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Comments: Drug Testing of Private Employees

Dean S. Landis
University of Baltimore School of Law

DRUG TESTING OF PRIVATE EMPLOYEES

Many private employers have begun testing job applicants and employees for illegal drug use. This comment considers the reliability of the tests used, as well as the issues of privacy raised by their use. The author suggests that public policy disfavors the use of drug testing in the private public sector because of these reliability and privacy concerns. The author concludes with a discussion of common law causes of action that may be available to a private employee subjected to drug testing, including tortious invasion of privacy, defamation, and wrongful discharge.

I. INTRODUCTION

The American workplace has become a battleground for employees challenging drug testing programs initiated by employers. It is reported that twenty-five to thirty percent of the Fortune 500 companies have started to test applicants and current employees for drug use.[1] Several Maryland companies have joined in the trend of requiring employee drug tests.[2] There are numerous reasons why private employers institute drug testing programs. The primary reason is lost productivity caused by substance abuse at the workplace. Studies indicate that billions of dollars are lost each year in American industry as a result of employee drug use.[3]

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1. Lacayo, *Putting Them All to the Test*, TIME, Oct. 21, 1985 at 61 (approximately 25% of Fortune 500 companies test for drug use); Englade, *Who's Hired and Who's Fired*, STUDENT LAWYER, 20, 22 (April 1986), [hereinafter Englade] (about 25% of Fortune 500 companies test now, but that figure has gone up 250% in the last three years and probably will increase still further); *Mandatory Drug Testing: An Invasion of Privacy?*, TRIAL, Sept. 1986 at 91, [hereinafter *Mandatory Drug Testing*] (29% performed preemployment screening in 1985 and 26% tested employees under certain conditions); Special Report, *Alcohol and Drugs in the Workplace: Costs, Controls, and Controversies* (1986), at 27 (BNA) [hereinafter *BNA*] (a 1985 survey of 180 Fortune 500 firms found that by 1987, 38% expected to have drug testing programs).
2. Baltimore Sun, March 17, 1986, at 5A, col. 2.
3. Estimates vary widely on the amount of money lost by American industry each year because of employee drug use. According to the Employee Assistance Society of North America, drug abuse accounts for a loss of 8.3 billion dollars yearly. *BNA*, *supra* note 1, at 7. Another source notes that more than 33 billion dollars worth of productivity was lost because of drug abuse in 1983. *BNA*, *supra* note 1, at 8. A third source cites studies that indicate that the costs of drug abuse to the U.S. economy exceeds 26 billion dollars annually. Hartsfield, *Medical Examinations as a Method of Investigating Employee Wrongdoing*, 37 LAB. L.J. 692 (1986) [hereinafter Hartsfield] (citing *Dealing with Drug Abuse in the Workplace*, BUSINESS AND HEALTH, (December 1985)).

   Most commentators agree, however, that illegal drug use is not the most prevalent problem in the workplace. Lost productivity and accidents because of alcohol consumption far outweigh the costs of substance abuse. A National Institute on Drug Abuse survey estimated that 100 million people had consumed alcohol within the past 30 days, while 30.7 million had used illegal drugs in the same period of time. *BNA*, *supra* note 1, at 11. Research regarding fatalities and injuries caused by impaired employees suggests that alcohol presents the greatest danger at the workplace. See, e.g., *Mandatory Drug Testing*, *supra* note 1, at 91, (citing Mason &

Employers also cite rising liability insurance, deteriorating job performance, increased absenteeism, and loss of quality in products and services as justifications for drug testing.[4]

Employers utilize drug testing in varying ways. Some require testing of all job applicants.[5] Others use random drug tests to curb substance abuse among persons already employed.[6] Still other employers test only when an employee is suspected of drug use.[7] Drug testing also is used after an employee has been involved in an accident in order to determine if drugs were a cause of the accident.[8]

Employer responses to positive test results vary from punitive measures to counselling programs. Twenty-five percent of companies testing persons currently employed at the company automatically discharge any employee whose urine test indicates drug use.[9] Other companies require that all employees who test positive for drug use attend rehabilitation programs.[10]

This Comment explores the legal ramifications of drug testing of

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McBay, *Ethanol, Marijuana, and Other Drugs in 600 Drivers Killed in Single-Vehicle Crashes in North Carolina*, 29 J. FORENSIC SCI. 987 (1984)). It also has been alleged that prescription drugs are more widely abused than illegal drugs. It is estimated that 70% of all drug related deaths are caused by the abuse of prescription drugs. *BNA*, *supra* note 1, at 71.

4. *See Mandatory Drug Testing*, *supra* note 1, at 91 ("worker drug and alcohol abuse cost employers $60 billion annually in lost productivity, accidents, higher medical claims, increased absenteeism, and theft of company property . . . according to the U.S. Chamber of Commerce"); Cohen, *Labor Law's New Specialty: Drug Testing*, AMERICAN LAWYER, June, 1986, at 10 (rising rates for liability insurance for employee accidents have caused some employers to utilize drug testing); Englade, *supra* note 1, at 22 (lost productivity, unnecessary accidents and absenteeism, deteriorating job performance, highway accidents, family disruption, and loss of quality in products and services are reasons why companies have started to test employees for drug use); *see also* RIA Employment Alert, March 6, 1986 at 4 (additional reasons for instituting drug testing include management reaction to drug-related incidents or increased drug use in the company, general concern for employee safety, and response to governmental regulations).
5. RIA Employment Alert, *supra* note 4, at 4 (80% of all drug testing occurs during pre-employment screening of applicants).
6. *See* The Nat'l L. J., April 7, 1986, at 22, col. 1 (discussing the legal challenge to the Southern Pacific Transportation Company's random drug testing program).
7. Hartsfield, *supra* note 3, at 693 (railroad regulations require two supervisory employees to have "a reasonable suspicion" before an employee can be subjected to a drug test); *BNA*, *supra* note 1, at 110-114, 119-124.
8. Federal Railroad Administration regulations provide that a urine sample may be required after accidents if the railroad reasonably suspects that an employee involved in an accident was impaired or under the influence of drugs at the time of the accident. Hartsfield, *supra* note 3, at 693.
9. *Mandatory Drug Testing*, *supra* note 1, at 91.
10. *See* RIA Employment Alert, *supra* note 4, at 4 (57% of companies that perform testing strongly encourage or require treatment for substance abuse). Some companies also provide counselling programs for suspected drug users before any drug problem surfaces at the workplace. *See BNA*, *supra* note 1, at 81-84, 114-116 (companies such as Northwestern Bell and Adolph Coors Brewing Co. provide counselling programs fully funded by the company or provide employee assistance programs.)

employees by private employers. The first section discusses the different types of drug tests used by employers and the extent to which these tests achieve the employers' objectives in instituting the testing. The Comment then reviews case law that has analyzed the reliability of drug tests and examines the privacy rights of private sector employees. The Comment concludes with a discussion of three common law causes of action that may be available to an employee who has been subjected to a drug test.

II. TYPES OF TESTS USED TO DETECT DRUG USE

For the purposes of drug testing, virtually all employers, both public and private, use urine testing.[11] There are three primary reasons for the prevalence of urine testing. First, the residue of drugs remains in an individual's excretory system for days or even weeks after the effect of the drug has worn off.[12] Second, proponents of drug testing believe that the nature of the physical intrusion necessitated by a urine sample is less invasive than the intrusion required by a blood test.[13] Last, and perhaps most important from the employer's perspective, the most common urine tests are relatively inexpensive and can be administered at the employer's workplace by persons with no medical experience.[14]

The urinalysis test most widely used by employers is the enzyme multiplied immunoassay test, otherwise known as the EMIT test.[15] The EMIT test has been the subject of considerable criticism. The Syva Cor-

11. *BNA*, *supra* note 1, at 31. Drug use apparently also can be detected by analysis of saliva, hair, breath, brainwaves, or blood. Of these various alternatives to urinanalysis, only blood tests are acknowledged as being reliable, convenient ways to detect intoxication. *Id.*

12. Englade, *supra* note 1, at 23-24; *See also* Bishop, *Drug Testing Comes to Work*, CALIFORNIA LAWYER, 29 (April, 1980) (some drugs can stay in the body's system for days, even weeks, after use); Comment, *Admissibility of Biochemical Urinalysis Testing Results for the Purpose of Detecting Marijuana Use*, 20 WAKE FOREST L. REV. 391, 391 n.8 (1984) [hereinafter Comment, *Detecting Marijuana Use*] (the process of purging the chemical residue of marijuana may range from days to weeks); Morgan, *Problems of Mass Urine Screening for Misused Drugs*, 16(4) J. OF PSYCHOACTIVE DRUGS 305, 306 (1984) [hereinafter Morgan] ("[t]he tests that assess the drugs of most current interest (marijuana and cocaine) measure metabolites of the drug that persist for hours or days after use.").

13. *BNA*, *supra* note 1, at 32-33 ("A blood test is more intrusive in terms of physical effects, but a urine test is more intrusive in terms of what it says about your personal life.").

14. *Id.* at 31 (blood tests are costly and complicated); Comment, *Detecting Marijuana Use*, *supra* note 12, at 392 (commonly used urine tests can be purchased in "inexpensive field kits that can be transported and used outside of the laboratory environment"); Englade, *supra* note 1, at 23 (urine tests are used because they allow for testing of many specimens at a reasonable cost without time-consuming sample preparation and personnel training); Comment, *Your Urine or Your Job: Is Private Employee Drug Urinalysis Constitutional in California*, 19 LOY. L.A.L. REV. 1452, 1455-56 (1986) [hereinafter Comment, *Private Employee Urinalysis*] (the development of an inexpensive, portable test made large scale drug testing convenient).

15. Comment, *Private Employee Urinalysis*, *supra* note 14, at 1455.

poration, the manufacturer of the test, claims that the test is ninety-seven to ninety-nine percent accurate when properly administered,[16] but a study conducted at Northwestern University found that twenty-five percent of the positive test results in employer administered EMIT tests were inaccurate.[17] This discrepancy in results may be caused by failure to administer the EMIT test properly. Contrary to Syva's recommendations, employers may fail to use control samples.[18] Control samples, laboratory specimens that have been confirmed as showing positive or negative results from drug use, are recommended by Syva to ensure that the testing equipment and personnel are performing efficiently.[19] Additionally, employers frequently disregard Syva's recommendation that a laboratory test be conducted to ensure the accuracy of the initial EMIT test.[20]

The type of urinalysis generally used to confirm results of the EMIT test is the gas chromatography/mass spectrometry test (GC/MS).[21]

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16. *Id.* at 1456, n.38.
17. *Mandatory Drug Testing*, *supra* note 1, at 91.
18. *See Detecting Marijuana Use*, *supra* note 12, at 398 (recommending that control samples be used when testing is done).
19. *Id.*
20. In Peranzo v. Coughin, 608 F. Supp. 1504 (S.D.N.Y. 1985), the court quoted the recommendations of the Syva Corporation with regard to confirmation of results:

    > *Confirmation of Results.* Syva recommends confirmation of positive results. Confirmation of positive results is important in certain environments. Repeating the test or obtaining verbal corroboration from the individual may be adequate confirmation in some situations. If greater accuracy is required, Syva recommends that results be confirmed by an alternative scientific method. Any of several chromatographic procedures may be used for confirmation, the most sensitive and specific of which is gas chromatography-mass spectrometry (GC-MS). The procedure used should include a hydrolysis step. Procedures without hydrolysis detect only the unconjugated form of the major urinary metabolite, whereas the EMIT Urine Cannabinoid Assay detects both the conjugated and unconjugated forms, as well as additional urinary metabolites.

    Id. at 1514 n.16.

    Many employers forgo using confirmatory tests because these tests cost $40 to $80 each compared to $5 to $10 for an EMIT test. *Mandatory Drug Testing*, *supra* note 1, at 91; *see also Detecting Marijuana Use*, *supra* note 12, at 396 n.60 (the cost of conducting the test usually used as a confirmation for an EMIT or similar test is about $75 whereas the initial test costs only $9). Even government officials frequently disregard the recommendation to conduct a confirmatory test. *See* Wykoff v. Resig, 613 F. Supp. 1504 (N.D. Ind. 1985) (prisoners subjected to disciplinary action on the basis of an unconfirmed EMIT test); *accord* Jensen v. Lick, 589 F. Supp. 35 (D.N.D. 1984) (prison officials could impose sanctions based on an unconfirmed EMIT test). *But see* Jones v. McKenzie, 628 F. Supp. 1500 (D. D.C. 1986) (school bus attendant's dismissal on the basis of a single unconfirmed EMIT was improper); Higgs v. Wilson, 616 F. Supp. 226 (W.D. Ky. 1985) (prison officials need to confirm an EMIT result before sanctions may be imposed).
21. *See* Englade, *supra* note 1, at 23 (the GC/MS test is a combination of two types of urinalysis — the gas chromatography test and the mass spectrometry test); *see also* Morgan, *supra* note 12, at 312 ("Many commentators now feel that a positive immunoassay screen must be confirmed by gas chromatography plus mass spectrometry (GC/MS)"); Peranzo v. Coughlin, 608 F. Supp. 1504, 1514 n.16 (S.D.N.Y.

Although the GC/MS test must be performed in a laboratory,[22] and requires a greater amount of time to receive results than the EMIT test, it is widely acknowledged as being more reliable.[23] The use of this test greatly reduces the chance of error in drug testing procedures.[24] Nonetheless, there are still problems inherent in urine testing.

Surveys have found that laboratories specializing in drug testing sometimes have large percentages of error.[25] The Federal Center of Disease Control in Atlanta, Georgia, reported that in 1985 there was as much as a 66% error in laboratory drug testing.[26] Instrument malfunction and human error account for much of this inaccuracy. The most common problem involves contamination and mislabelling of specimens received by a laboratory. For example, the United States Army once recalled 52,000 urine samples because of mislabelling and specimen contamination.[27] Additionally, "chain of custody" problems arise when more than a few samples are tested together.[28]

The illegal drug most frequently used in the United States is marijuana.[29] Consequently, almost all employers are concerned about the use

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1985) (quoting a Syva release that suggests that the GC/MS test be used as a confirmation for EMIT tests).

22. *See* Comment, *Detecting Marijuana Use*, *supra* note 12, at 394-95 (both the gas chromatagraphy test and the mass spectrometry test must be performed in laboratories).
23. Englade, *supra* note 1, at 23; *see also* McBay, Dubowski, and Finkle, *Urine Testing for Marijuana Use*, 249 J. A.M.A. 881 (1983) [hereinafter *Urine Testing*] (". . . alternative test methods . . . should have sensitivity at least equal to the screening test method — a condition not generally met at present. Gas chromatography — mass spectrometry assays . . . are available and proved accurate and sufficiently sensitive.").
24. Englade, *supra* note 1, at 23; *Urine Testing*, *supra* note 23, at 881.
25. *See* Morgan, *supra* note 12, at 312-316 (citing reports that indicate that drug testing laboratories have questionable quality control). In addition to poor quality control, laboratories that perform drug testing exclusively are usually unregulated by state health officials. Maryland has recently passed a law requiring all laboratories that perform drug tests to be licensed by the Department of Health and Mental Hygiene. Baltimore Sun, December 30, 1987, at 1B.
26. *Mandatory Drug Testing*, *supra* note 1, at 91.
27. *BNA*, *supra* note 1, at 68. *See generally* Morgan, *supra* note 12, at 312-13.
28. *See* Comment, *Detecting Marijuana Use*, *supra* note 12, at 398 (the degree of chain of custody problems is normally a function of the number of specimens taken); *see also* H. APPENDIZER, SPORTS AND LAW, 164-67 (1985) (listing chain of custody safeguards required when Olympic athletes are tested).

    Courts addressing the question of drug testing by public entities have held that the chain of custody of the urine sample must be established if the results of the urinalysis are to be used for disciplinary purposes. *See* Wykoff v. Resig, 613 F. Supp. 1504, 1513-14 (N.D. Ind. 1985) (finding that adequate measures were taken to insure that plaintiff's urine sample was properly handled and that only authorized personnel had access to plaintiff's sample). Private employers using the EMIT test and other immunoassays are less able to ensure that such protective measures are followed because of the lack of trained personnel performing the tests and the uncontrolled environment in which the testing is done. *See* Englade, *supra* note 1, at 23.
29. A 1982 survey conducted by the National Center on Drug Abuse in Rockville, Maryland found that 64% of Americans aged 18-25 said they had used marijuana at

of marijuana by employees. However, detection of marijuana use in the workplace by means of urine testing causes unique problems. The urine tests most frequently used to detect marijuana, the EMIT and other immunoassay tests, do not reveal the presence of the psychoactive ingredient of marijuana in an individual's urine. Rather, they examine the reactivity of three substances — a reagent, an indicator, and a THC metabolite.[30] The tests do not detect the presence of marijuana or any other drug. They monitor the reaction between chemicals found in one's urine and the chemical reagent provided in the tests.[31] One of the problems with the EMIT and other immunoassay tests is that various chemicals produced by the body may be confused with those present in marijuana.[32] As a result of this "cross-reactivity," detection of marijuana by use of an immunoassay test such as the EMIT test is often inaccurate.[33] Because the amount of cross-reactivity varies with each individual, immunoassays are considered by some experts to be inconclusive of marijuana use.[34]

Other considerations when testing for marijuana use are "passive inhalation" and "false positives." Passive inhalation, the unintentional inhalation of marijuana smoke, may account for test results indicative of drug use.[35] False positives occur when a substance other than an illegal drug is responsible for test results that indicate drug use.[36] Moreover,

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least once, while only 28% of the respondents admitted to experimenting with cocaine. Englade, *supra* note 1, at 22.

30. *See* Comment, *Detecting Marijuana Use*, *supra* note 12, at 396-97.
31. *Id.*
32. *Id.* at 394.
33. *Id.* at 394, 396-97.
34. *Id.* at 394; Morgan, *supra* note 12, at 316. Indeed, some researchers have concluded that it is virtually impossible to standardize immunoassays and that "a single urine specimen can be positive by one immunoassay and negative by another." *See Urine Testing*, *supra* note 23, at 881.
35. Comment, *Detecting Marijuana Use*, *supra* note 12, at 397. Whether a person tests positive for marijuana use after passive inhalation depends upon the calibration of the urinalysis used. Urine tests can be adjusted to detect greater or lesser amounts of the THC metabolite in a subject's urine. Consequently, some experts argue that the passive inhalation problem can be avoided if person's utilizing the tests calibrate the tests to detect greater amounts of the THC metabolite. Perez-Reyes, Di Guiseppi, and Davis, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids*, 249 J. A.M.A. 475 (1983).
36. Because all immunoassay tests are based upon the reaction of the tests' reagents and various enzymes in an individual's urine, innaccurate results can be caused when enzymes other than those of an illegal substance react with a reagent. *See generally* Morgan, *supra* note 12, at 309-311; *Detecting Marijuana Use*, *supra* note 12, at 394-96. There is some debate over what legal substances may cause drug tests to be inaccurate. *See* Morgan, *supra* note 12, at 309 (false positives may occur for unknown reasons); *Private Employee Urinalysis*, *supra* note 16, at 1459, n.52; *see also* Englade, *supra* note 1, at 23 (therapeutic cold medications, schizophrenia medications, and antibiotics can all cause false positives). Some researchers believe that persons with dark skin are more likely to produce positive test results in a urine test because enzymes in their skin react in a manner similar to the THC metabolite found in marijuana. New York Times, May 3, 1986, at 1, col.3.

the Syva Corporation has stated that six factors can affect the amount of THC, the psychoactive chemical in marijuana, that is excreted in urine.[37] Syva's recognition of these factors suggests that the test is not sufficiently reliable to serve as a basis for adverse personnel action.

III. CASE LAW CONCERNING THE RELIABILITY OF DRUG TESTING

Challenges to drug testing programs initiated against municipal, state or federal governments are common.[38] By contrast, few suits have

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37. These factors are:

> 1. THC has been shown to be metabolized (converted to metabolites) more rapidly in chronic (frequent) users than in infrequent users.
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> 2. In controlled smoking studies, frequent users of marijuana often show initial levels (in blood as well as in urine) of THC metabolites that are greater than the highest levels obtained by relatively infrequent users.
>
> 3. Absorption and distribution of THC throughout the body is different for each person. Thus, the rate of conversion to metabolites (and the subsequent excretion of these metabolites) of the THC that is stored in fatty tissue will vary for different individuals. It is not yet known whether factors such as body weight, stress, the menstrual cycle, diet or other physical or psychological influences can cause erratic increases and decreases in the excretion rate in any given individual.
>
> 4. The method of administration (smoking or eating) does not appear to affect excretion of metabolites.
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> 5. The volume of urine differs throughout the day for any individual. When the total volume is greater, for instance as a result of drinking large quantities of liquid, the concentration of a given component can become diluted. Thus, assuming that the same amount of THC metabolites are present in the urine of two different individuals, the person with the greatest *total volume of urine* will exhibit an apparently lower concentration of metabolites. Conversely, if an individual has retained urine for an extended period of time, for instance, during sleep, the urine concentration of the various components may be higher in a sample taken from the first urination in the morning than a sample taken from a urination later in the day. This fact may also affect the apparent concentration of THC metabolites in random urine collections over a 24-hour day.
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> 6. The kidney functions as one of the body's "filters." It removes waste from body fluids and deposits the waste in the urine for excretion. When the kidney's ability to filter is impaired (by disease, for instance), the wastes are not removed as promptly as they would be in healthy individuals. . . . [A]n individual may exhibit an erratic urinary excretion pattern of a given waste product such as THC metabolites, for example. (citations omitted).

Comment, *Private Employee Urinalysis, supra* note 16, at 1458, n.44.

38. *See* McDonell v. Hunter, 746 F.2d 785 (8th Cir. 1984)(employees of Iowa Department of Corrections were granted a preliminary injunction that prohibited strip searches, blood tests, and urinalysis of correctional officers as a condition of their employment); Banks v. Federal Aviation Admin., 687 F.2d 92 (5th Cir. 1982) (discharge of air traffic controllers on the result of a voluntary urine test, where urine samples had been destroyed following initial testing, was improper); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976) (urine and blood tests of municipal bus drivers, following serious accidents or when suspected of alcohol or drug abuse, performed in hospital held proper); Jones v. McKenzie, 628 F. Supp. 1500 (D. D.C. 1986) (discharge of school bus attendant on the basis of

been instituted against private employers.[39] As a rule, actions brought against public employers are brought on constitutional grounds such as the prohibition against unreasonable searches and seizures or the right of privacy.[40] Although an analysis of the constitutional arguments is not

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single unconfirmed EMIT test was arbitrary and capricious); National Treasury Employees Union v. Rabb, 649 F. Supp. 380 (E.D. La. 1986) (Customs Service drug testing plan requiring that all employees seeking promotion to certain positions submit to "close" observation during urine collection violates legitimate expectations of privacy, and absent reasonable suspicion, violates the fourth amendment); Lovvorn v. Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986) (city may not, consistent with the fourth amendment, subject firefighters to drug testing without reasonable cause to believe firefighter had used drugs); Capua v. Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (drug testing of city's firefighters, absent reasonable suspicion of drug use, is impermissible); Pella v. Adams, 638 F. Supp. 94 (D. Nev. 1986) (issues of material fact raised concerning the reliability of the EMIT test preclude summary judgment for prison officials who use the test as a basis for disciplinary action); Everett v. Napper, 632 F. Supp. 1481 (N.D. Ga. 1986) (former city firefighter's termination for refusal to participate in drug testing upheld because testing was not a "search" under the fourth amendment); Shoemaker v. Handel, 619 F. Supp. 1089 (D. N.J. 1985) (urinalysis and breathalyzer of jockeys pursuant to State Racing Commission regulations upheld); Higgs v. Wilson, 616 F. Supp. 226 (W.D. Ky. 1985) (preliminary injunction granted against prison from disciplining inmates solely on the basis of unconfirmed EMIT tests); Wykoff v. Resig, 613 F. Supp. 1504 (N.D. Ind. 1985) (EMIT test results, if confirmed by another type of urine test, can be used in prison disciplinary proceedings); Peranzo v. Coughlin, 608 F. Supp. 1504 (S.D.N.Y. 1985) (drug testing of inmates not enjoined); Allen v. Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (uring testing of government employees engaged in extremely hazardous work is not an unreasonable search under the fourth amendment); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (random drug testing of inmates on a daily basis is constitutional if conducted in a reasonable manner); Jensen v. Lick, 589 F. Supp. 35 (D.N.D. 1984) (prison officials could impose sanctions on prisoners based upon unconfirmed EMIT tests); Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (1986) (teachers cannot be required as a condition of tenure to submit to urine testing without reasonable cause); Caruso v. Ward, 133 Misc. 2d 544, 506 N.Y.S.2d 789 (1986) (order requiring police department personnel serving in the organized crime control bureau to consent and submit to random drug testing was unconstitutional and permanently enjoined); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985) (order regarding drug testing of police upon reasonable suspicion upheld); Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. App. 1985) (if city has reasonable suspicion, it may require urinalysis of police and firefighters); Smith v. State, 250 Ga. 438, 298 S.E.2d 482 (1983) (EMIT test is sufficiently reliable to stand as the only evidence in a parole revocation hearing); Kane v. Fair, 33 Cr. L. 2492 (Mass. Superior Ct., August 5, 1983) (state failed to show that knowledgeable scientists would accept an unsubstantiated EMIT positive result as evidence of drug use and required the positive result be accompanied by an alternative method of testing).

39. Cohen, *Labor Law's New Specialty: Drug Testing*, THE AMERICAN LAWYER, at 10 (March 1986) (most decisions involving private sector drug screening have occurred at the state court level or have been subject to arbitration). *See also* Susser, "Legal Issues Raised by Drugs in the Workplace," LABOR LAW J. 42, 45-50. In Association of Western Pulp v. Boise Cascade, 644 F. Supp. 183 (D. Or. 1986), the district court held that the employer's drug testing program did not violate workers' privacy rights, federal law, or state law as asserted by the employer's union.

40. *See, e.g.*, Lovvorn v. Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986) (firefighters successfully challenged the city's drug testing plan on the grounds that it violated their fourth amendment right to be free from unreasonable searches and seizures by

appropriate to suits against private employers,[41] an examination of how courts have analyzed the reliability of drug tests is of relevance to both private and public challenges to drug testing programs.

In *Pella v. Adams*,[42] the United States District Court for the District of Nevada discussed the reliability of urinalysis testing as evidence of drug use.[43] In *Pella*, a state prisoner challenged the competence of the technician performing the urinalysis as well as the use of positive EMIT test results in a disciplinary proceeding against him.[44] The *Pella* court noted the varying conclusions on the reliability of the EMIT test reached in prior cases brought against governmental agencies.[45] The court therefore refused to grant summary judgment for the defendants because there was a "substantial issue of material fact" as to the accuracy and reliability of the tests.[46]

In *Jones v. McKensie*,[47] the United States District Court for the District of Columbia refused to approve the firing of a school bus attendant on the basis of a single, unconfirmed positive urinalysis test.[48] After examining the nature of the EMIT test in relation to marijuana detection, as well as to the recommendations of the Syva Corporation, the court found that termination of the plaintiff's employment based on one drug test was arbitrary and capricious.[49] Specifically, the *Jones* court held that an unconfirmed EMIT test is not sufficient proof that the plaintiff was under the influence of marijuana while at work.[50]

In *Wykoff v. Resig*,[51] a prisoner brought an action against the Indiana Department of Corrections, claiming that his constitutional rights

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the government); National Treasury Employees Union v. Von Rabb, 649 F. Supp. 380 (E.D. La. 1986) (Customers Service drug testing plan infringes legitimate expectations of privacy of governmental employees).

41. *See* Stevens v. Morrison-Knudsen Saudi Arabian Consortium, 576 F. Supp. 516 (D. Md. 1983) (employer's acts of searching employees lockers for drugs did not amount to "state action" and therefore the employees could not raise protections of federal constitution); *see also* Blum v. Yaretsky, 457 U.S. 991 (1982) (acts of private individuals are beyond the scope of "state action" and thus beyond the protections of the federal constitution unless the State has exercised coercive power, making the act that of the State).
42. 638 F. Supp. 94 (D. Nev. 1986).
43. *Id.* at 97.
44. *Id.* at 95.
45. *Id.* at 97.
46. Summary judgment was granted for defendants as to Pella's fourth amendment claims and Pella's claims for damages, yet summary judgment was denied as to Pella's due process claims arising from his challenges to the testing program initiated by the defendants. *Id.* at 99.
47. Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986).
48. *Id.* at 1500.
49. The court relied on, *inter alia*, a report by the Food and Drug Administration, a letter published by three toxicologists in the Journal of the American Medical Association, and a scientific advisory written by the United States Center for Disease Control. *Id.* at 1505-07.
50. *Id.* at 1506.
51. Wykoff v. Resig, 613 F. Supp. 1504 (N.D. Ind. 1985).

were violated because he was subjected to disciplinary proceedings on the basis of a single EMIT test. The United States District Court for the Northern District of Indiana examined past decisions that had addressed the reliability of drug tests and found that there was considerable debate about the reliability of unconfirmed EMIT test results.[52] The court stated that "considering this case in light of all the aforementioned cases, this court would normally face a very difficult and delicate question as to the constitutionality of sanctions imposed upon prisoners based upon unconfirmed single EMIT tests."[53] However, because the prisoner's initial EMIT test had been confirmed four months later by an alternative method of urinalysis, the court upheld the use of the EMIT test result against the prisoner.[54]

In *Storms v. Coughlin*,[55] prisoners challenged a random EMIT testing program employed by a New York state prison.[56] The plaintiffs in *Storms* questioned both the reliability of the tests and the manner in which they were performed.[57] The United States District Court for the Southern District of New York determined that the issue of the test's reliability, although not providing a basis for a preliminary injunction to enjoin the testing, raised an issue of substance that was sufficient to overcome a motion to dismiss.[58] The court reached the same result under similar facts a year later in *Peranzo v. Coughlin*.[59]

IV. THE PRIVACY ISSUE

The reliability of drug tests is not the only policy issue relevant to private sector drug testing. Privacy, or more precisely the invasion of privacy, is an issue relevant to drug testing in both the public and private sectors. The fourth amendment right to privacy does not apply to the private sector,[60] but certain tort causes of action involving violation of individual privacy rights safeguard the same privacy concerns.

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52. *Id.* at 1508-12.
53. *Id.* at 1512.
54. *Id.* The court held that:
> the TLC (thin-layer chromatography) method of confirming an EMIT test is sufficient. Even though Gas Chromatography or Gas Chromatography/Mass Spectrometry might be the best methods with which to confirm an EMIT test, plaintiff has not shown that the TLC method of confirming positive EMIT results is inadequate or unreliable. . . . However, in order to afford a prisoner appropriate due process in accordance with Wolff v. McDonnell, [418 U.S. 539 (1974)], this court holds that all positive EMIT results in the future should be confirmed by a second EMIT test or its equivalent."

Id.
55. 600 F. Supp. 1214 (S.D.N.Y. 1984).
56. *Id.* at 1216.
57. *Id.* at 1221.
58. *Id.* at 1222.
59. 608 F. Supp. 1504 (S.D.N.Y. 1985).
60. *See supra* note 41.

A. The Invasion of Privacy Generally

The common law right to privacy was first recognized in the late nineteenth century.[61] It was not until much later, however, that a cause of action for tortious invasion of privacy became an effective means of preserving an individual's rights.[62] Some type of right to privacy, statutory or common law, is recognized in almost every state.[63] A few states have specific constitutional provisions that provide for a right to privacy[64] or have general provisions that have been interpreted to protect citizens from unwarranted intrusions into their personal privacy.[65]

Dean Prosser divides the right to privacy into four distinct categories, the most important of which is "intrusion upon seclusion."[66] Prosser states that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[67] The Restatement (Second) of Torts also states that an unreasonable intrusion may be actionable.[68] These authorities suggest, therefore, that there is a common law right to privacy, separate and apart from the constitutional right to privacy that protects individuals from unreasonable searches by the state.

Privacy actions brought against employers by employees reflect the variety of types of intrusions courts will recognize as tortious. In *Bratt v. International Business Machines*,[69] the First Circuit developed a balancing test to determine whether an invasion of privacy had in fact occurred. The court stated that "[t]he test for a violation of privacy is whether the substantiality of the intrusion on the employee's privacy . . . outweighs the employer's legitimate business interest in obtaining . . . the information. The personal nature of the information is one factor to be consid-

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61. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Dean Prosser notes that this article "has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law." Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

62. Prosser, *supra* note 61, at 384-88.

63. Prosser & Keeton, PROSSER AND KEETON ON THE LAW OF TORTS § 117 (5th ed. 1984) [hereinafter PROSSER & KEETON].

64. Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.

65. *See. e.g.*, State v. Glass, 583 P.2d 872, *reh. denied* 596 P.2d 10 (Alaska 1978); State v. Mueller, 66 Haw. 616, 673 P.2d 1351 (1983); People v. McCarthy, 86 Ill. App. 3d., 407 N.E.2d 971 (1980); Suenram v. Society of Valley Hosps., 155 N.J. Super. 593, 383 A.2d 143 (1977); Snider v. Shapp, 45 Pa Commw. 337, 405 A.2d 602 (1979); State v. Adler, 16 Wash. App. 459, 558 P.2d 817 (1976).

66. Prosser, *supra* note 61, at 389.

67. *Id.*

68. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

69. 785 F.2d 352 (1st Cir. 1986).

ered in determining the substantiality of the intrusion."[70]

In *Bratt*, the employee alleged that IBM had violated his right to privacy by allowing an independent physician, hired by IBM, to discuss his medical problems with IBM management without his permission.[71] Although the court granted summary judgment for the defendants on one of the plaintiff's privacy claims,[72] it held that other violations of his privacy by IBM may have occurred. The court noted that the existence of IBM regulations governing the confidentiality of medical records enhances the employee's expectation of privacy, and "[t]he substantiality of an invasion of privacy is thereby increased where a company violates [its own] internal regulations."[73] The *Bratt* decision suggests that an employee's right to privacy is likely to be violated when both common law tort principles of privacy and company regulations regarding worker's rights to privacy are violated.

In *Phillips v. Smalley Maintenance Services, Inc.*,[74] a former employee brought federal claims under the Civil Rights Act of 1964 in addition to a pendant state law claim that asserted tortious invasion of privacy for sexual harrassment.[75] The Eleventh Circuit presented certified questions as to Alabama's recognition and treatment of the tort of invasion of privacy to the Supreme Court of Alabama.[76] In its answer, the Supreme Court of Alabama recognized the right to privacy as defined by the Restatement (Second) of Torts, section 652B.[77] The court placed weight on Comment (b) of section 652B, which states in part: "The intrusion itself makes the defendant subject to liability, even though there is no publication . . . ."[78] The court interpreted section 652B to mean that a cause of action for invasion of privacy will lie regardless of whether there is an action for defamation.[79]

In *O'Brien v. Papa Gino's of America, Inc.*,[80] the First Circuit upheld damages for an employee who was discharged after submitting to a polygraph test.[81] The employee claimed tortious invasion of privacy in

70. *Id.* at 360.
71. *Id* at 357-58.
72. *Id.* at 361.
73. *Id.* at 360-61.
74. 711 F.2d 1524 (11th Cir. 1983).
75. *Id.* at 1526.
76. *Id.* at 1532-37.
77. The Supreme Court of Alabama, in its answer to the Eleventh Circuit's first certified question, expressly recognized § 652B of the Restatement (Second) of Torts as Alabama's definition of the right to privacy. In reaching this conclusion, the court relied heavily upon Norris v. Moskin Stores, Inc., 272 Ala. 179, 132 So.2d 321 (1961), which adopted Prosser's analysis of the right to privacy. *Compare* Prosser, Law of Torts, pp. 637-39 (2d. ed. 1955) *with* Restatement (Second) of Torts § 652B (1977). Prosser's analysis of the right to privacy is similar to the analysis contained in the Restatement.
78. *Id.* at 1535.
79. *Id.* at 1534-35.
80. 780 F.2d 1067 (1st Cir. 1986).
81. *Id.* at 1068.

addition to wrongful discharge and defamation.[82] As to the privacy issue, the court upheld the jury's award of damages[83] as well as the jury's finding that "the particular investigation conducted was 'highly offensive' and invasive of the employee's privacy."[84] The court gave no credence to the employer's claim that the plaintiff had contracted away his right to privacy with regard to his use of drugs.[85] The court stated:

> Because the company personnel manual forbids drug use by employees, the appellant [Papa Gino's] reasons that O'Brien impliedly gave permission in his employment contract for the company to make whatever investigations it deemed necessary, including the polygraph examination. Even if we were to read O'Brien's agreement with Papa Gino's so broadly as to give implied permission for polygraph examinations generally, it would not negate the jury's finding that the particular investigation conducted was "highly offensive" and invasive of plaintiff's privacy. Such a finding of egregious offensiveness in the particular case would indicate that the defendant's conduct exceeded the scope of any consent O'Brien had arguably given by accepting employment at Papa Gino's.[86]

A jury finding of offensive behavior on the part of an employer who requires a urinalysis as part of an investigation would negate assertions by the employer that the employee had waived all privacy rights by signing an employment contract and submitting to drug testing as a condition of his or her continued employment.

B. Invasion of Privacy and Drug Testing in Private Employment

In *Luck v. Southern Pacific Transport Co.*,[87] an employee brought an action against her former employer on the grounds of invasion of privacy.[88] The plaintiff in *Luck*, a computer programmer, refused to submit a urine sample for the purposes of drug testing and subsequently was dismissed by her employer.[89] The plaintiff in *Luck* contends that an employer must reasonably suspect that an employee has engaged in drug use before it has any right to require drug testing.[90] In essence, *Luck* challenges the right of a private employer to use random drug testing. By applying the holdings indicated above as an analytical framework, it ap-

82. *Id.* at 1071.
83. *Id.* at 1076-77.
84. *Id.* at 1072.
85. *Id.*
86. *Id.*
87. Cal. Super. Ct. for San Francisco Co., Docket No. C84-3-230. (The *Luck* case is awaiting trial at the time of this writing).
88. *Id.*
89. *Id.*
90. *Id.*

pears that the plaintiff in *Luck* states a cognizable invasion of privacy claim.

Whether the plaintiff in *Luck* or plaintiffs in similar cases will prevail depends on whether the intrusion is justified under an analysis such as the *Bratt* balancing test, where the substantiality of the intrusion upon the employee's privacy is balanced against the employer's business interests.[91] Unless an employer can demonstrate a legitimate business interest that outweighs the intrusion upon an employee's privacy necessitated by drug testing, an employee such as that in *Luck* may be able to recover for tortious invasion of privacy.

V. DEFAMATION

Another cause of action that exists against private employers for drug testing is defamation, which consists of the twin torts of libel and slander.[92] Prosser defines defamation as an invasion of an individual's interest in his or her name and reputation.[93] In order to recover for defamation in the drug testing context, an employee must show that the employer made false statements concerning the results of the employee's drug test to another and that the employee's reputation was damaged as a result. Unlike privacy actions, the drug testing itself is not the sole issue; rather it is the employer's communication to third persons about the results of an employee's drug test that creates liability.

In *Houston Belt and Terminal Railway v. Wherry*,[94] the Court of Civil Appeals of Texas upheld an award of damages in a libel suit brought by an employee against his employer.[95] The employee sustained a knee injury while at work and subsequently fainted.[96] Pursuant to company policy, he was then examined by the railroad's chief surgeon,[97] who administered a drug test to determine if the fainting had been caused by drug use.[98] The test result showed traces of methadone, a drug commonly used by heroin addicts.[99] The surgeon reported his findings to management-level personnel of the railroad and, based on his findings, the company issued reports to officers of the railroad and to federal labor officials indicating that the employee was a drug-user.[100] The employee

91. *Bratt v. International Business Mach., Inc.*, 785 F.2d 352, 360 (1st Cir. 1986).
92. Prosser & Keeton, *supra* note 63, at 771-72.
93. *Id.*
94. 548 S.W.2d 743 (Tex. 1977).
95. *Id.* at 753-55.
96. *Id.* at 746.
97. *Id.*
98. *Id.*
99. The type of drug test used is not stated in the case. The chief surgeon for the company stated that although traces of methadone were found, the trace was a minute amount and that one test was not enough to determine that the employee used methadone. *Id.*
100. The doctor reported that the test did not determine conclusively that the employee was a drug user. Thereafter, the doctor supplied a written report to the management that he had intended to indicate "only the possibility that Wherry was a her-

was suspended and eventually discharged for being an unsafe employee despite the fact that later tests revealed that no methadone or other drugs were present in his system.[101] The employee appealed his discharge and then brought suit against the railroad and certain company employees who had stated that he used narcotics.[102]

The court sustained the trial court's verdict for the employee with respect to the railroad company.[103] The court found that the essential elements of defamation were present: "We think the jury was entitled to conclude from the evidence that [officials of the railway] made false statements in writing that [the employee] was a narcotics user when they knew better."[104] The court also found that the second urinalysis, which showed no trace of methadone, verified the inaccuracy of the reports issued by the railroad.[105] The appellate court upheld the jury's verdict of punitive and compensatory damages for injuries suffered.[106]

O'Brien v. Papa Gino's of America, Inc.[107] dealt with defamation in addition to invasion of privacy.[108] The employee in *O'Brien* was terminated from his employment for allegedly failing a polygraph test.[109] The employee claimed he had been defamed because the company had communicated to its employees that he was terminated because he was a drug-user.[110] The employer claimed that such communications from an employer to its employees are privileged and, as such, do not constitute publication.[111] The district court found that no privilege existed between the employer and its employees and the First Circuit affirmed.[112]

The statement at issue in *O'Brien* was "O'Brien was terminated for drug [cocaine] use."[113] Although the jury found that the statement was substantially true, it found that there were retaliatory motives for the employee's discharge and that the failure to explain such motives in statements to company employees was a purposeful misrepresentation

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oin or methadone user, not that he was a user." *Id.* The company then issued reports to company officials that Wherry tested positive for drugs, despite the qualifications in the doctor's report. *Id.*

101. *Id.* at 746-47.
102. *Id.* at 747.
103. The jury verdict against two individual defendants was overturned. *Id.* at 755.
104. *Id.* at 752.
105. The company received the results of this second urine test two weeks before they dismissed the employee. *Id.* at 748.
106. Compensatory damages were awarded for loss of employment, injury to reputation and mental suffering. *Id.* at 753. The court found that there was actual malice, and under Texas civil law, awarded exemplary (punitive) damages. *Id.* at 753-55.
107. 780 F.2d 1067 (1st Cir. 1986).
108. *Id.* at 1071.
109. *Id.*
110. The statement at issue was "O'Brien was terminated for drug [cocaine] use." *Id.* at 1073.
111. *Id.*
112. *Id.* at 1074.
113. *Id.* at 1073.

that was defamatory.[114] *O'Brien* suggests that statements made by an employer concerning an employee need not be entirely false for an action in defamation to be allowed. Any communication about an employee that does not fully state the truth about an employee is defamatory.

VI. WRONGFUL DISCHARGE

A third possible cause of action for employees of private companies is wrongful discharge. This action is an exception to the general rule that an employment contract may be terminated legally at any time for any reason.[115] The common law rule is that an employment contract of indefinite duration, a so-called "at will" contract, can be terminated legally by either party at any time. Most states, however, have adopted statutes that provide exceptions to this common law doctrine[116] that limit an employer's ability to terminate an employee for any cause.[117]

As an exception to the common law "at will" doctrine, the action of wrongful discharge has been dealt with differently by courts. Some courts simply have refused to recognize a cause of action for wrongful discharge.[118] Other courts have acknowledged an exception to the "at will" doctrine, but have declined to classify the exception as wrongful discharge.[119] Still other courts recognize wrongful discharge as an acceptable cause of action in either contract or tort.[120] The majority of courts that recognize a wrongful discharge cause of action treat it as a tort action.[121]

In Maryland, the court of appeals has recognized that a cause of action for an employer's wrongful discharge of an at will employee exists in proper circumstances.[122] Such an action will be recognized only

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114. *Id.* at 1074.
115. *Moniodis v. Cook*, 64 Md. App. 1, 10, 494 A.2d 212, 216, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985).
116. *Adler v. American Standard Corp.*, 291 Md. 31, 35, 432 A.2d 464, 467 (1981).
117. *Id.*
118. Alabama, Florida, Georgia, Mississippi, Missouri and North Carolina do not recognize wrongful discharge. *See* Bender Ship Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980); Segal v. Arrow Industries Corp., 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1978); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978).
119. Colorado, Idaho, Kentucky, Montana, Vermont, and Wisconsin have not recognized a cause of action for wrongful discharge on the facts of the cases before them, but these jurisdictions have indicated a willingness to adopt such an exception to the at will doctrine in proper circumstances. *See* Lampe v. Presbyterian Med. Center, 41 Colo. App. 465, 590 P.2d 513 (1978); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. 1977); Keneally v. Orgain, 606 P.2d 127 (Mont. 1980); Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979); Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (Wis. Ct. App. 1980).
120. *Adler*, at 36, 432 A.2d at 467.
121. *Id.* at 37, 432 A.2d at 468.
122. *See* Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981) (answer-

where the motivation for the discharge contravenes some clear mandate of public policy, which is most often expressed statutorily.[123] The court of appeals also has noted that the at will doctrine can be modified judicially in response to changing circumstances in employment law.[124]

Maryland's statute regarding polygraph examinations provides a model of the type of law that would support a wrongful discharge cause of action.[125] In *Moniodis v. Cook*,[126] an employee was subjected to a polygraph examination by her employer because of missing inventory at the employer's store.[127] The court allowed recovery against her employer on the grounds of wrongful or constructive discharge noting that the employer, Rite-Aid, violated a clear statutory mandate against the use of polygraph tests.[128]

Consequently, a claim for wrongful discharge will rarely be upheld unless some statutory basis can be found to support the employee's claim. Currently only San Francisco has enacted a city ordinance prohibiting drug testing in the workplace.[129] Bills similar to the San

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ing certified questions of law from the United States District Court for the District of Maryland, the Court of Appeals of Maryland ruled that a cause of action for abusive discharge does exist in Maryland).

123. *Id.* at 47, 432 A.2d at 471.

124. *Id.* at 42-43, 432 A.2d at 471.

125. The statute forbids any employer to require an employee or prospective employee to take a polygraph examination as a condition of employment or of continued employment. MD. ANN. CODE art. 100, § 95 (1983 Repl. Vol.).

126. 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985).

127. *Id.* at 6, 494 A.2d at 214.

128. *Id.* at 10, 494 A.2d at 216-17. Constructive discharge occurs when an "employer has deliberately caused or allowed an employee's working conditions to become so intolerable that a reasonable person in the employee's place would have felt so compelled to resign." *Id.* at 11, 494 A.2d 217, (citing Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 653, 477 A.2d 1197, 1203, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984)).

129. The amendment provides, in part:

> Sec. 3300A.1 POLICY. It is the public policy of the City and County of San Francisco that all citizens enjoy the full benefit of the right to privacy in the workplace guaranteed to them by Article 1, Section 1 of the California Constitution. It is the purpose of this Article to protect employees against unreasonable inquiry and investigation into off-the-job conduct, associations, and activities not directly related to the actual performance of job responsibilities.
>
> Sec. 330A.5 EMPLOYER PROHIBITED FROM TESTING OF EMPLOYEES.
>
> No employer may demand, require, or request employees to submit to, to take or to undergo any blood, urine, or encephalographic test in the body as a condition of continued employment. Nothing herein shall prohibit an employer from requiring a specific employee to submit to blood or urine testing if:
>
> (a) the employer has reasonable grounds to believe that an employee's faculties are impaired on the job; and
>
> (b) the employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and
>
> (c) the employer provides the employee, at the employer's expense, the

Francisco ordinance have been proposed in Michigan, Maine, and Maryland[130] but have had little support.[131] Some state constitutions grant private individuals protection from intrusions into their privacy.[132] Presumably in these states a wrongful discharge action would lie for intrusion of privacy because of the constitutional proscription.

Although a wrongful discharge cause of action may be difficult to prove without the requisite statutory support, courts have granted employees damages for lost wages arising from improper dismissal. For example, in *Love v. Southern Bell Telephone and Telegraph Co.*,[133] the plaintiff was awarded damages for his lost wages that arose incident to his claim for invasion of privacy.[134] Likewise, in *O'Brien* the court granted the discharged employee damages representing lost wages.[135] Although damages for lost wages differ from punitive damages that are granted for wrongful discharge, an employee can recover for his or her dismissal if the employee is found to have violated the employee's rights.

VII. CONCLUSION

Drug testing is becoming more and more popular in the American workplace. Presidential declarations and an increase in the public's awareness of the dangers of drug abuse have led to greater employer concern about drug abuse. Although certain of employers' justifications for drug testing are laudable, such as safety in the workplace and assistance for chemically dependent employees, privacy concerns and the lack of reliable tests caution against the use of drug testing by private employers.

> opportunity to have the sample tested or evaluated by [a] State licensed independent laboratory/testing facility and provides the employee with a reasonable opportunity to rebut or explain the results.
>
> SAN FRANCISCO, CAL., POLICY CODE ch. 8, art. 33A(1985).
>
> Additionally the amendment states that in conducting those tests designed to identify the presence of chemical substances in the body, the employer shall ensure to the extent feasible that the test only measure, and that its records only show or make use of, information regarding chemical substances in the body which are likely to affect the employee's ability to safely perform his or her duties while on the job. *Id.*

130. Baltimore Sun, April 8, 1986, at 21A, col.2.

131. The Maryland bill, introduced by Delgate Nathaniel McFadden, would not have prevented drug testing but would have limited disciplinary actions that could be taken by employers on the basis of the tests' results. The bill died in the House Economic Matters Committee in mid-March of 1986. Baltimore Sun, March 17, 1986, at 5A, col.1.

132. *See* White v. Davis, 13 Cal.3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (police practice of enrolling officers as students in major university to conduct covert surveillance of students and teachers was a prima facie violation of plaintiff's explicit right to privacy under the right to privacy amendment of the California Constitution); and State v. Helfrich, 183 Mont. 484, 600 P.2d 816 (1979) (sample of marijuana obtained by private party from defendant's garden by means of a trespass is an illegal invasion of defendant's constitutional right of privacy.).

133. 263 So. 2d 460, *cert. denied*, 262 La. 1117, 266 So. 2d 429 (1972).

134. 263 So. 2d at 467.

135. 780 F.2d at 1076.

Moreover, when such tests are administered by a private employer, the employee may have a remedy in various common law causes of action.

Private employers should utilize drug testing only when they have some basis to suspect that an employee is using drugs. In these situations, the preliminary EMIT test should be confirmed by GC/MS test conducted under stringent laboratory conditions to ensure that the EMIT tests results are not erroneous. This limited and careful use of drug testing strikes the proper balance between the employer's rights to ensure safety and efficiency in the workplace and the employee's rights not to be subjected to unwarranted and inaccurate drug testing.

Dean S. Landis