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DRUG TESTING SYMPOSIUM FOREWARD

CHRISTINE VER PLOEG*

Although illicit drug use has long been a national social problem, in recent years the focus of attention on this problem has markedly shifted. Whereas before, drug abuse was most often considered a problem confined to the fringes of society—to organized crime and hard core users—today we are bombarded with warnings of the effect that drug abuse is having in the American workplace.

Although estimates concerning the use of drugs in the workplace vary widely, all available evidence confirms that drug usage is widespread, it is growing, and the resulting loss of productivity is enormous. Although the following articles detail the extent of that loss, it is interesting to consider just one example, the auto industry, at this point.

Recently, the National Institute on Drug Abuse (NIDA) has reported that on-the-job drug and alcohol abuse by auto workers costs an estimated \$175 per vehicle in lost productivity and increased injury claims. Unfortunately that figure, which is thirty to forty percent of the auto industry's total health care costs, is rising. Approximately thirty percent of auto factory job applicants test positive for drugs and alcohol, and thirty-five percent of current auto workers are estimated to get high or drunk on the job.

For reasons such as these, concern about the so-called "drug crisis" has exploded. President Reagan has called for drug testing of federal employees, and the President's Commission on Organized Crime has gone even further and has called for testing of *all* employees, public and private. Daily news articles discuss new testing measures proposed for everyone from

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baseball players to airline pilots to clerical workers. Most recently, Minnesota has passed one of the first and one of the most comprehensive statutes regulating drug and alcohol testing in the workplace. That statute became effective September 1, 1987, and its parameters are just now beginning to be explored. Testing is clearly one of the hottest topics in employment law today.

As concern has grown, so also has awareness that the legal and constitutional issues surrounding drug testing in the workplace are highly complex. Employers, lacking definitive guidance from the courts, are engaged in a delicate process of balancing rights and interests, as well as struggling to avoid liability under Minnesota's new drug testing statute and such emerging common law doctrines as wrongful discharge, invasion of privacy and emotional distress.

This issue of the William Mitchell Law Review offers six articles on various important drug testing topics. These articles will be welcomed by anyone who is struggling to write a drug testing policy, trying to identify employees' rights to challenge a test or test results, or by anyone who seeks to gain a general understanding of this complex and controversial topic.

The first article, entitled *Workplace Drug Testing - House File 42*, is written by Representative Sandra Pappas. Representative Pappas, who drafted the first legislation presented to the Minnesota legislature on the subject of drug testing in the workplace, outlines the reasons which motivated her to propose her original bill. In particular, she emphasizes her overriding concern for workers' rights in light of what she perceives to be serious constitutional questions and technological limitations.

The author's view that drug testing should be used only as a tool to help troubled employees and as one method to improve safety in the workplace, contrasts sharply with other drug testing legislation introduced during the 1987 session. Senate File 91, drafted and introduced by Senator Florian Chmielewski, proceeded from the quite different philosophy that testing should *not* be restricted, and that mandatory or mass and random testing is appropriate.

When the Senate surprisingly substituted the House bill for the Senate bill, the authors of the two bills began a three day process to try to negotiate a compromise. The result was an

agreed upon bill which eventually was unanimously passed by both the House and the Senate, signed into law by the Governor, and became effective last fall.

Representative Pappas' optimistic assessment of Minnesota's new statute is understandable considering the pivotal role she played in both drafting the original bill and then steering the concept through the many legislative hurdles which arose in the 1987 session. Nevertheless, many significant questions are emerging as employers struggle to write drug testing policies under its provisions, and as unions and employees seek further guidance concerning the precise legal protections accorded persons who would be or who are tested.

In an article which considers the Minnesota statute from a different perspective, Barbara D'Aquila cautions that the Act "fails to address some important questions" and, in particular, is in conflict with the Minnesota Human Rights Act in some significant respects.

Ms. D'Aquila considers various provisions of the statute, commenting upon what she believes to be vague and unaddressed areas that suggest possible constitutional or other challenges. She then takes a more pointed look at the Human Rights Act and identifies three potential areas of conflict that can arise as a result of that Act's prohibition against discrimination based on disability. Of particular significance are provisions that recognize alcoholism (and possibly drug usage) as a disability, an employer's obligation to make reasonable accommodation for disabled employees, and discrimination charges that may be brought based upon an employer's *perception* of disability. The author concludes by predicting that these and other related questions will have to be addressed by "future legislative sessions and the already overburdened court system in Minnesota."

Professor Deborah Schmedemann's article *Unions and Urinalysis* provides a comprehensive overview of drug testing's place in collective bargaining. At the outset is the question whether drug testing is a mandatory or permissive subject of bargaining. After extensively examining the developing law in this area, the author concludes that "drug testing falls most clearly into the category which requires bargaining." This position has recently been supported by the National Labor Relations Board. (NLRB)

Assuming that employers must bargain with unions concerning a drug testing program, it is self-evident that although such bargaining may take place, there is no assurance that the parties will reach agreement at the bargaining table. And even where the parties manage to agree upon relevant contract language, it is unrealistic to expect any written provisions to address all possible situations which may arise under its terms. Recognizing this, Professor Schmedemann proceeds to discuss arbitration as the forum where many of the parameters of a drug testing program have been and will continue to be defined.

The proposition that it is arbitrators who will continue to decide the vast number of questions surrounding drug testing programs is supported by the author's analysis of NLRB and court decisions that suggest those bodies will continue to defer to arbitration in matters of this type. For this reason, her analysis of relevant arbitration decisions, and her conclusion that arbitrators have been more inclined than courts or the NLRB to protect the rights of employees disciplined or discharged under a drug testing policy, is of particular interest.

In conclusion, Professor Schmedemann asserts that although private rules and methods of resolving drug testing disputes have dominated the development of policy, "at some point, what goes on in the workplace becomes a public matter." Thus, she urges that public lawmakers and courts continue to play a greater role in setting rules to guide the conduct of employers and employees, and that we accept Justice Brandeis' invitation to "try novel social and economic experiments" in this new and fascinating area of labor relations.

Craig Ayers' article *Constitutional Issues Implicated by Public Employee Drug Testing* is particularly pertinent because court decisions on the validity of drug testing programs have come almost exclusively from the public sector. This is due to the fourth amendment, which applies to government entities in their capacity as employers and which prohibits them from engaging in unreasonable searches and seizures. Claims of invasion of privacy have thus provided the basis for many challenges to government-sponsored drug testing programs.

The author discusses the courts' traditional reluctance to authorize carte blanche drug testing in the public sector, and notes that courts that have considered fourth amendment chal-

lenges to drug testing programs have weighed issues of individual privacy against competing governmental claims.

This balancing process has resulted in a general consensus that collecting urine probably constitutes a taking within the search and seizure clause, that it is easier to show probable cause to test where specific individuals are tested for an articulated reason than where employees are tested on a mass or random basis, and that testing is better tolerated where there is evidence of safety or security concerns. Thus, courts have upheld the testing of employees who work in hazardous industries, such as transportation, when they have been involved in accidents or when there is reasonable suspicion that they are under the influence of drugs or alcohol.

The author also outlines other, non-fourth amendment constitutional challenges that may be brought, but notes that they have been for the most part unsuccessful. He concludes by cautioning advocates that this area of the law is still in a state of flux; the public sector remains baffled as to the scope of constitutionally permissible drug testing. Furthermore, because so many constitutional principles are at stake, the trench warfare between public sector employers, unions and employees is not likely to end soon.

In a more partisan analysis of the drug testing issue, authors Elliot Kaplan, Judith Langevin and Richard Ross present their views in *Drug and Alcohol Testing in the Workplace: The Employers' Perspective*. Beginning with a presentation of broad statistical data to highlight the magnitude of alcohol and drug abuse in the United States, the authors leave no doubt why employers are concerned about substance abuse problems that exist both on and off the job.

The authors trace the development of several common law theories that are of concern to employers, including the doctrines of *respondeat superior* and liability for negligent hiring. The latter theory is of particular concern because of its more recent acceptance by the courts and its potential for significantly expanding liability.

From discussion of the many reasons why employers should be concerned about employee drug and alcohol abuse, the authors then argue that testing employees for substance abuse is both reasonable and necessary for both the employee and the employer. Commenting upon Minnesota's new drug testing

law in generally laudatory terms, the authors believe it is “consistent with the rationale behind employers’ liability” in that it provides a useful starting point for investigating an applicant’s background, it serves to prevent accidents, and it promotes the social goal of maintaining a drug-free environment. Thus, they find that the Act provides sufficient safeguards to protect employees’ rights while at the same time limiting employers’ liability. Moreover, it is interesting that the authors disagree with the assertion put forward by Barbara D’Aquila in her article and find the Act to be in harmony with the Minnesota Human Rights Act.

The student Note, *To Test or Not to Test: Is That the Question? Urinalysis Substance Screening of At Will Employees*, provides a comprehensive overview of employers’ reasons for screening, concerns about the accuracy of drug tests and the uses to which those tests may be put, and court standards for screening.

Distinguishing between the rights of public sector employees, private sector unionized employees, and at will employees, the author notes that the latter employees are not covered by the fourth amendment, and only infrequently have just cause protections, so that their rights to challenge a test are much narrower.

Nevertheless, possible causes of action do exist that may be available to an at will employee who is discharged following a drug test. Such claims include contract actions based upon implied modifications of the employment contract, tort liability for invasion of privacy, intentional infliction of emotional distress, defamation and negligence, and statutory liability for violation of the Human Rights Act or the Unemployment Compensation statute.

The author outlines significant features of Minnesota’s Drug and Alcohol Testing in the Workplace Act and submits that while it is a good start, it is not a panacea for the many issues involved with the rights and liabilities of employers and employees.

Reading the articles in this issue will make clear that despite passage of the Minnesota Drug and Alcohol Testing statute, there remain a host of questions which have not been specifically addressed or definitively answered by either the courts or the legislature. Employers continue to struggle in deciding whether it is desirable to introduce a testing program into the

workplace, and if so, just how such a policy should be written and implemented. Employees and unions remain uncertain of their rights to protest testing and how test results may be used. The articles in this issue provide no definitive answers, for no definitive answers are possible. But they do raise the concerns and present the issues, and that is the beginning of understanding this complex and controversial issue.

