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DRUG AND ALCOHOL TESTING IN THE WORKPLACE: THE EMPLOYERS' PERSPECTIVE

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Employers face potential liability for the torts of their employees under theories of negligent hiring and respondeat superior. Unless employers can implement drug testing programs, increased drug and alcohol use and abuse by employees in the workplace threaten to magnify employer liability. This article examines Minnesota's drug testing statute and concludes that the statute stands as a satisfactory balance between employee privacy interests and employer rights.

INTRODUCTION

As drug and alcohol testing programs are initiated with increasing frequency, both proponents and opponents are prepared for controversy. Employees espouse a right to privacy. Employers argue that they want to make their workplaces productive and safe. Ira Glasser, the executive director of the American Civil Liberties Union, stated in an interview:

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> Employers do have that responsibility [to provide a safe workplace] but not the authority to regulate or survey what their employes are doing off the job. If there is evidence that a person is drinking on the job or using drugs on the job, that person can be legitimately fired. But such evidence is not going to be found through these drug tests. The tests are fairly unreliable, unspecific about what drugs were used and incapable of determining when they were used. They cannot determine things such as impairment of performance or impairment of ability or safety.[1]

Employers and drug enforcement officials, however, view employee testing in a different light. Peter Bensinger, former head of the Drug Enforcement Administration, stated:

> Drugs affect people long after they're taken. People who take a drug on a Saturday or Sunday night and then go to work on a Monday and believe they're perfectly fine are operating under a delusion. They're going to bring the aftereffects of that drug to the workplace whether they think so or not. Employers should not have to wait until an accident happens.[2]

The employers' interests in safe and efficient workplaces, coupled with increasing drug use, have resulted in the initiation of drug and alcohol testing programs across the country. An estimated twenty-five percent of Fortune 500 companies now test for illegal drugs,[3] which is up from ten percent three years ago.[4] Two Wall Street firms, Kidder, Peabody & Company and Smith, Barney, Harris, Upham & Company, recently became the first brokerage houses to test employees for illegal drug use.[5]

Despite recent erosion in the employment-at-will doctrine, the law generally allows private employers to discharge employees at any time for any reason, with or without notice.[6]

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1. *Test Employes for Drug Use*, U.S. NEWS & WORLD REP., Mar. 17, 1986, at 58 (arguing in opposition to drug testing).

2. *Id.* (arguing in favor of drug testing).

3. Chapman, *The Ruckus Over Medical Testing*, FORTUNE, Aug. 19, 1985, at 57, 58.

4. *Id.*

5. Kaufman, *The Battle Over Drug Testing*, N.Y. Times, Oct. 19, 1986, § 6, at 52, 59, col. 1.

6. At-will employment is generally characterized as employment which "may be terminated by either party at any time, and no action can be sustained in such case for a wrongful discharge." Skagerberg v. Blandin Paper Co., 197 Minn. 291, 302, 266 N.W. 872, 877 (1936)(quoting Minter v. Tootle, Campbell Dry Goods Co., 187 Mo. App. 16, 27-28, 173 S.W. 4, 8 (1915)). Statutory and common law exceptions,

The employee, however, is not completely deprived of legal rights in the workplace. Constitutional protection against unreasonable searches and seizures generally applies to governmental actions, not private industry. A minority of state constitutions have privacy provisions.[7] A drug-dependent employee may find legal protection in the form of the Federal Rehabilitation Act[8] or similar state laws. The Minnesota Human Rights Act provides protection for workers suffering from the disability of alcoholism or drug addiction.[9]

Minnesota recently enacted a drug testing statute which sets forth guidelines for employee testing.[10] The statute provides that random drug testing is prohibited unless the employer has a "reasonable suspicion" of employee substance abuse or the employee is working in a safety-sensitive position.[11] This article analyzes the legal implications arising from the statute and the theories under which an employer can be held liable for negligently hiring (or employing) individuals who abuse drugs or alcohol. Although the article focuses on the problem of substance abuse from the employers' perspective, it is not intended to advocate what employers can or should do in the drug testing context.

I. Drug and Alcohol Abuse: National Statistics

The National Institute on Drug Abuse ("NIDA") has concluded that drug abuse is the most common health hazard in the American workplace.[12] This is evidenced by the fact that nearly two-thirds of those entering the work force for the first time have used illegal drugs, and forty-four percent of that two-thirds used illegal drugs within the last year.[13] Addition-

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however, have been carved into the employment-at-will doctrine. *See, e.g.*, Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569, 571 (Minn. 1987) (recognizing recent public policy exception to the employment-at-will doctrine).

7. *See, e.g.*, Cecere and Rosen, *Legal Implications of Substance Abuse Testing in the Workplace*, 62 Notre Dame L. Rev. 859, 865 (1987). State constitutional provisions protecting an individual's right of privacy are found in Alaska, Arizona, California Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington.

8. 29 U.S.C. §§ 793, 794 (1982 & Supp. 1987).

9. *See, e.g.*, Minn. Stat. §§ 363.01, subd. 25; 363.03, subd. 6 (Supp. 1987).

10. Minn. Stat. § 181.950 (Supp. 1987).

11. *Id.* § 181.950, subd. 13.

12. Copus, Matters of Substance: Alcohol and Drugs in the Workplace 1 (1987).

13. *Id.*

ally, statistics show that between ten percent and twenty-three percent of all workers abuse drugs on the job.[14] According to the NIDA October 9, 1986 report, nearly thirty-seven million Americans, or twenty percent of everyone over the age of twelve, used illegal drugs in 1985.[15] NIDA additionally concluded that one in twenty workers is a current cocaine user and that ninety percent of cocaine users use it on the job.[16] One out of every eighteen employees is a drug pusher.[17] NIDA has also found that sixty-two million Americans, or one-third of the population, has used marijuana at least once.[18]

Despite the concern over drugs, alcoholism is still considered the most common adult drug problem in the United States. It is the third leading cause of death behind heart disease and cancer.[19] Approximately 1.1 million people were admitted to state alcohol treatment centers in 1985.[20] Statistics show that an alcoholic's risk of being involved in an industrial accident is two to three times greater than that of a non-alcoholic.[21] Up to forty percent of industrial fatalities and forty-seven percent of industrial injuries can be linked to alcohol abuse and alcoholism.[22] Grievance procedures by workers who are appealing drug or alcohol-related firings cost employers an average of $1,050 each.[23] The North Carolina Research Triangle Institute (RTI) estimates that alcohol abuse caused a sixty-five billion dollar loss in productivity in the work force in 1983. Drug abuse caused an additional thirty-three billion dollar productivity loss.[24] The RTI also concluded that health

14. *Id.*
15. *Id.*
16. *Id.* at 2-3.
17. *Id.* at 3.
18. *Id.*
19. *Id.* at 5.
20. *Id*; *see also* Holder, *Alcoholism Treatment and Total Health Care Utilization and Costs: A Four-Year Longitudinal Analysis of Federal Employees*, J. AM. MED. ASS'N 1456 (Sept. 19, 1986)(study examining the effect of alcoholism treatment services on overall health care utilization and costs for health insurance enrollees).
21. *Alcohol & Drugs in the Workplace: Costs, Controls and Controversies* (BNA) SPECIAL REP., at 7 (1986) [hereinafter *Alcohol & Drugs in the Workplace*].
22. *Id.* Statistics additionally show that U.S. industry lost eighty-one billion dollars in 1984 due to worker accidents. *Id.* at 8.
23. *Id.* at 7. The BNA report also concluded that non-alcoholic members of alcoholics' families used ten times as much sick leave as other employees, and absenteeism among alcoholics or problem drinkers is 3.8 to 8.3 times greater than normal. *Id.*
24. *Id.* at 8. Varying figures are quoted in different sources. For instance, the

service charges for alcohol problems cost the industry over eight billion dollars annually.[25] A 1982 survey sponsored by the National Institute on Alcohol Abuse and Alcoholism estimated that 14.7 million Americans have drinking problems.[26] Half of all "problem drinkers" are working.[27]

II. The General Principles of the Negligent Hiring and Respondeat Superior Doctrines

At common law, an employer has legal responsibilities for the protection of its employees. An employer's common law responsibilities include the following duties: (1) to provide a safe work environment; (2) to provide safe appliances, tools and equipment; (3) to warn of dangers of which employees might reasonably be expected to remain in ignorance; (4) to provide an adequate number of suitable fellow employees; and (5) to promulgate and enforce rules for employee conduct which will enhance work safety.[28] Based on common law, therefore, employers have a strong argument that drug testing enables them to protect the health, safety and morale of all employees by early detection of drug abuse problems and the prevention of drug-related accidents.

Because a large number of industrial accidents are drug or alcohol-related, testing provides a powerful deterrent to substance abuse. Accordingly, the number of industrial accidents may be substantially decreased. For example, after Pacific Gas & Electric Company began to use pre-employment drug tests, on-the-job injuries of construction workers fell forty percent.[29] Between 1975 and 1984, employees with drug or alcohol problems were involved in forty-eight accidents in the rail in-

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New York Times quoted RTI as concluding that drug abuse drained sixty billion dollars from the nation's economy in 1983. *See* Kaufman, *supra* note 4, at 53. The Employee Assistance Society of North America noted a $30.8 billion alcohol-related productivity loss and a $8.3 billion drug-related loss. *Id.* at 7; *see also Taking Drugs on the Job*, Newsweek, Aug. 22, 1983, at 52.

25. *Alcohol & Drugs in the Workplace*, *supra* note 21, at 8.

26. *Id.* at 13. While demographically alcohol and drug abuse problems are not limited to a specific segment of the society, research shows that illegal drug use is most concentrated in the younger sectors of the work force and is more prevalent among men than women. *Id.* at 12.

27. *Id.*

28. W. Keeton, D. Dobbs, R. Keeton & P. Owen, Prosser & Keeton on the Law of Torts § 80, at 569 (5th ed. 1984).

29. Copus, *supra* note 12, at 6.

dustry, causing thirty-seven deaths and eighty injuries.[30] Financially, these accidents resulted in $20.4 million in property damages and fourteen million dollars in environmental clean-up costs.[31] As a result, Southern Pacific Railway implemented an alcohol testing program. Since the program began in August 1984, Southern Pacific has experienced a seventy-two percent drop in the number of accidents.[32]

A. Negligent Hiring and Respondeat Superior Doctrines

In addition to the legal duty to provide a safe workplace, employers can be held liable for negligently hiring or retaining employees who prove to be dangerous workers. According to the Restatement (Second) of Agency,"A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: . . . (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others."[33]

Additionally, comment d of the Restatement provides that if the dangerous quality of an agent causes harm, liability attaches to the principal under the rule that "one initiating conduct having an undue tendency to cause harm is liable therefor."[34] Similarly, the Restatement (Second) of Torts[35] provides that an employer "is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care" in selecting an employee, even if the employee is a contractor.[36]

Many jurisdictions have adopted the "negligent hiring" doctrine. This doctrine holds that an employer who negligently employs an incompetent or unfit individual may be liable to third parties whose injury is proximately caused by the employer's negligence.[37] The doctrine of negligent hiring en-

30. *Id.*
31. *Id.*
32. *Id.*
33. RESTATEMENT (SECOND) OF AGENCY § 213, at 458 (1958).
34. *Id.* § 213 comment d.
35. RESTATEMENT (SECOND) OF TORTS § 411, at 376 (1977).
36. *Id.*
37. *See, e.g.*, D.R.R. v. English Enterprises, CATV, 356 N.W.2d 580, 583 (Iowa Ct. App. 1984) (television franchise held liable for rape by independent contractor); Hersh v. Kentfield Builders, Inc., 385 Mich. 410, 412-13, 189 N.W.2d 286, 288 (1971) (salesman attacked by builder's employee); Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 912 (Minn. 1983) (tenant raped by manager of apartment); Gaines

compasses a broader range of acts than does the doctrine of respondeat superior. While the doctrine of respondeat superior is limited to an employee's acts within the scope of employment, the doctrine of negligent hiring may encompass direct liability to third parties.[38] In terms of employer liability, the increasing use of the broader doctrine is disconcerting.

In *Di Cosala v. Kay*,[39] suit was brought after a boy was accidently shot in the neck on Boy Scout campgrounds by someone who was employed as a counselor at the camp.[40] In determining whether liability could attach to the employer for an act outside the scope of employment, the court first noted:

> The doctrine of *respondeat superior* has traditionally been thought to render the employer liable for torts of one of its employees only when the latter was acting within the scope of his or her employment. The scope of employment standard, concededly imprecise, is a formula designed to delineate generally which unauthorized acts of the servant can be charged to the master.[41]

The doctrine of respondeat superior, therefore, focuses on acts which are so closely connected with what the servant is employed to do and so reasonably incidental to it, "that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment."[42]

Distinguishing between the concepts of negligent hiring and respondeat superior, the *Di Cosala* court continued:

> [T]he tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous

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v. Monsanto Co., 655 S.W.2d 568, 570 (Mo. Ct. App. 1983) (employee murdered tenant in her apartment); Priest v. F.W. Woolworth Five & Ten Cent Store, 228 Mo. App. 23, 27, 62 S.W.2d 926, 928 (1933) (assault by assistant manager of store); Di Cosala v. Kay, 91 N.J. 159, 174, 450 A.2d 508, 516 (1982) (shooting by camp counselor); F & T Co. v. Woods, 92 N.M. 697, 699-700, 594 P.2d 745, 747 (1979) (rape by television delivery man); Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1984) (automobile accident caused by intoxicated employee); Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. Civ. App. 1979) (hiring of security guard with prior criminal record); LaLone v. Smith, 39 Wash.2d 167, 173, 234 P.2d 893, 897 (1951) (tenant assaulted by janitor).

38. *See Ponticas*, 331 N.W.2d at 912; *Di Cosala*, 91 N.J. at 168-71, 450 A.2d at 513-16; Welsh Mfg. v. Pinkerton's, Inc., 474 A.2d 436, 439-40 (R.I. 1984); *see also* Cutter v. Town of Farmington, 126 N.H. 836, 840-41, 498 A.2d 316, 320 (1985) (negligent hiring can encompass direct liability to a third party from misconduct of employee).

39. 91 N.J. 159, 450 A.2d 508 (1982).

40. *Id.* at 165, 450 A.2d at 510-12.

41. *Id.* at 168-69, 450 A.2d at 513 (citations omitted).

42. *Id.* at 169, 450 A.2d at 513 (citations omitted).

> individual, while the doctrine of *respondeat superior* is based on the theory that the employee is the agent or is acting for the employer. Therefore the scope of employment limitation on liability which is a part of the *respondeat superior* doctrine is not implicit in the wrong of negligent hiring.
>
> Accordingly, the negligent hiring theory has been used to impose liability in cases where the employee commits an intentional tort, an action almost invariably outside the scope of employment, against the customer of a particular employer or other member of the public, where the employer either knew or should have known that the employee was violent or aggressive, or that the employee might engage in injurious conduct toward third persons.[43]

In adopting the doctrine of negligent hiring, the court then set forth two requirements needed to establish employer liability:

> The first involves the knowledge of the employer and foreseeability of harm to third persons. An employer will only be held responsible for torts of its employees beyond the scope of the employment where it knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities created a risk of harm to other persons. The second required showing is that, through the negligence of the employer in hiring the employee, the latter's incompetence, unfitness, or dangerous characteristics proximately caused the injury.[44]

Minnesota also recognizes this doctrine. In *Ponticas v. K.M.S. Investments*,[45] a tenant was raped by a manager of an apartment complex. The tenant, along with her husband, sued the owner and operator of the apartment complex, alleging negligence in the hiring of the manager, who had a criminal record.[46] The apartment manager had general supervision over 198 apartment units and was issued a pass key which admitted him to all units.[47] He had previously been found guilty of burglary and sentenced to prison.[48] The manager had also been fired from a bus company after only a month and a half for drinking on

43. *Id.* at 172-73, 450 A.2d at 515.

44. *Id.* at 173-74, 450 A.2d at 516 (citations omitted); *see also F & T Co.*, 92 N.M. at 699, 594 P.2d at 747 (theory of negligent hiring grounded upon "knew or should have known" standard, not actual knowledge).

45. 331 N.W.2d 907 (Minn. 1983).

46. *Id.* at 907.

47. *Id.* at 909.

48. *Id.*

the job and for apparently fighting with his supervisor.[49]

In determining whether or not to adopt the doctrine of negligent hiring, the Minnesota Supreme Court first reviewed the origin of the negligent hiring theory:

> The origin of the doctrine making an employer liable for negligent hiring, as well as negligent retention, arose out of the common law fellow-servant law which imposed a duty on employers to select employees who would not endanger fellow employees by their presence on the job. The concept of direct employer liability arising as a result of negligent hiring was later expanded to include a duty to "exercise reasonable care for the safety of members of the general public" so today it is recognized as the rule in the majority of the jurisdictions and recognized as the law by Restatement (Second) Agency § 213 (1958) . . . .[50]

The court further noted:

> Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.[51]

Thus, the court concluded:

> We can ascertain no substantial difference in imposing a duty on an employer to use reasonable care in the initial hiring from his duty to use that care in the retention of an employee. We therefore align ourselves with the majority of those jurisdictions which recognize a claim by an injured third party for negligent hiring and with the authors of Restatement (Second) Agency and hold that an employer has the duty to exercise reasonable care in view of all circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public.[52]

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49. *Id.*

50. *Id.* at 910-11 (citation omitted).

51. *Id.* at 911.

52. *Id.* (citation omitted). Originally, employers only owed a duty to co-employees. This duty has now been extended to licensees, invitees or customers of the employer, and in many jurisdictions, the general public. *See, e.g.*, Greening v. School Dist. of Millard, 223 Neb. 729, 736, 393 N.W.2d 51, 57 (1986) (third persons); *Welsh Mfg.*, 474 A.2d at 439-40; *Estate of Arrington*, 578 S.W.2d at 178 (to other servants and to the public); *see also* RESTATEMENT (SECOND) OF AGENCY § 213, at 458 (1958) (third

The *Ponticas* court also noted:

> Although an employer will not be held liable for failure to discover information about the employee's incompetence that could not have been discovered by reasonable investigation, the issue is whether the employer did make a reasonable investigation. The scope of the investigation is directly related to the severity of the risk third parties are subjected to by an incompetent employee.[53]

Most jurisdictions also hold that whether an employer exercises reasonable care in investigating an employee's background is a fact question and involves a determination, *inter alia*, of the risk involved and the type of employment sought.[54]

B. Employer Liability for Employing Individuals Who Use or Abuse Drugs or Alcohol

Both the doctrines of "negligent hiring" and "respondeat superior" have been used to hold employers liable in situations where their employees, because of intoxication or drug

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persons). *But cf.* Baugher v. A. Hattersley & Sons, Inc., 436 N.E.2d 126, 128 (Ind. Ct. App. 1982) (plaintiffs, who were neither customers, patrons nor invitees of employer, were beyond scope of duty owed by employer to public); *D.R.R.*, 356 N.W.2d at 583-84 (negligent hiring cause of action exists only when the party is a licensee, invitee or customer of the employer).

53. *Ponticas*, 331 N.W.2d at 912-13; *see also* Svacek v. Shelley, 359 P.2d 127, 131-32 (Alaska 1961) (if employer knew that employee was a dangerous person, or learned or should have learned of employee's dangerous propensities, employer would be liable for injuries inflicted by employee on another person).

54. *See, e.g.*, Colwell v. Oatman, 32 Colo. App. 171, 176, 510 P.2d 464, 466-67 (1973) (when an employer selects employees to perform services for third party, employer must exercise the care of a reasonably prudent person in selecting employees); Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1240 (Fla. Dist. Ct. App. 1980) (in analyzing employer's responsibility to check out an applicant's background, it is necessary to consider the type of work to be done by the prospective employee), *petition for rev. denied*, 392 So. 2d 1374 (Fla. 1981); Malorney v. B & L Motor Freight, Inc., 146 Ill. App.3d 265, 268, 496 N.E.2d 1086, 1088-89 (1986) (an employer should exercise that degree of care reasonably commensurate with perils and hazards likely to be encountered in the performance of an employee's duty); Shelton v. Board of Regents, 211 Neb. 820, 828, 320 N.W.2d 748, 753 (1982) (whether or not the hiring or retention of an employee with a prior criminal record constitutes negligence depends upon the facts and circumstances of each individual's case) (citing Annotation, *Employer's Knowledge of Employee's Past Criminal Record as Affecting Liability for Employee's Tortious Conduct*, 48 A.L.R.3d 359, 361 (1973)); *Estate of Arrington*, 578 S.W.2d at 178 (upholding master's long-recognized duty to make inquiry as to the competence and qualifications of those he considers for employment, especially where engaged in an occupation which could be hazardous to life and limb and requires skilled or experienced servants).

use, have injured or assaulted others.[55] Again, however, liability is only imposed if the employer, exercising reasonable care, could have foreseen a potential problem.[56]

In *Mays v. Pico Finance Co.*,[57] a job applicant, who was raped by an employee, brought suit under the theories of respondeat superior and negligent hiring.[58] She had been interviewed by the employee, who falsely informed her that she had to meet the district manager in a nearby town.[59] The employee took the woman to the nearby town, where he subsequently drank heavily and then raped her in his hotel room.[60] The court first rejected the plaintiff's argument that the employee was acting within the scope of his employment when the rape occurred, stating, "[The employee] may have given plaintiff the impression he was acting for [his employer], but he was not actually doing so."[61] With respect to the negligent hiring claim, the court noted:

> [The employer] did not make more than a cursory check of [the employee's] background. A thorough investigation would have revealed that [the employee] had pled guilty to theft, was an alcoholic, and had personality problems. However, there was no evidence of past sex offenses. The jury found that [the employee's] past history could not reasonably lead the employer to anticipate that [the employee] might commit rape. We agree with that finding. Even if the employer had a duty to protect plaintiff from the actions of an off-duty employee she originally met at the office, which is highly questionable, the harm plaintiff suffered could not have been foreseen.[62]

Therefore, because the rape was not foreseeable, the employer

55. *See* Alexander v. Alterman Transp. Lines, Inc., 387 So. 2d 422, 426 (Fla. Dist. Ct. App. 1980); Pittard v. Four Seasons Motor Inn, Inc., 101 N.M. 723, 728-31, 688 P.2d 333, 336-39 (1984); Chesterman v. Barmon, 82 Or. App. 1, 4-6, 727 P.2d 130, 132-33 (1986), *petition for rev. granted*, 302 Or. 614, 733 P.2d 449 (1987); G.& H. Equip. Co., Inc. v. Alexander, 533 S.W.2d 872, 876 (Tex. Civ. App. 1976); LaLone v. Smith, 39 Wash.2d 167, 171-72, 234 P.2d 893, 897 (1951) (negligent retention).

56. *See, e.g.*, Stein v. Burns Int'l Sec. Serv., Inc., 102 Ill. App.3d 776, 779-80, 430 N.E.2d 334, 337 (1981); Woodward v. Mettille, 81 Ill. App.3d 168, 183, 400 N.E.2d 934, 947 (1980); Mays v. Pico Fin. Co., Inc., 339 So. 2d 382, 385 (La. Ct. App. 1976), *writ denied*, 341 So. 2d 1123 (La. 1977).

57. 339 So. 2d 382 (La. Ct. App. 1976), *writ denied*, 341 So. 2d 1123 (La. 1977).

58. *Id.* at 382.

59. *See id.* at 383-84.

60. *Id.* at 384.

61. *Id.* at 385.

62. *Id.*

was not held liable for the plaintiff's injuries.[63]

A number of plaintiffs have made claims for punitive damages in negligent hiring cases.[64] In *Stein v. Burns International Security Services, Inc.*,[65] the plaintiff, who was injured by a detective agency's employee, brought an action to recover compensatory and punitive damages for the employer's willful and wanton failure to make a proper investigation of the employee's background before hiring him.[66] In holding that it was error to allow the jury to consider the willful and wanton count for punitive damages, the court stated:

> The mere failure to check an applicant's background does not give rise to an action for punitive damages against defendant. For liability to exist, the conduct of defendant in failing to check the background must be willful and the conduct must exhibit a reckless disregard for the plaintiff's safety. It is not enough to merely show that the applicant would not have been hired. Plaintiff must show that if a proper background investigation had been pursued, the defendant would have discovered facts indicating the propensity of the applicant to do harm. In the present case, plaintiff at best showed that defendant was negligent in performing a background investigation, and even if a proper investigation had been performed, defendant would not have discovered any facts indicating a propensity on [the employee's] part to do harm. Intoxication during one day of prior employment and termination because of [the employee's] failure to show up for work are not facts, standing alone, that indicate [the employee] had a propensity to do harm.[67]

63. *Id.* at 385-86; *see also Woodward*, 81 Ill. App.3d at 183, 400 N.E.2d at 946 (trial court erred in not allowing evidence of independent contractor's general reputation of sobriety to be placed before the jury, as such evidence is material to the issue of whether defendant was guilty of negligent hiring when he knew or should have known that contractor was an alcoholic); Hemphill v. State Farm Ins. Co., 472 So. 2d 320, 325 (La. Ct. App. 1985) ("employer" held not liable because he neither knew nor should have known of businessman's and his employee's drinking).

64. *See, e.g.*, Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545, 547 (Fla. 1981); *Stein*, 102 Ill. App.3d at 777, 430 N.E.2d at 335; *Alexander*, 387 So. 2d at 422.

65. 102 Ill. App.3d 776, 430 N.E.2d 334 (1981).

66. *Id.* at 779-80, 430 N.E.2d at 337.

67. *Id.* at 779-80, 430 N.E.2d at 337 (citations omitted). *But see Mercury Motors Express*, 393 So. 2d at 549 (in wrongful death action resulting from drunk employee's car accident, under the doctrine of respondeat superior, punitive damages may be imposed on employer with proof of some fault on part of employer which foreseeably contributed to the plaintiff's injury).

Similarly, in *Alexander v. Alterman Transport Lines, Inc.*,[68] a wrongful death suit was brought against a trucking company and its employee following a vehicle accident.[69] A jury verdict was returned for the plaintiff, and the trucking company appealed, *inter alia*, the award of punitive damages.[70] The plaintiff contended that the evidence showed that the employee involved in the accident was intoxicated when he appeared at work on the morning of the accident and that the company either knew, or should have known, the condition of the employee when he took charge of the truck.[71] The defendant responded that, at best, the evidence demonstrated only gross negligence, which was insufficient for the imposition of punitive damages.[72]

In rejecting the defendant's contention, the court first noted that Florida law permits jury awards of punitive damages against an intoxicated driver who is involved in an accident without regard to external proof of carelessness or abnormal driving.[73] In *Alexander v. Alterman Transport Lines, Inc.*,[74] an earlier decision on the same case, the court held that the imposition of punitive damages requires willful, wanton or outrageous conduct by a driver.[75] At trial, therefore, the jury had been instructed:

> If you find that the defendant, Alterman Transport Lines, Inc., knew or in the exercise of reasonable care should have known that [the employee] had a record for driving recklessly and carelessly or had a chronic drinking problem or was under the influence of alcohol immediately prior to embarking on his work assignment, then you may find the defendent Alterman Transport Lines, Inc. liable for punitive damages to the plaintiff.[76]

In upholding the trial court's instruction, the court concluded:

> The evidence conclusively established that Alterman's driver was visibly drunk at the time of the accident, and, although conflicting on this point, there was evidence from

68. 887 So. 2d 422 (Fla. Dist. Ct. App. 1980).
69. *Id.* at 422.
70. *Id.* at 423.
71. *Id.* at 425.
72. *Id.*
73. *Id.*
74. 350 So. 2d 1128 (Fla. Dist. Ct. App. 1977).
75. *See id.* at 1130.
76. *Alexander*, 387 So. 2d at 426.

> which the jury could have concluded that [the employee] was visibly intoxicated when he left Alterman's Orlando terminal at noon on that day. [The employee] himself testified that he had been out drinking until late the night before, had consumed alcohol again that morning before going to the terminal, and that he had consumed no alcohol from the time he left the terminal in the truck up to the time of the accident.[77]

Thus, the punitive damage issue was properly submitted to the jury, and the judgment against the company was affirmed.[78]

In *Pittard v. Four Seasons Motor Inn, Inc.*,[79] the parents of a child who was sexually assaulted on hotel premises by a hotel employee brought an action against the hotel alleging respondeat superior, failure to adequately care for the safety of guests and invitees, failure to provide adequate security, negligent hiring, negligent retention and inadequate supervision.[80] The employee, Perales, was working at the hotel as a steward assisting in the preparation of banquets.[81] He admitted to being intoxicated when he reported for duty and to further consumption of alcohol while on duty.[82] Perales left the banquet area while on duty and encountered the plaintiff's son near the hotel's swimming pool area.[83] He enticed the boy into a hotel bathroom, locked the door behind them, and sexually assaulted him.[84] The court noted several important factors for holding Four Seasons liable. First, Perales was on the business premises and on-duty.[85] Second, Perales had admitted to having a drinking problem during the period of employment with the defendant, and of being violent when he drank.[86] Third, Perales also admitted to being drunk while on duty on the day in question.[87] Therefore, the court concluded: "There was evidence from which a jury might find that defendant was aware or should have been aware that Perales had a

77. *Id.*
78. *Id.*
79. 101 N.M. 723, 688 P.2d 333 (1984).
80. *Id.* at 726, 688 P.2d at 336.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 730, 688 P.2d at 340.
86. *Id.*
87. *Id.*

drinking problem and a propensity for violence."[88] Thus, in reversing the trial judge's judgment for the hotel, the court stated: "We hold that plaintiffs have introduced sufficient evidence to entitle them to reach the jury. Notice of an employee's alcoholism and tendency toward violent behavior may make sexual assault by that employee foreseeable to the employer. The jury, rather than the judge, should determine foreseeability on these facts."[89]

In *Chesterman v. Barmon*,[90] the plaintiff was raped and sexually abused by Barmon, who was employed by the defendant corporation. The plaintiff brought suit against the corporation for negligent retention of the employee and vicarious liability for the employee's actions.[91] Barmon was the president of the defendant corporation.[92] As president, he was responsible for placing bids for construction jobs and deploying the necessary employees to carry out the work.[93] At the time of the incident, Barmon had been suffering from depression and was having difficulties at work.[94] He had obtained illegal drugs including chocolate mescaline and amphetamines from a friend and had been taking amphetamines at work for about two weeks.[95] On the night of the attack, Barmon was preparing a bid in a customer's backyard when he took a mescaline pill.[96] He got in his truck and began driving, but became disoriented and began to hallucinate.[97] Unable to drive safely, he stopped and got out of the truck.[98] He subsequently walked to a nearby house where a friend had once lived, saw the plaintiff, forced his way into the house, and raped her.[99]

The defendant conceded that it was chargeable with the

88. *Id.*

89. *Id.* at 731, 688 P.2d at 341. *Cf. G & H Equip. Co., Inc.*, 533 S.W.2d at 876 (fact that employee had been driving his own pickup at the time of the accident was not controlling in deciding whether or not he was acting within scope of employment and any intoxication of the employee would not in itself have taken the employee out of the scope of employment).

90. 82 Or. App. 1, 727 P.2d 130 (1986).

91. *Id.* at 3, 727 P.2d at 131.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

knowledge that Barmon was taking drugs at work.[100] The defendant employer contended, however, that it was not liable under a negligent hiring or negligent retention theory because, under Oregon law, the defendant owed no duty to the plaintiff.[101] In response, the court noted:

> An employer whose employes come into contact with members of the public during their employment is responsible for exercising a duty of reasonable care in the selection or retention of its employes. Liability is for negligently placing an employe with known dangerous propensities, or dangerous propensities which could have been discovered by a reasonable investigation, in a position where it is foreseeable that he could injure the plaintiff in the course of the work. The duty to use reasonable care in hiring or retaining employes arises because it is foreseeable that the employe, in carrying out his employment, may pose an unreasonable risk of injury to others.[102]

Thus, to establish that the defendant owed a duty to use reasonable care in retaining Barmon, the plaintiff needed to show that it was reasonably foreseeable that she would come into contact with him as a result of his employment.[103] Because the plaintiff was not a client or potential client, it was not foreseeable that she would come into contact with Barmon as a result of his position with the company.[104] Thus, summary judgment on the issue was proper.[105]

The *Barmon* court, however, found that under the facts of the case, a jury could reasonably conclude that Barmon was acting within the scope of his employment when he ingested the drug.[106] The court stated:

> He was employed to prepare bids for construction jobs. He testified that he took the drug, because "I started dropping into this depression, and it was really imperative that I stay with this bid and get my figures together, and I wound up taking out the pills." Although he was not hired to take drugs on the job, a jury could infer that he took drugs as an intended aid for carrying out the job he was employed to

100. *Id.* at 4, 727 P.2d at 131-32.
101. *See id.* at 4-5, 727 P.2d at 132.
102. *Id.* (citations omitted).
103. *Id.* at 5, 727 P.2d at 132.
104. *Id.*
105. *Id.*
106. *Id.* at 6, 727 P.2d at 133.

perform. It was approximately 11 p.m. when he took the drug. He was at potential customers' home working on a bid. His wife testified that, on numerous occasions, he stayed up late to do his work. Therefore, it could also reasonably be inferred that the act in question occurred substantially within the authorized limits of time and space of the employment. Further, a reasonable jury could infer from Barmon's testimony that he was motivated to take a drug, at least in part, by a purpose to serve the employer by staying up to finish the bid. Finally, the causation question is clearly one for the jury.[107]

Earlier decisions have likewise held employers responsible for the torts of intoxicated employees. In *La Lone v. Smith*,[108] suit was brought to recover damages for personal injuries received when the plaintiff was assaulted by an employee of the defendants. The employee in question, Trask, was hired by the manager of an apartment building to work as a janitor on a twenty-four hour basis.[109] During his employ, he exhibited signs of dissipation and irresponsibility.[110] Furthermore, Trask was known to have periods of drunkenness and was quarrelsome and violent when drunk.[111] Two months before the assault in question, he had assaulted another tenant who had notified the manager.[112] On the day of the second assault, he was apparently intoxicated.[113] The defendants, however, argued that neither their employment of Trask nor his retention after his first assault was the proximate cause of the second assault in question.[114]

Quoting from the comments to the Restatement of Agency section 213, the court first noted:

> One who employs another to act for him is not liable under the rule stated in this Section merely because the one employed is incompetent, vicious, or careless. If liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand. What precau-

107. *Id.* at 6-7, 727 P.2d at 133.
108. 39 Wash.2d 167, 234 P.2d 893 (1951).
109. *Id.* at 168, 234 P.2d at 894.
110. *Id.* at 169, 234 P.2d at 894-95.
111. *Id.*, 234 P.2d at 895.
112. *Id.*
113. *Id.*
114. *Id.* at 170-71, 234 P.2d at 896.

> tions must be taken depend upon the situation. One may normally assume that another who offers to perform simple work is competent. If, however, the work is likely to subject third persons to serious risk of great harm, there is a special duty of investigation.
>
> Liability results under the rule stated in this Section, not because of the relationship of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. The employer is subject to liability only for such harm as is within the risk. If, therefore, the risk exists because of the quality of the employee, there is liability only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause harm.[115]

Thus, the court affirmed the trial court's judgment, noting:

> To the facts of this case, as found by the trial court, we must apply the rule of law that an employer is liable to a third person for injuries inflicted upon him by an employee who had been retained in employment after the employer knows, or ought to know, that because of his vicious temperament or propensities he is likely to assault persons during the course of his employment.[116]

In addition to negligent hiring, employers can be held liable for failing to control the conduct of employees, where the employer should know of the reason to exercise control. In *Otis Engineering Corp. v. Clark*,[117] a wrongful death action was instituted against an employer after persons were killed in an automobile accident involving an Otis employee. The employee, Matheson, who worked the evening shift at the Otis plant, had a history of drinking on the job and was intoxicated on the night of the accident.[118] A co-worker testified that he knew of Matheson's drinking problem and that he had told Matheson's supervisor on the day of the accident that Matheson was not acting right, was not coordinated, was slurring his words and that "we need to get him off the machines."[119] After the dinner break, the supervisor told Matheson to go home and es-

115. *Id.* at 172, 234 P.2d at 896-97.
116. *Id.* at 173, 234 P.2d at 897.
117. 668 S.W.2d 307 (Tex. 1983).
118. *Id.* at 308.
119. *Id.*

corted him to the company's parking lot.[120] He asked Matheson if he was all right and if he could make it home.[121] Matheson answered that he could.[122] Several miles from the plant, Matheson was involved in a fatal collision.[123] After the accident, a medical examiner showed that Matheson had a blood alcohol content at the time of the accident of .268%, which indicated that he had ingested a substantial amount of alcohol.[124] The plaintiff thus contended that under the facts of the case, Otis negligently sent home, in the middle of the employee's shift, an employee whom it knew to be intoxicated.[125]

Otis moved for summary judgment on the basis that it owed no duty to the plaintiffs.[126] In response, the court stated:

> As a general rule, one person is under no duty to control the conduct of another, even if he has practical ability to exercise such control. Yet, certain relationships do impose, as a matter of law, certain duties upon parties. For instance, the master-servant relationship may give rise to a duty on the part of the master to control the conduct of his servants outside the scope of employment. This duty, however, is a narrow one. Ordinarily, the employer is liable only for the off-duty torts of his employees which are committed on the employer's premises or with the employer's chattels.[127]

Noting that several recent cases in other jurisdictions had extended the concept of duty in the area of employer liability, the *Otis* court held:

> [T]he standard of duty that we now adopt . . . is: when, because of an employee's incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others. Such a duty may be analogized to cases in which a defendant can exercise some measure of reasonable control

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 309.
127. *Id.* at 309 (citations omitted). *Cf.* Meany v. Newell, 367 N.W.2d 472, 474-76 (Minn. 1985) (employer's duty to control arises when employee is on the premises, using employer's chattel or where employer knows or has reason to know of his ability to control employee and knows of need to exercise control) (dicta).

> over a dangerous person when there is recognizable great danger of harm to third persons. Additionally, we adopt the rule from cases in this Restatement area that the duty of the employer or one who can exercise charge over a dangerous person is not an absolute duty to insure safety, but requires only reasonable care.[128]

Thus, the court determined that the employer could be held liable under the circumstances.

III. The Rationale Behind Employee Testing

A. Legal Theories

Based on the foregoing cases, a strong argument can be made for the implementation of drug and alcohol testing in the workplace. Employers can be held liable for an employee's torts under a variety of legal theories, including: negligent hiring, negligent retention, negligent supervision, failure to exercise control, respondeat superior and negligent entrustment. The legal theories under which an employer can be held liable hinge upon whether or not a reasonable investigation occurred in light of the potential risks of the job and the foreseeability of injury. Failure to make a reasonable investigation may result in large compensatory and punitive damage awards against the employer. Given statistical evidence that a large percentage of the American work force abuses drugs or alcohol, many employers are left in a precarious position. They must either forego testing and accept the risk of an alcohol or drug-related accident, test employees or applicants and accept the possibility of a suit for constitutional or civil rights violations, or find an alternative way to uncover facts concerning an employee or applicant's drug and alcohol habits.

Limited drug testing appears to be the most reasonable solution for both the employee and the employer. To forego testing not only exposes the employer to liability, but also exposes co-workers and the public to the risk of injury as the result of a drug or alcohol-induced accident. A narrowly crafted drug testing program could be limited, for example, to job appli-

128. *Otis*, 668 S.W.2d at 311 (citation omitted). The doctrine of negligent entrustment has also been used to hold employers liable in some circumstances. *See, e.g.*, Thomason v. Harper, 162 Ga. App. 441, 450-51, 289 S.E.2d 773, 782 (1982) (sufficient evidence of prior reckless driving and of salesman driving after drinking, which were within dealer's knowledge, held to establish liability under a negligent entrustment theory).

cants, employees who objectively appear to exhibit signs of substance abuse, or employees involved in work-related accidents and would protect both the employee and the employer, with minimal intrusion into the employee's private affairs. Therefore, a job applicant would be on notice that the potential job requires a prerequisite drug test, and most workers would be free from random testing, notwithstanding a "reasonable suspicion" or a job-related accident. Rather than reprimanding workers for *suspicion* of substance abuse, employers would have an objective test upon which to base their allegations. Drug testing is relatively inexpensive[129] and protects the privacy of the employee more than polygraph tests, which can address a number of incidents concerning the worker's past history along with off-work habits.[130]

Several interesting legal issues may arise as a result of employee testing. If, for example, an employer implements a drug and alcohol testing program for applicants and an applicant tests positive, liability for any later accident which is alcohol or drug-related may be imputed to the employer. Liability would be based on the theory that once a positive test had occurred, the accident was "foreseeable." On the other hand, a negative urine test may provide an escape from liability for the employer, if an employee is involved in a drug or alcohol-related accident at a later time. To date there are no cases focusing on employees who have been involved in accidents which were drug or alcohol-related *after* a drug and alcohol testing program has been implemented.

B. The Minnesota Drug Testing Statute[131]

Minnesota has recently enacted a drug and alcohol testing

129. *Alcohol & Drugs in the Workplace*, *supra* note 21, at 30 (the most widely used urine test, the immuno-assay technique, costs as little as ten dollars per test).

130. Twenty-one states, including Minnesota, prohibit employers from requiring that an individual submit to a polygraph test as a condition of employment. Twenty-eight states have statutes requiring that the examiners be licensed. Nagle, *The Polygraph in the Workplace*, 18 U. RICH. L. REV. 43, 67 (1983).

131. MINN. STAT. § 181.951 (Supp. 1987). Minnesota's drug statute is apparently inconsistent with section 181.75 of Minnesota Statutes, which prohibits polygraph testing in the employment context. MINN. STAT. § 181.75 (1986). However, the distinction lies, *inter alia*, in that polygraph testing is geared toward theft prevention, while drug testing is geared toward safety and efficiency.

statute which took effect September 1, 1987.[132] The drug testing law clearly provides that private employers may conduct across-the-board testing of current employees only in connection with an annual physical exam, while random drug testing is permitted for persons in safety-sensitive positions.[133] All other testing of employees must be based on the employer's reasonable suspicion that the employees are under the influence of drugs or alcohol, unless the employee is currently undergoing evaluation or treatment or unless two years have not yet passed since the employee was in a prescribed treatment program.[134]

The statute also regulates the content of an employer's drug

132. MINN. STAT. § 181.951 (Supp. 1987). The Minnesota statute provides in pertinent part:

> [181.951] [AUTHORIZED DRUG AND ALCOHOL TESTING]
>
> Subd. 1. Limitations on Testing. (a) An employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in this section . . . .
>
> Subd. 2. Job Applicant Testing. An employer may request or require a job applicant to undergo drug and alcohol testing provided a job offer has been made to the applicant and the same test is requested or required of all job applicants conditionally offered employment for that position . . . .
>
> Subd. 3. Routine Physical Examination Testing. An employer may request or require an employee to undergo drug and alcohol testing as part of a routine physical examination provided the drug or alcohol test is requested or required no more than once annually and the employee has been given at least two weeks' written notice that a drug or alcohol test may be requested or required as part of the physical examination.
>
> Subd. 4. Random Testing. An employer may request or require only employees in safety-sensitive positions to undergo drug and alcohol testing on a random selection basis.
>
> Subd. 5. Reasonable Suspicion Testing. An employer may request or require an employee to undergo drug and alcohol testing if the employer has a reasonable suspicion that the employee:
>
> (1) is under the influence of drugs or alcohol;
>
> (2) has violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided the work rules are in writing and contained in the employer's written drug and alcohol testing policy;
>
> (3) has sustained a personal injury, as that term is defined in section 176.011, subdivision 16, or has caused another employee to sustain a personal injury; or
>
> (4) has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

MINN. STAT. § 181.951 (Supp. 1987).

133. *Id.* § 181.951, subds. 3-4.

134. *Id.* § 181.951, subds. 5-6.

testing policy[135] and requires that notice of the drug testing policy be given to all individuals affected.[136] The drug testing policy must be in writing and must identify, *inter alia*, (1) the employees or job applicants to which the test applies, and (2) the right of the individual to refuse to submit to the test and the consequences thereof.[137] Finally, the law prohibits an employer from requiring an employee or job applicant to undergo drug and alcohol testing on an "arbitrary or capricious basis."[138]

Minnesota's drug testing law is consistent with the rationale behind employers' liability. Case law holds that an employer must make an investigation of an employee's background commensurate with the risks that the potential job encompasses.[139] Drug testing of prospective employees can provide a useful start for investigating an applicant's background. Also, individualized testing of employees exhibiting signs of abuse is consistent with the negligent retention theory. If an employer hires an individual and retains the employee after the employer discovers or should discover dangerous propensities which eventually cause injury, the employer can be held liable.[140] Testing based on individualized suspicion serves an accident-preventative function, as well as providing protection for employers in the event of a lawsuit. Routine testing as part of an annual physical exam also promotes the societal goal of a drug-free environment by providing a powerful deterrent to drug use. In addition, routine testing provides a mechanism for employers to test employees hired prior to the implementation of a testing program and protects the privacy rights of employees. Workers who show no signs of substance abuse and who have not been involved in work-related accidents only have to undergo the procedure once a year and are put on notice as to when the annual exam would take place. Additionally, the Minnesota statute prohibits testing except pursuant to a written drug testing policy, which must contain specific information, including who may be tested, the circumstances of testing and the individual's rights under the policy and the

135. *Id.* § 181.952, subd. 1.
136. *Id.* § 181.952, subd. 2.
137. *Id.* §§ 181.951, subd. 1(b); 181.952, subd. 1.
138. *Id.* § 181.951, subd. 1(c).
139. *See generally supra* note 37 and accompanying text.
140. *See supra* note 108 and accompanying text.

law.[141]

Given the potential for large damage awards against employers for employee torts, annual testing represents a compromise between the privacy rights of the worker and the workplace rights of the employer. The provision of the Minnesota statute which proscribes testing on an "arbitrary or capricious" basis provides an important safeguard for employees who are discriminated against under the guise of "reasonable suspicion."[142] Significantly, the Minnesota statute also prohibits termination following the first confirmed positive urine test.[143] An employee can be terminated only after he has had the opportunity to participate in a rehabilitation program at his own expense or under an employee benefit plan and either fails to complete the program or records a second confirmed positive urine test later on.[144] This provision of the statute is extremely important, because it protects the rights of workers while working at a solution for the nation's drug problem.

IV. The Legal Implications of Drug Testing

Civil libertarians strongly argue that drug testing violates a fundamental right to privacy.[145] Under the United States Constitution, citizens enjoy a constitutional right to privacy[146] and protection against unreasonable governmental searches and seizures.[147] Similarly, some states have either statutory or constitutional "right to privacy" provisions.[148] Federal constitutional protections against invasion of privacy and unreasonable searches and seizures apply only to governmental conduct and do not reach private industry unless "state action" is found to exist. The test for determining whether or not state action exists focuses on:

(1) whether and to what extent the state subsidizes the actions of the private entity;
(2) whether and to what extent the state regulates the private employer;

141. Minn. Stat. §§ 181.951, subd. 1(b); 181.952, subd. 1 (Supp. 1987).
142. *Id.* § 181.951, subd. 5.
143. *Id.* § 181.953, subd. 10(b).
144. *Id.* § 181.953, subd. 10(b)(1), (2).
145. *See* Chapman, *supra* note 3, at 58.
146. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
147. U.S. Const. amend. IV.
148. *See* Cecere and Rosen, *supra* note 7, at 865.

(3) whether the private entity is performing a function which has been the exclusive prerogative of the state; and

(4) whether a symbiotic relationship exists between the state and the private entity.[149]

Because relatively few private employers can be found to fall within the provisions of the "state action" test, employees objecting to drug and alcohol testing programs have little recourse; however, there may be common law remedies for invasion of privacy and defamation in some situations.[150]

On invasion of privacy grounds, many employees have argued that drug and alcohol testing are an intolerable intrusion, which violate the right to privacy and threaten an individual's sense of personal freedom and dignity.[151] The Restatement (Second) of Torts section 652B provides in pertinent part: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[152]

In *Satterfield v. Lockheed Missiles and Space Co.*,[153] Satterfield, an electronics missile technician, was terminated from a company after testing positive to a urine screening test as part of a yearly physical.[154] Subsequently, Satterfield and his wife brought a variety of "wrongful discharge" claims, including invasion of privacy.[155] In rejecting the plaintiff's invasion of privacy claim, the court stated:

> When a plaintiff bases an action for invasion of privacy on "intrusion" alone, bringing forth no evidence of public disclosure, it is incumbent upon him to show a blatant and

149. *See* Blum v. Yaretsky, 457 U.S. 991, 1003-05 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982).

150. "State action" has been found in at least one instance of a heavily regulated industry. *See* Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 577 (1986) (urine testing of jockeys).

151. *See* Chapman, *supra* note 3, at 57-58.

152. RESTATEMENT (SECOND) OF TORTS § 652B (1977). To date, Minnesota has not recognized the tort of invasion of privacy, nor has it, however, specifically rejected the claim. *See* Price v. Viking Press, Inc., 625 F. Supp. 641, 651 (D. Minn. 1985); Hendry v. Conner, 303 Minn. 317, 318-19, 226 N.W.2d 921, 923 (1975); House v. Sports Films & Talents, Inc., 351 N.W.2d 684, 685 (Minn. Ct. App. 1984).

153. 617 F. Supp. 1359 (D.S.C. 1985).

154. *Id.* at 1360.

155. *Id.*

> shocking disregard of his rights, and serious mental or physical injury or humiliation to himself resulting therefrom.[156]

Because the test results were not disclosed publicly, and because a urine test was found not to be a shockingly unreasonable intrusion, the Satterfields' claims failed.[157]

The unreasonable intrusion category of the privacy tort does not require any publicity of the intrusion.[158] The intrusion makes the defendant subject to liability.[159] There is no liability, however, "unless the interference with the [individual's] seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable [person], as the result of conduct to which the reasonable [person] would strongly object."[160] The highly offensive intrusion element of the privacy tort, however, is substantially high and very difficult to satisfy.[161] Therefore, while it is difficult to forecast how courts will decide the drug testing issue, the common law elements of invasion of privacy suggest that employees who object to urinalysis have a difficult burden to hurdle.[162]

In addition to a common law action for invasion of privacy, a false light invasion of privacy action might be maintained if publicity is given to a matter that places someone before the public in a false light:

> [I]f (a) the false light in which the other was placed would

156. *Id.* at 1370 (citing Shorter v. Retail Credit Co., 251 F. Supp. 329 (D.S.C. 1966)).

157. *Id. But cf.* O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067 (1st Cir. 1986) (polygraph testing for drug use held to be an invasion of privacy, and award to employee of $358,000 for lost wages on the privacy claim was not clearly against the weight of evidence).

158. RESTATEMENT (SECOND) OF TORTS § 652B comment a (1977).

159. *Id.* comment b.

160. *Id.* comment d.

161. *See, e.g., Satterfield*, 617 F. Supp. at 1370; K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. Ct. App. 1984) (searching of employee's locker not of such magnitude as to cause ordinary individual to feel severely offended, humiliated or outraged).

162. *See, e.g.*, McDonell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987) (urinalysis is not as intrusive as body searches or blood tests); Turner v. Fraternal Order of Police, 500 A.2d 1005, 1009 (D.C. App. 1985) (urine testing requires only a normal bodily function which is not an extreme body invasion). *But see* Tucker v. Dickey, 613 F. Supp. 1124, 1129-30 (W.D. Wis. 1985) (urinalysis is as intrusive as a body search or blood test); Caruso v. Ward, 506 N.Y.S.2d 789 (N.Y. Sup. Ct. 1986) (a compelling argument can be made that urine testing in the presence of another is more intrusive than blood testing).

be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[163]

Like defamation, however, this form of privacy tort is limited to situations in which the information is publicly disseminated.[164] Thus, employers who test for drugs can easily defeat false light and defamation claims by keeping test results confidential.[165]

Both defamation and false light actions require "falsity" as a precondition for recovery.[166] In the drug and alcohol context, one who disseminates a "false-positive" test result to others may be subject to a defamation or false light cause of action.[167] In fact, at least one employee has successfully sued for defamation based on false-positive test results.[168] Moreover, the Centers for Disease Control's monitoring program has produced evidence that the testing process for commonly abused drugs

163. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

164. Minnesota does not recognize false light actions. Defamation actions, on the other hand, are plausible when released information tends to injure an individual's reputation and expose the individual to public hatred, contempt, ridicule or degradation. *See* Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 573 (Minn. 1987); Church of Scientology of Minn. v. Minnesota State Medical Ass'n Found., 264 N.W.2d 152, 155 (Minn. 1978).

165. *See, e.g.*, W. KEETON, D. DOBBS, R. KEETON & P. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 797-98 (5th ed. 1984).

166. *See id.* at 802, 863-65.

167. A number of substances are known to cause "false-positive" test results. They include skin pigment, passive marijuana smoke, poppy seeds and herbal tea. *See generally* Maugh, *Drug Tests' Reliability is Limited, Experts Say*, L.A. Times, Oct. 27, 1986, § 1, at 20-21. The fallabilities of drug testing can be used effectively to prove a false-positive test result and bolster a defamation or false light cause of action. At a minimum, they should be considered by a company that is about to institute a drug testing program.

168. Houston Belt & Terminal Ry. Co. v. Wherry, 548 S.W.2d 743 (Tex. Civ. App. 1976) (plaintiff reportedly had a trace of methadone in his system; jury allowed $150,000 in compensatory and $50,000 in punitive damages). Allowing suits for false-positives not only protects the rights of wrongfully terminated workers, but provides an impetus for employers to double check the accuracy of the test results. The private laboratories are largely unregulated and may not perform back-up tests due to the additional expense. Given that a positive test result could ruin a worker's entire career, strict regulation of drug testing on the employer's and on the testing laboratory's sides should be required. *See* Maugh, *supra* note 98, at 20. Minnesota's drug testing statute has anticipated this problem and establishes a licensing program for testing laboratories. MINN. STAT. § 181.952 (Supp. 1987). The program is administered by the Department of Health, and the statute requires employers to use licensed testing laboratories. *Id.* § 181.953.

is substantially less than perfect.[169] The errors from the thirteen laboratories screened ranged from 0 to 100% for cocaine, 11 to 94% for barbiturates and 19 to 100% for amphetamines.[170]

In addition to common law remedies, an individual who is fired for substance abuse may find redress under federal or state rehabilitation laws. Persons with histories of drug use are "handicapped individuals" within the meaning of the Federal Rehabilitation Act.[171] The Minnesota Human Rights Act classifies a disabled person as any person who has a physical or mental impairment which substantially limits one or more major life activities.[172] Thus, under both of these acts, it may be possible for an individual with a drug or alcohol problem to recover lost wages.

Conclusion

Due to the employer's potential liability under the negligent hiring and respondeat superior theories, employers have a strong legal basis for arguing that they should be allowed to test employees for drug and alcohol abuse. Minnesota's drug testing statute represents a beneficial compromise between employee privacy and employer rights. Important safeguards have been incorporated into the statute which should protect workers while allowing employers the latitude to test under limited circumstances. Above all, the statute provides a carefully constructed framework for solving the problem of alcohol and drug use in the workplace.

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169. *See* Hansen, *Crisis in Drug Testing*, 253 J. Am. Med. Ass'n 2382-83 (1985).

170. *Id.* at 2382. Blood tests are clearly more intrusive than urine tests, but indicate impairment with greater accuracy. *Alcohol & Drugs in the Workplace*, *supra* note 21, at 32.

171. Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978) (persons with histories of drug use are handicapped individuals).

172. Minn. Stat. § 363.01, subd. 25 (1986).