise. Positive results can result from the passive inhalation of marijuana smoke, natural bodily enzymes, aspirin, and from eating poppyseed bagels. *Id.* A positive test result for cocaine may appear as a result of drinking herbal tea. SPECIAL REPORT, *supra* note 1, at 29-30. Over-the-counter medication containing phenobarbital may also test positive. *Id.* at 30.

Urinalysis is incapable of distinguishing between on-duty and off-duty drug use. McGovern, *supra* note 13, at 1457. Researchers studying the correlation between smoking marijuana and its delayed effects on driving a car and on operating an airplane reached contradictory findings that would not allow reliable predictions about impairment. Barnett, Licko & Thompson, *Behavioral Pharmacokinetics of Marijuana*, 85 PSYCHOPHARMACOLOGY 51 (1985).

15. Employers typically use polygraph testing to screen applicants and to investigate incidents of theft or wrongdoing. Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1, 28 (1977). The theory behind polygraph examinations is that changes in a person's heartbeat, respiration, skin resistance, and blood pressure indicates truth or deception. Comment, *Regulation of Polygraph Testing in the Employment Context: Suggested Statutory Control on Test Use and Examiner Policy*, 15 U.C. DAVIS L. REV. 113, 116-17 (1981) [hereinafter *Regulation of Polygraph Testing*]. However, the same physiological reactions can be caused by factors other than lying such as "nervousness, state of mind, moral attitude toward lying, physical handicaps, the location of the test, and even the personality of the examiner." *Hearings, supra* note 3, at 4 (statement of Rep. Stewart McKinney, Conn.).

The probability of inaccurate polygraph results increases when the test is used in the pre-employment context. Broad questions which explore an applicant's past are not likely to be a valid indicator of the person's present honesty. Hermann, *Privacy, the Prospective Employee, and Employment Testing: The Need to Restrict Polygraph and Personality Testing*, 47 WASH. L. REV. 73, 85 (1971). The more specific the area of inquiry, the more accurate the analysis. Administering and interpreting the polygraphs are highly subjective tasks. The accuracy of the test depends on the skill, training and competence of the technician, which has frequently been found lacking. *Regulation of Polygraph Testing, supra*, at 114-15.

The American Polygraph Association ("APA") claims an accuracy rate of 90%. *Hearings, supra* note 3, at 29 (statement of Norma Rollins, Assoc. Director, New York Civil Liberties Union). Based on this percentage, of the 2.3 million people tested in 1985, 230,000 people were incorrectly labelled as either honest or dishonest. Studies performed by non-APA researchers demonstrate an accuracy rate of between 64 and 73%. *Id.* at 56. The unreliability of polygraph examinations has generated strong opposition to their use in employment settings. *Id.* at 46. Using polygraphs to conduct background checks on applicants was characterized as "twentieth century witchcraft." *Id.* (statement of Robert F. Harbrant, President, Food and Allied Service Trades Department, AFL-CIO).

ful work environment such testing fosters.[16] Conversely, advocates cite to drug testing's valuable deterrent effect and point to the United States Navy's successful drug testing program as an example.[17]

Employers have turned to both urinalysis and polygraph tests, believing them to be more cost-effective than more traditional methods of labor management such as thorough background investigations, rigorous training, close supervision, performance evaluations, and dismissals for documented just cause. However, the cost of litigation which may flow from abusing urinalysis and polygraph tests as labor management techniques should cause employers to re-evaluate their cost effectiveness. For instance, employers may be held liable if presumptively confidential test results are disclosed to the public, the police, or to prospective employers.[18] Misuse of the information obtained from the urinalysis may also trigger liability. Misuse is any use other than to determine drug use. Urinalysis may reveal "pregnancy, social alcohol use, . . . epilepsy, diabetes, or manic-depression."[19] Discovery of these medical conditions may result in prejudicial treatment or wrongful discharge of the employee, whether or not the condition affects his job performance. Firing or rejecting an employee solely on the basis of an unconfirmed positive urinalysis test result would also constitute misuse and may give rise to a claim of negligent testing.[20] Manufacturers and toxicologists alike stress the need for confirmatory testing.[21]

Given the unequal bargaining power of employees vis-à-vis employers, it is arguable that submitting to a urinalysis or a polygraph test is truly consensual. There is no consent if an employee does not know that a urine specimen taken during a routine physical is secretly tested for drugs. Moreover, an employee who refuses a "request" for a urine sample

---

The Polygraph Protection Act of 1985 passed the House, but died in the Senate Labor Committee. 2 Cong. Index (CCH) 35,018 (Dec. 10, 1986).

16. SPECIAL REPORT, *supra* note 1, at 28.

17. In 1980, 47% of the seamen in the study under the age of 26 admitted to recent illicit drug use. Following the implementation of drug testing, the rate fell to 4%. *Id.*

18. Miller, *supra* note 10, at 232.

19. *Id.* Just as employers have gone beyond the scope of legitimate interests in conducting urinalysis testing, so have employers who conduct polygraphs. Questions of a highly personal nature may be put to employees during an examination. The subject may resist responding to these questions, but the machine continues to record physiological changes that accompany the silence or evasion. *Regulations of Polygraph Testing*, *supra* note 15, at 118. In an effort to partially remedy this abuse, Virginia statutorily prohibits questions pertaining to sexual activities from being asked during polygraph examinations "unless such sexual activity of the prospective employee has resulted in a conviction of a violation of the criminal laws of this State." VA. CODE ANN. § 40.1-51.4:3 (Repl. Vol. 1986).

20. L. Dogoloff & R. Angarola, *Urine Testing in the Workplace* 15 (S. Price ed. 1985).

21. Hansen, *Drug Abuse Testing Programs Gaining Acceptance in the Workplace*, 64 CHEMICAL AND ENGINEERING NEWS 7, 9 (1986).

or a polygraph test places himself in a "no-win" situation.[22] While the employee's refusal of the request arouses the employer's suspicion as to drug use, submitting to the test may confirm them. An employee's refusal to submit to testing may place his prospective or current employment at risk. Thus, "the economic compulsions are generally such that the employee has no realistic choice but to submit to the urinalysis or polygraph test."[23]

B. *Public Employees*

The United States Constitution extends to public employees limited protections against intrusions by the federal, state or local government as an employer. Unfortunately, employees working in the private sector have few comparable protections from the abuses of their employers.[24] As a general rule, federal constitutional protections inhibit only government or state actions, not the actions of private employers.[25] However, where the conduct of a private employer has been such an abusive interference with the employee's constitutional rights, courts have found a violation of public policy and rejected the private employer's state action defense. Gross violations of an individual's constitutional rights may bring the actions of private individuals within the purview of the fourteenth amendment.[26]

1. Fourth Amendment Challenges

McDonell v. Hunter[27] was a class action suit brought on behalf of prison guards challenging the constitutionality of Department of Corrections officials' discretionary searches.[28] One of the guards, McDonell, had been observed associating with certain people suspected of drug involvement. Based on this observation alone, he was requested to submit to a urinalysis. McDonell refused, and as a result his employment was terminated.[29] McDonell alleged that the Department of Corrections' drug test-

22. McGovern, *supra* note 13, at 1475.

23. Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111, 115 (W. Va. 1984) (quoting State v. Community Distributors, Inc., 64 N.J. 479, 484, 317 A.2d 697, 699 (1974)).

24. McGovern, *supra* note 13, at 1455.

25. SPECIAL REPORT, *supra* note 1, at 60. Private employers have successfully defended constitutional challenges with state action arguments. *Id.*

26. *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (state action defense rejected in face of flagrant abuse of individual's constitutional rights); Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (private employer's violation of employee's constitutional rights violated public policy).

27. 809 F.2d 1302 (8th Cir. 1987).

28. *Id.* at 1304. Employees were subjected to searches of their vehicles, strip searches, urinalyses, blood tests and breath tests. *Id.*

29. *Id.* at 1304-05. McDonell was reinstated with lost pay ten days later. *Id.*

ing policy violated his fourth amendment rights and constitutional right to privacy.[30]

The court began its analysis by recognizing previous federal decisions which held that urinalysis constituted a search and seizure within the meaning of the fourth amendment.[31] The court balanced the state's need to search prison employees as a means of insuring prison security and the invasion of the employee's right to privacy.[32] The court reasoned that, while on duty, corrections officers have a diminished expectation of privacy, and that such a diminished expectation of privacy is reasonable.[33] Within these parameters, the court addressed both the uniform, random drug testing scheme[34] and the conducting of drug tests based on a reasonable suspicion. The court held that urinalysis could be "performed uniformly or by systematic random selection" upon employees who had daily contact with prisoners, so long as the selection was not arbitrary or capricious.[35] The court based its decision on the importance of insuring prison safety and security, the fact that urinalysis is not as intrusive as body searches, and corrections employees' diminished expectation of privacy under the fourth amendment.[36]

The court analyzed the facts of *McDonell* according to the rationale espoused in *Shoemaker v. Handel*.[37] *Shoemaker*[38] upheld daily breathalyzer testing and random, unscheduled drug testing of race horse jockeys. The court in *Shoemaker* determined that race horse jockeys had a diminished expectation of privacy because they were employed in a

30. *Id.* at 1305. The court did not decide the privacy issue. *See* McGovern, *supra* note 13, at 1465.

31. *McDonell*, 809 F.2d at 1307 (citing Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); Jones v. McKenzie, 628 F. Supp. 1500, 1508-09 (D.D.C. 1986), *rev'd in part, vacated in part*, 833 F.2d 335 (D.C. Cir. 1987); Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); Storms v. Coughlin, 600 F. Supp. 1214, 1217 (S.D.N.Y. 1984); *In re* Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, ___, 505 N.Y.S.2d 888, 889 (N.Y. App. Div. 1986); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325-27 (Fla. Dist. Ct. App. 1985)).

This line of cases developed from the ruling in Schmerber v. California, 384 U.S. 757, 767 (1966), where the Supreme Court held that the fourth amendment right of people to be secure in their persons from unreasonable search and seizure extended to the involuntary taking of blood for testing. In *Capua*, 643 F. Supp. at 1513, the court analogized urine and blood samples, noting that both are obtained for the purpose of learning physiological facts about the person through chemical analysis. Therefore, the search and seizure protections afforded blood tests also applied to urine tests. *Id.*

32. *McDonell*, 809 F.2d at 1307.

33. *Id.* at 1306.

34. A uniform, random drug testing scheme is one where every worker in every class is eligible for testing, but persons to be tested are selected on a random basis from the class.

35. *McDonell*, 809 F.2d at 1308.

36. *Id.*

37. *Id.* (construing Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.) *cert. denied*, 107 S. Ct. 577 (1986).

38. *Shoemaker*, 795 F.2d 1136.

heavily regulated industry.[39] The court weighed the jockeys' diminished expectations of privacy against the state's desire to ensure the integrity of the horse racing industry. The heavily " 'regulated industry' exception to the warrant requirement"[40] of the fourth amendment applied to the horse racing industry because jockeys must be licensed. The licensing requirement was also used to support the court's conclusion that the jockeys' expectations of privacy were diminished.[41] The balance was struck between the jockeys' "somewhat" diminished expectation of privacy and the public's confidence in the integrity of the horse racing industry.[42] The interests of the "betting" public were found to outweigh the jockeys' diminished expectations of privacy.[43] Thus, the court appears to hold that the interests of a particular group of society are sufficient to meet the definition of a compelling "state" interest under the fourth amendment.

Prior to *Shoemaker*, the only cases that had upheld random urinalysis testing under the fourth amendment involved military personnel. Those decisions were based on the rationale that national security required servicemen to be fit for duty twenty-four hours a day.[44] Prior to *Shoemaker*, only public safety and concern about safety-sensitive jobs such as law enforcement, which impact on the entire public, were compelling enough to permit warrantless urinalysis.[45] Prior to *Shoemaker*, several cases had characterized urinalysis as equally as degrading as body cavity searches.[46] However, the *Shoemaker* court disagreed and stated that urinalysis is less intrusive than body cavity and strip searches.[47] The public's interest in drug-free jockeys is not a public safety issue and not an interest "compelling enough to warrant the severe intrusion urinalysis testing repre-

---

39. *Id.* at 1142.

40. Miller, *supra* note 11, at 228. Types of warrant requirement exceptions include consent searches, criminal searches where obtaining a warrant is impractical, and the limited routine searches that promote "particular regulatory schemes," as found in the firearm or liquor industries which are closely regulated by government. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358-59 (1974).

41. *Shoemaker*, 795 F.2d at 1141.

42. *Id.* at 1142.

43. *Id.*

44. Miller, *supra* note 11 at 231. The first major use of urinalysis was in 1972 by the military. Because the testing was pursuant to the government's capacity as employer, as opposed to law enforcer, an administrative exception was taken to the fourth amendment allowing the government to legally test entire units without individualized suspicion, probable cause or warrants. The courts found that the government's need for military readiness sufficiently "outweighed the servicemembers' fourth amendment rights," thus establishing a balancing test approach. McGovern, *supra* note 13, at 1460-61; *see* Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) (random urinalysis upheld due to need for military preparedness).

45. Miller, *supra* note 11, at 230; *see* Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985).

46. *See* Tucker v. Dickey, 613 F. Supp. 1124 (W.D. Wis. 1985); Storms v. Coughlin, 600 F. Supp. 1214 (S.D. N.Y. 1984).

47. Miller, *supra* note 11, at 230.

sents."[48] Thus, *Shoemaker* sets a low threshold for a state's interest to be compelling.

It appears to be unnecessary that the *McDonell* court followed the anomalous[49] findings of *Shoemaker* regarding random urinalysis because there were no facts establishing that the corrections institution *needed* random drug testing. There was no factual basis for the *McDonell* majority to conclude that employees who use drugs and have daily contact with prisoners are likely to supply drugs to inmates.[50] Moreover, this rationale is not congruent with the court's ruling that other urinalysis requests must be based on reasonable suspicion,[51] a standard which calls for a factual basis. The court in *McDonell* clearly states that such reasonable suspicion is "based on specific objective facts and reasonable inferences drawn from these facts in light of experience that the employee is then under the influence of drugs . . . or that the employee has used a controlled substance within the twenty-four hour period prior to the required test."[52] This language implies that urinalysis should be used as a tool to corroborate reasonable suspicions of on-the-job impairment. Also, this language implies that an employer's legitimate interests and reasonable suspicions regarding employee conduct should be limited to that which directly relates to job performance.[53] If the *McDonell* court had applied its own test of reasonableness it would have reached a different conclusion on the random urinalysis issue because there was no evidence to support the need for random tests.

Apparently responding to criticism lodged against urinalysis testing, the court in dicta stressed the need for strict guidelines to assure confidentiality of urine test results.[54] The court stated that measures should be taken to ensure that equipment and procedures were sufficiently trustworthy to ensure accuracy.[55] The court also rejected the state's argument that by signing a consent form, correctional employees had waived their expectation of privacy. Consent to a search "must be given voluntarily and without coercion determined from the totality of the circum-

48. *Id.*
49. *Id.* at 230-31.
50. *McDonell*, 809 F.2d at 1308.
51. Miller, *supra* note 11, at 231.
52. *McDonell*, 809 F.2d at 1308.
53. Miller, *supra* note 11, at 224.
54. *McDonell*, 809 F.2d at 1309.
55. *Id.* The court specified that drug testing equipment and procedures should conform to standards set out in Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986). In *Spence*, prisoners alleged that the Iowa State Penitentiary's random drug testing policy violated their constitutional rights because the drug tests used were not reliable. *Id.* at 754-55. The court held that double EMIT testing satisfied due process requirements and provided adequate protection of the inmates' fourteenth amendment rights. *Id.* at 756. Inmates, however, were not allowed to present expert testimony regarding EMIT reliability. EMIT's 95% accuracy rate was deemed sufficient for disciplinary action. *Id.*

stances."[56] Thus, employers cannot always rely upon consent forms to protect themselves from fourth amendment challenges.

Despite the arguments that *Shoemaker* was not a well-reasoned case,[57] two recent suits have been based on its theory. In one case, random drug screening was upheld, and in the other case, it was rejected.[58] As noted in *Rushton*, the *Shoemaker* court established that a "warrantless administrative search is justified where a strong state interest exists in conducting an unannounced search and the pervasive regulation of the industry has reduced the justifiable privacy expectation of the individual searched."[59] This reasoning was applied in *Rushton v. Nebraska Public Power District*.[60] The Nebraska Public Power District's nuclear power station was heavily regulated by the Nuclear Regulatory Commission ("NRC")[61] which required that the area be protected and secure. The few officials who were authorized to have unescorted access were subjected to detector devices and pat-downs.[62] These facts led the court to conclude that the employees of a nuclear power plant have a diminished expectation of privacy[63] due to the vital need for safety associated with employment in the nuclear power industry. Therefore, the administrative search exception[64] to the fourth amendment was applicable[65] and properly applied to the facts. The conclusion reached in *Rushton* is much more credible than in *Shoemaker*, given the truly compelling interest of protecting the public from nuclear accidents, and the employees' diminished expectation of privacy being one that the public as a whole would deem to be reasonable.

---

56. *McDonell*, 809 F.2d at 1310.

57. Miller, *supra* note 11, at 228. *Miller* strongly criticizes *Shoemaker* as "unsupportable in light of both current search and seizure case law, and more particularly the rule of legality currently prevailing in urinalysis testing cases." *Id.*

58. *See* Rushton v. Nebraska Pub. Power Dist., 653 F. Supp. 1510 (D. Neb. 1987) (random urinalysis of nuclear plant employees upheld). *Cf.* Fraternal Order of Police v. City of Newark, 216 N.J. Super. 461, 524 A.2d 430 (1987) (random urinalysis of police officers rejected since law enforcement is not a highly-regulated industry).

59. *Rushton*, 653 F. Supp. at 1524.

60. *Id.*

61. *Id.* at 1512-13.

62. *Id.*

63. *Id.* at 1524-25. The NRC required the Nebraska Public Power District, as a licensee, to search employees entering the nuclear power station for firearms, explosives, and incendiary devices. Packages and vehicles were searched and employees were subject to random pat-down searches. *Id.*

64. Warrantless searches of businesses in highly regulated industries do not violate the fourth amendment because of the strong public interest involved. Also businesses who enter highly regulated industries have impliedly consented to warrantless searches in that they expect regulation to be enforced via inspections. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor industry); United States v. Biswell, 406, U.S. 311 (1972) (guns).

65. *Rushton*, 653 F. Supp. at 1525.

In *Fraternal Order of Police v. City of Newark*,[66] narcotic bureau officers were ordered to provide urine samples. The officers sued claiming a violation of their fourth amendment rights. The court quickly determined that the taking of urine samples constituted a search and seizure within the meaning of the fourth amendment. The issue then became whether the search was reasonable. The court's discussion indicated that to be reasonable, a warrantless search must be based on some well- grounded, individualized suspicion.[67]

Starting with the premise that warrantless searches, absent probable cause are unconstitutional,[68] the court looked for exceptions to the warrant requirement. The City of Newark relied on *Shoemaker*, and argued that urinalysis of law enforcement officers comes within the "pervasively regulated industry"[69] exception to the warrant requirement. This exception permits searches and seizures without either probable cause or an individualized suspicion. The pervasively regulated industry exception to the warrant requirement applies when unannounced administrative searches of private commercial property are necessary to insure that regulations are being followed.[70] While on commercial property, employees of highly regulated industries are also subject to warrantless searches.[71] The City of Newark contended that because its police officers were bound by statutes and administrative regulations, they were subject to warrantless administrative searches.

The court rejected the *Shoemaker*-premised argument as "inapplicable,"[72] stating that "[p]olice officers are not members of a 'highly-regulated' industry;"[73] that law enforcement is not a "commercial enterprise;"[74] and to find otherwise would "dangerously extend and distort [the highly-regulated industry] exception to the warrant requirement beyond its intended scope."[75] As no special exception to the warrant requirement existed, the burden fell upon the city to demonstrate the reasonableness of the proposed urinalysis program[76] which it could not do.[77]

---

66. 216 N.J. Super. 461, 524 A.2d 430 (1987).
67. *Id.* at ___, 524 A.2d at 432-33.
68. *Id.* at ___, 524 A.2d at 433.
69. *Id.* at ___, 524 A.2d at 434.
70. *Id.*
71. *Id.*
72. *Id.* at ___, 524 A.2d at 435.
73. *Id.* at ___, 524 A.2d at 434.
74. *Id.* at ___, 524 A.2d at 435.
75. *Id.*
76. *Id.*
77. *Id.* at ___, 524 A.2d at 437. The court listed the considerations involved in balancing the need for the search against the invasion of personal rights as: (1) the scope of the intrusion; (2) the manner in which the search is conducted; (3) the justification for the search; (4) the place in which the search is conducted; (5) the need for the particular technique; and (6) whether practical, alternative means are available. The private interests considered in the

The majority of decided cases addressing urinalysis in the public employment sector "have concluded that such testing is unconstitutional in the absence of some reasonable individualized suspicion."[78] The reasoning of these cases recognizes the public employer's interest in public safety[79] as balanced against the public employee's diminished expectation of privacy.[80] The courts look for a "factual showing that drug use is widespread among the specific employees in question or that it presents an identifiable risk to the public."[81] The reasonable individualized suspicion test protects employee privacy while enabling the public employer to prevent the use of drugs in the workplace.[82] Applying the above analysis, the court concluded that the random urinalysis proposed by the City of Newark for its narcotic bureau officers was unreasonable and constitutionally invalid since the city had neither probable cause nor individualized suspicion.[83]

2. Fourteenth Amendment Challenges

Fourteenth amendment challenges may be grounded upon violations of substantive due process[84] and procedural due process.[85] For example, in *Rushton v. Nebraska Public Power District*[86] employees of a nuclear power plant raised both substantive and procedural due process claims. The employees alleged that the risk of false positive results from the urinalysis tests arbitrarily subjected them to the risk of losing their jobs. This substantive due process claim was denied by the court because evidence showed that the test was accurate when used in conjunction with a

---

balancing test included: (1) the degree of personal intrusion; (2) whether the search is for civil or regulatory purposes or to discover evidence of a crime; (3) whether the intrusion is a search or an inquiry; (4) whether the intrusion is of the person, residence, automobile or commercial premises; and (5) whether the intrusion is based on individualized suspicion. *Id.* at ___, 524 A.2d at 435-36.

78. *Id.* at ___, 524 A.2d at 436.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id. Contra* National Treasury Employees Union v. Von Raab, 816 F.2d 170, (5th Cir. 1987) (random urinalysis of Customs Service employees); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (random urinalysis of prison guards); Rushton v. Nebraska Pub. Power Dist., 653 F. Supp. 1510 (D. Neb. 1987) (random urinalysis of nuclear plant employees).

83. Factors which support reasonable suspicion include "absenteeism, deterioration of work habits, chronic lateness, and confidential information as to illegal drug use." *Newark*, 216 N.J. Super. at ___, 524 A.2d at 438.

84. "Substantive due process provides a shield against arbitrary and capricious deprivations of liberty." Rushton v. Nebraska Pub. Power Dist., 653 F. Supp. 1510, 1525 (D. Neb. 1987).

85. Procedural due process provides for notice and an opportunity to be heard. *Id.* at 1527.

86. 653 F. Supp. 1510 (D. Neb. 1987).

confirmatory method.[87] The *Rushton* court also found the employees' procedural due process claim lacking because the employees had the opportunity to be heard both prior to the imposition of the drug testing and prior to the termination proceedings for their failure to submit to urinalysis testing.[88]

Everett v. Napper[89] addressed a city firefighter's claim[90] that his fourteenth amendment rights were violated when he was suspended without a hearing for refusing to submit to a urinalysis test. The firefighter was asked to submit to a urinalysis following a report that the firefighter had purchased marijuana from an informant. The firefighter's refusal resulted in immediate suspension based on the violation of the department rule that employees "shall promptly obey all proper and lawful orders of supervisors."[91]

The firefighter claimed that his suspension without a hearing violated his procedural due process rights. In analyzing the notice and opportunity to be heard elements of due process, the *Everett* court looked to *Cleveland Board of Education v. Loudermill.*[92] In *Loudermill,* the Supreme Court held that the minimum due process rights to which an employee in the public sector is entitled prior to termination are oral or written notice, an explanation of the charges against the employee, and an opportunity to respond to the charges.[93] To require more would unduly frustrate public employers confronted with unsatisfactory employees.[94] Based on *Loudermill,* the *Everett* court determined that prior to termination a public sector employee need only receive notice of the charges against him and an opportunity to be heard before being deprived of a property interest.[95] The plaintiff firefighter had participated in a full hearing which

87. *Id.* at 1525.

88. *Id.* at 1527.

89. 632 F. Supp. 1481 (N.D. Ga. 1986), *aff'd in part, rev'd in part,* 833 F.2d 1507 (11th Cir. 1987).

90. The firefighter also claimed a violation of the fourth amendment. However, the court held that no search had occurred within the meaning of the fourth amendment because the firefighter had refused to submit to the urinalysis. *Id.* at 1484.

91. *Id.* at 1483.

92. 470 U.S. 532 (1985).

93. *Id.* at 546.

94. *Id.*

95. *Everett,* 632 F. Supp. at 1485. There was written notice to the employees that they would be subject to polygraphs and drug tests. The notice, however, was in the form of a memorandum which was issued the day before the firefighter was asked to submit to the urinalysis. The department had previously promulgated rules prohibiting the use of drugs while on duty, and prohibiting off-duty use that impaired performance. The previous rules, however, had no requirement that polygraph or drug test refusals could result in termination of employment. The court gave very little regard to the short notice of the policy. *Id.* at 1483-84.

was held within two months of the suspension. This period of time was considered reasonable and not a violation of procedural due process.[96]

The firefighter also contended that the department's urinalysis requirement violated his substantive due process rights and that his termination based on his refusal to submit to a urinalysis test was arbitrary and capricious. The test for determining the constitutional validity of government intrusion is predicated upon the particular interest involved and whether there is a reasonable need for the intrusion.[97] The issue before the court, therefore, was to evaluate whether the Bureau's need to test employees implicated by the informant was reasonable, and whether the testing was rationally connected to protecting public welfare and property.[98] The court found that drug use by firefighters would pose a serious threat to community safety. Consequently, the Bureau's interest in insuring that firefighters were fit to protect the safety of the community was "sufficiently rational justification" for the urinalysis requirement.[99] The court therefore granted summary judgment to the Bureau on the substantive due process claim.[100]

3. Fifth Amendment Challenges

In *Rushton v. Nebraska Public Power District*,[101] employees argued that a drug testing program administered by the Nebraska Public Power District violated their fifth amendment rights against self-incrimination. The protection of the fifth amendment, however, extends only to self-incriminating evidence that is testimonial or communicative.[102] The results of blood tests were not viewed as evidence of a testimonial or communicative nature in *Schmerber v. California*[103] Therefore, the *Rushton* court similarly concluded that the results of urine tests are "not evidence of a testimonial or communicative nature"[104] and therefore do not compel an employee to be a witness against himself. Accordingly, urinalysis evi-

96. *Id.* at 1485. On appeal, however, the Eleventh Circuit Court of Appeals reversed the lower court's ruling on the plaintiff's procedural due process claim. The court held that the Bureau was required to offer the plaintiff a hearing before suspending him without pay. *Everett*, 833 F.2d at 1512.

97. *Everett*, 632 F. Supp. at 1485.

98. *Id.*

99. *Id.*

100. *Id.* at 1486.

101. 653 F. Supp. 1510 (D. Neb. 1987).

102. Schmerber v. California, 384 U.S. 757 (1966) (taking blood sample to determine intoxication was an attempt to gather incriminating evidence, however, the blood test results constitute neither testimony nor a communicative act).

103. *Id.*

104. *Rushton*, 653 F. Supp. at 1528. Persons challenging polygraph examinations could arguably allege violation of their fifth amendment rights. Responses made to questions presented by the polygraphist are oral and should qualify as being communicative and testimonial in nature.

dence was not viewed as self-incriminating and thus the admission of the urinalysis results did not violate the fifth amendment.

4. Ninth Amendment Challenges

The right to privacy is not specifically enumerated in the Constitution but it has been retained by the people through the ninth amendment.[105] The right to privacy protects the intimacy of the mind, the body and the home.[106] Interference with this fundamental liberty should only be permitted in the face of a "compelling state interest."[107] In *Rushton v. Nebraska Public Power District*[108] employees claimed privacy rights in the act of urination and in the medical information contained within the urine samples themselves. However the court found that in order for the plaintiffs to have sustained a right of privacy claim in the act of urination, at a minimum, the act would have had to have been witnessed.[109]

The Court of Appeals for the Third Circuit established a privacy right to the information gleaned from a urinalysis in *Shoemaker v. Handel*.[110] However, the *Rushton* court reasoned that if the employer's interest in obtaining the urinalysis was sufficiently compelling, then the employer's right to the information was established.[111] The *Rushton* court noted, however, that disclosure of the information obtained from the urinalysis to a law enforcement agency would be a violation of the right to privacy, if such a release by the employer had occurred in the past or would occur in the future.[112]

---

105. The ninth amendment reserves to the people those rights not enumerated in the Constitution. The constitutional right to privacy which protects individuals from unlawful governmental invasion has been found to exist in the penumbra of the ninth amendment. Griswold v. Connecticut, 381 U.S. 479 (1965). The right to privacy has been extended to protect individuals from unwarranted disclosure of personal information to governmental agencies. Gunn v. Employment Development Dept., 94 Cal. App.3d 658, 156 Cal. Rptr. 584 (1979). *See* generally Watson, *The Ninth Amendment: Source of a Substantive Right to Privacy*, 19 J. MARSHALL L. REV. 959 (1986); Note, *Guarantying the Right to Privacy: A Proposal*, 12 RUTGERS L. REV. 615 (1986); Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980).

106. J. BAKALAR & L. GRINSPOON, DRUG CONTROL IN A FREE SOCIETY, 117 (1984). Ten state constitutions have recognized a right to privacy: Alabama, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. *See* SPECIAL REPORT, *supra* note 1, at 76 (citing Luck v. Southern Pac. Trans. Co., No. C-84-3-230 (Cal. Super. Ct., filed Aug. 5, 1985).

107. J. BAKALAR & L. GRINSPOON, *supra* note 106, at 117.

108. 653 F. Supp. 1510, 1529 (D. Neb. 1987).

109. *Id.* at 1528.

110. 795 F.2d 1136, 1144 (3rd Cir.), *cert. denied*, 107 S. Ct. 577 (1986).

111. *Rushton*, 653 F. Supp. at 1528.

112. *Id.*

C. *Private Employees*

Private employers are not constrained by the protections of the United States Constitution because of the state action barrier.[113] Employees in the private sector must look to state[114] or federal legislation[115] for remedies against a discharge for failure to submit to a urinalysis. Private sector employees have also grounded their claims in tort or contract law.[116]

1. Tort of Invasion of Privacy

It has been said that "the right to privacy is an individual right that should be held inviolate. To hold otherwise, under modern means of communication, hearing devices, photography, and other technological ad-

---

113. Most constitutional rights protect individuals from the actions of government on their agents. Individuals receive no constitutional protection from purely private acts. An employee cannot successfully challenge the acts of a private employer as violating his constitutional rights unless he can show the acts constituted state action. To establish state action "a complaining party must show that there was a sufficiently close nexus between the state and the challenged action so that the action of the private party may be treated as that o the state itself." Stevens v. Morrison-Knudsen Saudi Arabic Concortium, 576 F. Supp. 516, 522 (D. Md. 1983) (state action defense used successfully where employees jailed for marijuana use).

114. No state has yet adopted drug-testing legislation, but twenty-four states have considered various proposals. The proposals ranged from strictly barring any test that could not indicate on-the-job impairment, to limiting the tests to those grounded on reasonable suspicion of on-the-job use where the job is safety-sensitive, to tests requiring reasonable suspicion only, and to the least restrictive proposal of merely providing procedural protection. McGovern, *supra* note 13, at 1470-71.

Massachusetts attempted to attach a rider to its polygraph regulations that would have barred the testing of body fluids as a condition of employment. However, the labor unions refused to support the drug-testing rider because of their concerns about safety which outweighed the employees' privacy rights. *Id.* at 1481.

115. The Federal Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 2 U.S.C. and 42 U.S.C.) is designed to prevent discrimination against the handicapped. In the area of drug testing, the Act would prohibit the use of drug testing when used to discriminate against drug addicts. McGovern, *supra* note 13, at 1469.

Drug testing used in a discriminatory manner against minorities could also be challenged under Title VII of the Civil Rights Act of 1964. *Id.* Black employees in Shield Club v. City of Cleveland, 647 F. Supp. 274 (N.D. Ohio 1986), *rev'd*, No. 86-4108 (6th Cir. Dec. 4, 1987) alleged that field urine tests discriminated against blacks because the tests had a 56% false positive rate for detection of marijuana. Allegedly, the test was reporting traces of marijuana which were in fact traces of melanin, a dark brown or black skin pigment, whose chemical analysis resembles marijuana. Researchers have conducted studies that found no cross reactivity between melanin and the marijuana metabolite that shows up in urine and as a result, they have concluded that there is no basis for the melanin issue. Hansen, *supra* note 21, at 11.

116. Note, *Employee Drug-Testing—Issues Facing Private Sector Employers*, 65 N.C.L. REV. 832, 833 (1987).

vancements, would effectively deny valuable rights and freedoms to the individual."[117] An invasion of privacy claim requires that a plaintiff show:

(1) the unwarranted appropriation or exploitation of his personality; or

(2) the publicizing of his private affairs with which the public has no legitimate concern; or

(3) the wrongful intrusion into one's private activities, in such a manner as to cause mental suffering, shame or humiliation to a person of ordinary sensibilities.[118]

In *Satterfield v. Lockheed Missiles & Space Co.*,[119] a private sector employee challenged the termination of his employment on the grounds of invasion of privacy and intentional infliction of emotional distress. The employee, Satterfield, was terminated as a result of a urinalysis performed during his annual physical which tested positive for marijuana. Satterfield alleged that Lockheed knew or should have known that his urine sample was not labeled properly and had been confused with other samples. However, the court dismissed Satterfield's claim of intentional infliction of emotional distress because he failed to show an intrusion so outrageous as to result in serious mental or physical injury, or humiliation to himself.[120]

In addition, the court dismissed Satterfield's invasion of privacy claim because Lockheed did not publicize the results of the test. In the urinalysis context, claims of invasion of privacy are grounded in the circumstances surrounding the taking of the sample or upon the analysis, use, and confidentiality of the test results.[121] The *Satterfield* court was not sympathetic to the private employee's injuries, and would not consider a claim for invasion of privacy unless the employee actually submitted to the urinalysis. However, in the future, courts may recognize that a private employee's rights when forced to submit to a urinalysis are as important as when the employee is confronted with other types of searches and seizures, so that the private employee may refuse the test without having employment terminated.

---

117. Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111, 116 (W. Va. 1984) (quoting Roach v. Harper, 143 W. Va. 869, 876, 105 S.E.2d 564, 568 (1958)).

118. Miller, *supra* note 11, at 241 (quoting Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1369 (D.S.C. 1985)).

119. 617 F. Supp. 1359 (D.S.C. 1985).

120. *Id.* at 1369. *But cf.* O'Brien v. Papa Gino's of Am. Inc., 780 F.2d 1067 (1st Cir. 1986) (polygraph used to investigate drug use was considered to be "highly offensive to a reasonable person and . . . invasive of the plaintiff's privacy"). *Id.* at 1071.

121. McGovern, *supra* note 13, at 1469. The *Code of Ethical Conduct for Physicians Providing Occupational Medical Services* adopts the position that employers are entitled to information about medical fitness for duty but not to medical diagnosis of their employees. NATIONAL INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 86-1477, DRUG ABUSE IN THE WORKPLACE 10 (1986).

2. Wrongful Discharge

At-will employees appear to have the least protection from employers who use urinalysis and polygraphs. The doctrine of employment at-will provides that "when a contract of employment does not fix a definite term the employment is terminable without cause at the will of either party."[122] An employer's right to terminate at-will however, is not absolute.[123] If the employer's reason for discharge constituted a violation of public policy,[124] the employee may recover damages under a claim of wrongful discharge.

In *Smith v. American Cast Iron Pipe Co.*,[125] Smith, a private sector employee, was discharged for refusing to submit to a polygraph following the discovery of "three suspicious cigarette butts" in his car which was parked on American Cast Iron Pipe Co.'s ("ACIPCO") premises.[126] Part of ACIPCO's policy was a verification rule that provided for the dismissal of any employee who failed to cooperate with the investigation committee, which included refusal to take a polygraph test when required.[127] Smith was discharged, not for suspected possession of drugs, but for failure to cooperate with the investigation committee. Smith sued ACIPCO for breach of contract, arguing that the use of the polygraph in private employment settings should be void as against public policy. Smith also claimed that he should have the same constitutional protections from the use of polygraphs as those accused in a criminal case.[128] The court rejected Smith's claims and ruled that his discharge was proper. The court found that protections in private employment situations are contractual,

---

122. Note, *supra* note 116, at 842.

123. Bowman v. State Bank of Keysville, 229 Va. 534, 539, 331 S.E.2d 797, 801 (1985) (termination of at-will employee violated public policy where bank attempted to control shareholder employee's vote of stock).

124. '[P]ublic policy' is that principle of law which holds that 'no person can lawfully do that which has a tendency to be injurious to the public or against public good[']. . . . It is a question of law which the court must decide in light of the particular circumstances of each case.

The sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government—with us—is factually established.

Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111, 114 (W. Va. 1984) (quoting Allen v. Commercial Casualty Ins. Co., 131 N.J.L. 475, 477-78, 37 A.2d 37, 38-39 (1944)).

125. 370 So. 2d 283 (Ala. 1979).

126. *Id.* at 284.

127. *Id.*

128. *Id.* at 287. *See supra* note 10. In a subsequent trial of a different ACIPCO employee who brought action for wrongful discharge, the court held polygraph tests were admissible. The employee had voluntarily submitted to the polygraph pursuant to an investigation into drug trafficking. Green v. American Cast Iron Pipe Co., 446 So. 2d 16 (Ala. 1984).

not constitutional, and because ACIPCO's employment handbook provided for discharge based on a failure to cooperate, Smith's discharge was proper.

Cordle v. General Hugh Mercer Corp.[129] also dealt with the wrongful discharge of an employee who refused to take a polygraph. The *Cordle* court reached the opposite conclusion of *Smith* and upheld the wrongful discharge claim of two cleaning maids who refused to take a polygraph. The court found a violation of public policy existed because West Virginia recognizes a legally protected interest in privacy and has a state law that limits employers' use of polygraphs.[130]

In comparing *Smith* with *Cordle*, it appears that wrongful discharge claims of at-will employees will probably not succeed unless that particular state recognizes a legally protected privacy interest or has legislation that regulates the use of urinalysis or polygraphs.[131] If a state regulation prohibits the use of polygraphs, an employee may argue that the use of urine testing should also be prohibited based on a violation of public policy. Hence, absent a state constitutional right to privacy, an employee may establish that an employer's "behavior failed to conform to established interests of society"[132] and thus violated public policy. Therefore, a private employee's termination for refusing to submit to a urinalysis would constitute a wrongful discharge.

3. Breach of Contract

Contractual employees who are dismissed on drug-related charges can challenge the discharge on the grounds of breach of contract and demand a showing of just cause for their termination. If provided for in the employment contract, the dispute will be submitted to arbitration.[133] Drug-related discharges may be set aside in arbitration,[134] however, arbitrators have been persuaded to uphold discharges based on evidence that the employees received notice of the drug policies, the employees were treated

---

129. 325 S.E.2d 111 (W. Va. 1984).

130. *Id.* at 112-13. *Accord* State v. Century Camera, Inc., 309 N.W.2d 735 (Minn. 1981) (violation of Minnesota statute that prohibits employers from compelling employees to take polygraph); Kamrath v. Suburban Nat'l Bank, 363 N.W.2d 108 (Minn. Ct. App. 1985) (court upheld a bank teller's award of $60,000 for posttraumatic stress syndrome which resulted from submitting to polygraph requested by the bank in violation of Minnesota statute).

131. The dissent by Justice Miller in *Cordle* noted that the majority cited no cases where a court "permitted an at-will employee to recover on a polygraph discharge in the absence of a statute forbidding such discharge." *Cordle*, 325 S.E.2d at 118 (Miller, J., dissenting).

132. McGovern, *supra* note 13, at 1467.

133. Note, *supra* note 116, at 844.

134. *Id.*

equally, the rule was reasonable and there was actual on-the-job impairment.[135]

III. VIRGINIA APPLICATION

In *Blake v. Hercules, Inc.*,[136] the Virginia Court of Appeals addressed the issue of whether positive drug test results constituted disqualification for unemployment benefits.[137] The court held that positive drug test results were insufficient evidence to establish that the employee, Blake, willfully disregarded the company's rule prohibiting employees from reporting to work under the influence of alcohol.[138]

Blake had worked as a solvent powder mixer for about a year and a half at Hercules, a munitions factory which manufactured explosives.[139] The worker safety program at Hercules was stringent and included rules prohibiting the use or possession of alcohol or drugs on company premises and further prohibited workers from being under the influence of alcohol or drugs while at work.[140] Workers were aware of these policies through worker orientation, newsletters and posted notices.[141]

The facts of *Blake* present the situation of an employee in a safety-sensitive job. The employer's legitimate concern for safety is reflected in company rules and the care they have taken to make sure employees are aware of these rules. Blake was not suspected of drug use until the company received an anonymous tip. Acting upon the tip, a company investigation was conducted which lasted two months and included searches of Blake's person and car, but failed to produce any evidence.[142] Prior to the anonymous tip, no one had observed Blake's alleged drug use or had any suspicion of on-the-job possession, use or impairment. In addition, the company reported no unusual absences, diminished productivity or unusual behavior by Blake upon which to base their suspicions of drug use.

The caution with which the court reviewed the *Blake* evidence suggests that the court would be reluctant to deprive an individual of his constitutional rights without convincing evidence. The court's sympathies appear to lie with the employee as the burden to prove work-related misconduct was placed on the employer.[143] The court implied that the employer lacked reasonable individualized suspicion to warrant a demand for a urinalysis. Furthermore, the court recognized the lack of scientific evi-

135. *Id.*
136. 4 Va. App. 270, 356 S.E.2d 453 (1987).
137. *Id.* at 271 n.1, 356 S.E.2d at 454 n.1.
138. *Id.* at 271, 356 S.E.2d at 454.
139. *Id.* at 272, 356 S.E.2d at 455.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 273, 356 S.E.2d at 455.

dence correlating the presence of a drug in one's urine with on-the-job impairment and the imprecision of urinalysis testing because it does not distinguish between on and off-duty use or active or passive drug exposure.[144]

The tone of the *Blake* decision suggests that if the case involved a public employee discharged for failure to submit to a urinalysis, Virginia courts would adopt a reasonable individualized suspicion test that would require some objective factual basis before an employer's demand for a urinalysis would be constitutionally valid. This test would require observed, documented behavior that suggested intoxication, poor performance or unlawful conduct on the part of the employee. With such evidence at hand, an employer could then legitimately use a urinalysis test as a tool to corroborate the existing suspicions. This conclusion apparently would be reached even in the face of the ultrahazardous work site of a munitions factory. The dicta in *Blake* implies that the employer's need for drug testing would have to be based on some objective factual basis and an overriding, compelling interest in order to justify intrusion.

For the past thirty years, Virginia has rejected the admissibility of polygraph test results due to their lack of reliability.[145] This fact further supports the contention that employer use of urinalysis testing would not be given blanket approval. In *Taylor v. Commonwealth*,[146] the Virginia Court of Appeals stated that the burden of establishing the trustworthiness of scientific evidence rests upon the proffering party.[147] Virginia courts that extend this burden of proof to the admissibility of urinalysis test results will be putting both public and private employers on notice to develop strict procedural guidelines that incorporate confirmatory methods in drug testing programs.

Virginia's adherence to the doctrine of employment at-will suggests that a private employee's wrongful discharge claim would have to be premised on a violation of public policy. A claim that employer-mandated polygraph or urinalysis tests violate public policy would most likely fail in Virginia because there are no statutes forbidding or restricting their use nor are there any cases that find their use to be an egregious intrusion upon an employee's right of privacy. The possibility of adding a right to privacy provision to section 10 of the revised Virginia Constitution was rejected because the revisers believed a thorough study of the implications of new technologies should be conducted prior to such an addition.[148] Thus, it appears that tort cases initiated by private employees for invasion of privacy and wrongful discharge would not likely succeed.

---

144. *Id.*
145. *See* Robinson v. Commonwealth, 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986).
146. 3 Va. App. 59, 348 S.E.2d 36 (1986).
147. *Id.* at 62, 348 S.E.2d at 37.
148. A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, 175 n.9 (1974).

IV. Conclusion

Whether an employee is in the public or private sector, he or she should not be subjected to a urinalysis test as a condition of employment unless the employer has a reasonable, objective, individualized suspicion or the employee's job is safety-sensitive. It is not necessary to violate personal liberties to combat drug use on the job. Methods less intrusive than urinalysis such as close supervision, performance evaluations and dismissals for just cause should be utilized whenever feasible to achieve the goals of job safety, increased productivity and reduced costs. Every possible safeguard should be explored to insure that the employee's personal freedom and right to privacy are not lost in a specimen jar.

Gloria L. Freye