Notre Dame Law Review

Volume 62 | Issue 5 Article 3

1-1-1987

Legal Implications of Substance Abuse Testing in the Workplace

Michael S. Cecere

Legal Implications of Substance Abuse Testing in the Workplace

Michael S. Cecere
*Philip B. Rosen**

Introduction

Substance abuse, whether of alcohol or drugs, in our society has reached epidemic proportions. The workplace is no exception. Indeed, substance abuse by employees infects every sector of the American workplace: Professional, managerial, and hourly. A confidential survey by the National Cocaine Helpline showed that seventy-five percent of those surveyed used drugs on the job, fourty-four percent dealt drugs to fellow employees, and twenty-five percent reported *daily* drug use at work.[1] After a drug-screening program was implemented by the United States Postal Service in Philadelphia, 230 job applicants were rejected based upon the results of their urinalysis tests.[2] In California, when various banks informed job applicants that all applicants would be screened for drugs, thirty-five to forty percent failed to return.[3] In New Jersey, an autopsy of the pilot involved in an airplane crash which killed two crewmen revealed that the pilot had been smoking marijuana, possibly while flying.[4] In San Jose, California, the police recovered $250,000 worth of computer parts stolen by Silicon Valley electronics workers attempting to finance their drug habits.[5]

In response to this epidemic, employers have turned to workplace substance abuse testing programs. Although the authors feel employers have both legal and moral bases for imposing drug tests, such programs can impinge upon employee privacy rights and civil liberties. This Article addresses the legal implications of workplace substance abuse testing in both the public and private employment sectors. It also examines how federal and state laws impact on such procedures. The Article consists of four component parts: Part one examines the impact of substance abuse testing on employees' privacy rights, Part two looks into the impact of handicap and discrimination laws, Part three focuses on collective bargaining agreements, and Part four suggests criteria for effective sub-

* The authors are partners in the law firm of Jackson, Lewis, Schnitzler & Krupman, which is engaged exclusively in the practice of labor and employment law on behalf of management throughout the United States. The authors wish to express their appreciation to Meryl R. Kaynard, associate, Ilene T. Weisbard, paralegal, and Louis R. Satriale, law clerk, at Jackson, Lewis, Schnitzler & Krupman for their assistance in the preparation of this Article.

1 O'Boyle, *More Firms Require Employee Drug Tests*, Wall St. J., Aug. 8, 1985, at 6, col. 1.

2 Kerr, *Drug Tests Losing Most Court Cases*, N.Y. Times, December 11, 1986, at A1, Col. 1.

3 McKenna, *Most Banks Reluctant to Test Employees for Drug Use*, AMERICAN BANKER, Sept. 18, 1985, at 25. *See also* Note, *Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy*, 13 J. LEGIS. 269 (1986).

4 Castro, *Battling the Enemy Within*, TIME, Mar. 17, 1986, at 52.

5 Bishop, *Coast Electronics Plants Fighting Drug Abuse Among Workers*, N.Y. Times, Apr. 6, 1985, § 1, at 5, Col. 1.

stance abuse testing programs in both the public and private sector. The authors conclude that such testing may be lawfully conducted in both the public and private sectors within defined parameters.

I. Substance Abuse Testing and Privacy Rights

A. *Employer Interests*

Employers, whether public or private, have a right to control their workplace to ensure its efficiency, safety, and in the private sector, profitability. Substance abuse adversely affects all three concerns. In 1986 alone substance abuse cost employers over sixteen billion dollars in lost productivity.[6] Today's accident rates for substance abusers are three and one-half times greater than for nonabusers.[7] Industrial accidents (which normally lead to workers' compensation claims) are likely to occur two or three times more often with alcoholic employees.[8] Absenteeism and tardiness is three times greater.[9] Furthermore, the quality of the abuser's work is generally substandard.[10]

In exchange for the employer's right to control the workplace the law imposes certain duties upon him. The employer's duty to provide employees with a safe working environment is imposed by statute[11] and common law.[12] Public employers have an additional general duty to protect the public welfare.[13] Substance abuse testing may be undertaken by employers exercising these rights and discharging these duties. However, these employer interests must be balanced against the rights of individual employees.

B. *Employee Privacy Rights*

The fourth amendment to the United States Constitution establishes, derivatively, a right to privacy.[14] It prohibits the federal government and its agents from engaging in unreasonable searches and seizures.[15] The prohibition applies to the states and their agents by virtue of the fourteenth amendment.[16] It does not apply to private employers in the absence of "state action."[17]

In determining whether state or federal governmental action violates the fourth amendment's prohibition against unreasonable searches and seizures, the courts require the government to demonstrate a legitimate

6 Alcohol & Drugs in the Workplace: Cost, Controls, and Controversies (Washington, D.C.: The Bureau of National Affairs, 1986), at 6-9.
7 *Id.* at 8.
8 *Id.* at 7.
9 *Id.*
10 *Id.* at 7,9.
11 29 U.S.C. § 651 (1982).
12 Tolbert v. Martin Marietta Corp., 621 F. Supp. 1099, 1103 (D. Colo. 1985).
13 Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).
14 Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Schmerber v. California, 384 U.S. 757, 767 (1966).
15 United States v. Chadwick, 433 U.S. 1, 7 (1977).
16 Mapp v. Ohio, 367 U.S. 643, 655 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).
17 Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

government interest.[18] Under this analysis, the government's interest served by the search or seizure is balanced against the individual's privacy expectations under the fourth amendment.[19] Even if the government's interest outweighs individual privacy expectations, the courts must examine the government's specific conduct. The government's conduct must be substantially related to its stated interest and not overly intrusive to the individual before the courts will uphold the constitutionality of the search or seizure.[20]

Courts have found substance abuse testing by public employers to be a form of search and seizure subject to the restrictions of the fourth amendment.[21] The ultimate determination of any search's reasonableness requires a judicious balancing of the intrusiveness of the search against its promotion of a legitimate governmental interest.[22] Government employees, federal and state, cannot lawfully be subjected to unreasonable substance abuse testing programs because of fourth amendment restrictions. What is unreasonable in a given case depends upon its facts.

C. *Constitutionality of Public Employer Substance Abuse Testing Programs*

1. The Government's Legitimate Interest in Implementing Such a Program

The first factor courts examine is whether the government has a legitimate interest served by the program. The government is most successful in meeting this burden in areas where it already extensively regulates for public safety reasons.

In the recent case of *Rushton v. Nebraska Public Power District*,[23] the district court upheld a drug screening program established by the Nebraska Public Power District ("NPPD") under which all employees having access to "protected" areas of a nuclear power plant were subjected to drug screening randomly or at least once a year.[24] Employees testing positively were given the choice of entering an employee assistance program or facing disciplinary action, including discharge.[25] Two employees challenged the program on, *inter alia*, fourth amendment grounds. The court upheld the program. It found that the government's interest in operating a safe nuclear power plant outweighed employee privacy expectations. The court found that such privacy expectations were reduced by the government's pervasive regulation of nuclear plants.[26]

The Third Circuit confronted a testing program of the New Jersey

18 *Capua*, 643 F. Supp at 1513; National Treasury Employees Union v. Von Raab, 643 F. Supp. 380, 390 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir.), *emergency stay denied*, 107 S. Ct. 3182 (1987).

19 New Jersey v. T.L.O., 469 U.S. 325, 337 (1985); Bell v. Wolfish, 441 U.S. 520, 559 (1979).

20 *Wolfish*, 441 U.S. at 559.

21 Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); Storms v. Coughlin, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984).

22 Illinois v. Lafayette, 462 U.S. 640 (1983); United States v. Villamonte-Marquez, 462 U.S. 579 (1983).

23 654 F. Supp. 1510 (D. Neb. 1987).

24 *Id.* at 1516.

25 *Id.*

26 *Id.* at 1524-25.

Racing Commission in *Shoemaker v. Handel*.[27] Under the program, the Commission required jockeys to undergo an urinalysis on a random basis even in the absence of reasonable suspicion of drug abuse. Here, too, the court upheld the program, finding that the State's interest in regulating the racing industry outweighed the jockeys' privacy expectations. The court noted that the jockeys' privacy expectations were diminished because the industry is highly regulated and the jockeys are licensed by the state.[28]

A third drug testing case, *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*,[29] concerned the constitutionality of a substance abuse testing program established by the Chicago Transit Authority. Under the program, bus drivers were required to submit to blood tests or urinalysis whenever they were involved in a "serious accident" or suspected of being intoxicated or under the influence of narcotics.[30] The union challenged the constitutionality of the program on fourth amendment grounds. The Court of Appeals for the Seventh Circuit upheld the program. It determined that the Transit Authority's interest in "protecting the public by insuring that bus . . . operators are fit to perform their job . . ." was "paramount" and outweighed any employee expectations of privacy regarding such tests.[31]

The preceding decisions demonstrate that a legitimate government interest supports the constitutionality of a substance abuse testing program in the public sector. However, such an interest alone does not guarantee the consitutionality of the program.

2. The Government's Reasonable Suspicion of Substance Abuse

Even where the government has a legitimate interest in undertaking a substance abuse testing program, it will not always be successful defending it in court. A number of courts have struck down testing programs as violating the fourth amendment because no reasonable suspicion of substance abuse by a particular employee was required.

In *Capua v. City of Plainfield*,[32] a district court confronted a substance abuse testing program implemented by the Plainfield, New Jersey, police and fire departments. Under the program, all members of both departments were subject to surprise, mass urinalysis. The City based the program upon its conclusion that employing "drug-free" police and fire fighters was mandated by its duty to protect the public welfare.[33]

In May 1986, a surprise, mass urinalysis, found traces of drugs in sixteen members of the Plainfield fire department. All sixteen were terminated without pay.[34] The sixteen firefighters and one civilian member

27 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986).
28 *Id.* at 1142. The New Jersey program also subjected jockeys, trainers, officials and grooms to take breathalyzer tests when directed by the State Steward. *Id.* n.1.
29 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).
30 *Id.* at 1266.
31 *Id.* at 1267.
32 643 F. Supp. 1507 (D.N.J. 1986).
33 *Id.* at 1512.
34 *Id.*

of the police department, who had been suspended for positive test results, filed suit to overturn their terminations and suspension.[35] They challenged the constitutionality of the program as an unreasonable search and seizure in violation of the fourth amendment.

The court agreed with the plaintiffs. It found that the program "sweeps up the innocent with the guilty and willingly sacrifices each individual's fourth amendment rights in the name of some larger public interest."[36] The court further found that the "[City] had no general job-related basis for instituting this mass urinalysis, much less any individualized basis."[37] The court noted that the City had no specific information or independent knowledge of any of the department members being under the influence of drugs.[38] None of the plaintiffs had received prior warnings for below standard job performance. Nor was there any evidence of an increased incidence of accidents or complaints.[39] The court concluded that the plaintiffs' privacy expectations outweighed the state's interest in implementing the program.[40]

A second case which initially found a government testing program unlawful is *National Treasury Employees Union v. Von Raab*.[41] *Von Raab* involved a substance abuse testing program implemented by the United States Customs Service pursuant to Executive Order 12,564.[42] That Order, signed by President Reagan on September 15, 1986, mandated drug testing for employees in sensitive jobs involving law enforcement, public health or safety or national security.[43] It further authorized testing for "nonsensitive" civilian employees where: (i) there is reasonable suspicion of illegal drug use; (ii) it relates to an accident or unsafe practice; or (iii) it is in follow-up to rehabilitation for illegal drug use.[44] The Order also requires each government agency to develop its own testing program consistent with, among other things, its "mission" and employees' privacy rights.[45]

Under the program implemented by the Customs Service, all employees selected for promotion were required to undergo urinalysis. If they refused, they would not be promoted.[46] The specimen was collected in the presence of a customs service "laboratory representative." The Union challenged the constitutionality of the program on fourth amendment grounds.

The court found that the urinalysis constituted a "full-blown search" triggering fourth amendment protections.[47] It then noted that the gov-

35 *Id.*
36 *Id.* at 1517.
37 *Id.* at 1516.
38 *Id.*
39 *Id.*
40 *Id.* at 1520.
41 649 F. Supp. 380 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir.), *emergency stay denied*, 107 S. Ct. 3182 (1987).
42 51 Fed. Reg. 32,889 (1986).
43 *Id.* 32,892-93.
44 *Id.* at 32,890.
45 *Id.*
46 649 F. Supp. at 382.
47 *Id.* at 386.

ernment neither had knowledge of nor suspected any employee of selling or using drugs on the job. Thus, the "search" was made in the total absence of probable cause or reasonable suspicion.[48] As such, the court declared that the plan was an "overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy and was wholly unconstitutional."[49] It characterized the program as "a degrading procedure that so detracts from human dignity and self-respect that it 'shocks the conscience' and offends this Court's sense of justice."[50] On appeal, however, the Fifth Circuit vacated the district court's permanent injunction and reinstated the Customs Service's drug testing program.[51] Following that decision, the National Treasury Employees Union applied for an emergency stay of the Customs Service's drug testing program. The United States Supreme Court denied the stay on June 1, 1987.[52] The question of whether the testing program is constitutional has yet to be decided by the Supreme Court.

A New York appellate court struck down a similar mandatory drug testing program for school teachers in *Patchoque-Medford Congress of Teachers v. Board of Education of the Patchoque-Medford Union Free School District*.[53] Under that program, all probationary school teachers were subject to mandatory urinalysis before permanent appointment. The teachers' union attacked the program as an illegal search in violation of the fourth amendment and as an invasion of privacy.[54] The court held that "the reasonable suspicion standard is the appropriate basis for constitutionally compelling a public school teacher to submit to a urine test for the purpose of detecting the use of controlled substances."[55]

Comparing the cases involving testing by public employers reveals that a legitimate government interest, supposedly served by testing, will not always outweigh employee privacy rights. The courts are more likely to defer to the government interest in cases involving heavily regulated industries where clear dangers to the public welfare exist. Transportation and nuclear power appear to be foremost among such industries. However, even in those industries, it is unsettled whether testing not based on reasonable suspicion of substance abuse will withstand judicial scrutiny. In any event, testing based on reasonable suspicion of drug abuse is far more likely to be upheld on constitutional grounds.

48 *Id.* at 387.
49 *Id.*
50 *Id.* at 388.
51 816 F.2d 170.
52 107 S. Ct. 3182 (1987).
53 119 A.D.2d 35, 505 N.Y.S.2d 888 (N.Y. App. Div. 1986).
54 *Id.* at 37, 505 N.Y.S.2d at 889.
55 *Id.* at 40, 505 N.Y.S.2d at 891. *Accord* Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985) (upholding a District of Columbia police department program which required reasonable suspicion before administering a drug test). *Cf.* Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (upholding tests administered in connection with an undercover investigation of city employees suspected of using marijuana on the job). *But see* McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (modifying a district court order which required reasonable suspicion, thereby allowing urinalyses uniformly or by systematic random selection of employees having regular contact with prisoners on a day-to-day basis in medium or maximum security prisons).

3. The Government's Program is No More Intrusive than Reasonably Necessary to Serve the Government's Interest

Another factor courts examine is the intrusiveness of the testing program. The courts require that the program be no more intrusive than reasonably necessary to serve the government's interest. The degree of intrusion engendered by any search must be viewed in the context of the individual's legitimate expectation of privacy.[56] The test for determining when an expectation of privacy is legitimate was articulated by Justice Harlan in *Katz v. United States*: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[57] This standard is used to differentiate between levels and degrees of intrusiveness among searches and seizures. "As measured by the expectation of privacy, inspections of personal effects are generally least intrusive, while breaches of the 'integrity of the body' result in the greatest invasion of privacy."[58]

In summary, a government employer substance abuse testing program will most likely pass constitutional muster where: (1) the government has a legitimate interest in implementing such a program; (2) the program is substantially related to that interest; (3) submission is required only of employees reasonably suspected of substance abuse; and (4) the program is no more intrusive than reasonably necessary to serve the government's interest.

D. *Constitutionality of Private Employer Substance Abuse Testing Programs*

As stated earlier in this Article, the United States Constitution's prohibition of unreasonable searches and seizures does not apply to private employers in the absence of state action.[59] State constitutional provisions protecting the right of privacy are found in Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington.[60] Some state constitutions (such as California) prohibit un-

56 Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

57 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

58 *Capua*, 643 F. Supp. at 1514.

59 Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

60 In determining the elements of a privacy tort, the courts generally look to the RESTATEMENT (SECOND) OF TORTS, §§ 652A-652I, which defines the relevant torts as follows:

(a) *Instrusion upon Seclusion*

"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." *Id.* § 652B.

(b) *Public Disclosure of Private Facts*

"One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Id.* § 652D.

(c) *False Light*

"One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would 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." *Id.*

reasonable searches and seizures by private, as well as public, employers.[61] Thus, in those states, the constitutional principles previously discussed are instructive.

Nevertheless, even in those states whose constitutions do not apply to private employers, their testing programs will be subject to constitutional scrutiny under federal law where "state action" is found to have occurred. The courts are most likely to find state action where a private employer: (1) acts in concert with a law enforcement agency;[62] (2) permits the government to hire, promote, terminate, or reinstate the private employer's employees; or (3) allows its employees to work on government property or to use government equipment.[63] In those instances, a private employer substance abuse testing program will be subject to federal constitutional standards. Furthermore, at least one state, Utah, has drafted a statute giving specific guidelines on how private employers are allowed to conduct drug and alcohol tests.[64] Those guidelines closely resemble the consitutional limitations described earlier.[65]

II. Substance Abuse Testing and Handicap or Disability Discrimination Laws

Absent state action, an applicable state constitution, or a specific statute, a private employer's substance abuse testing program still poses problems under federal and state handicap or disability discrimination

61 CAL. CONST. art. I, § 13. *See also* White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (public and private employers prohibited from secretly gathering personal information or from overly broad collection or retention of personal information regarding employees or applicants unless the employer has a compelling interest).

62 Lehr & Middlebrooks, *Workplace Privacy Issues and Employer Screening Policies*, EMPLOYEE REL. L. J. 407, 408 (1985).

63 *Id.*

64 Drug and Alcohol Testing Act, 1987 Utah Laws § 234 (codified at UTAH CODE ANN. §§ 34-38-1 to 34-38-15 (Supp. 1987)).

65 The guidelines set forth in Utah's Drug and Alcohol Testing Act are as follows:

All sample collection and testing for drugs and alcohol under this chapter shall be performed in accordance with the following conditions:

(1) the collection of samples shall be performed under reasonable and sanitary conditions;

(2) samples shall be collected and tested with due regard to the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;

(3) sample collection shall be documented, and the documentation procedures shall include:

(a) labeling of samples so as reasonably to preclude the probability of erroneous identification of test results; and

(b) an opportunity for the employee or prospective employee to provide notification of any information which he considers relevant to the test, including identification of currently or recently used prescription or nonprescription drugs, or other relevant medical information;

(4) sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the probability of sample contamination or adulteration; and

(5) sample testing shall conform to scientifically accepted analytical methods and procedures. Testing shall include verification or confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method, before the result of any test may be used as a basis for any action by an employer under Section 34-38-8.

UTAH CODE ANN. § 34-38-6, as enacted by H.B. 145, L. 1987, effective April 26, 1987.

laws, and other state statutory and common law. Alcoholism and drug addiction are handicaps or disabilities under federal law[66] and under the law of most states.[67] Consequently, employer substance abuse testing programs, whether public or private, may be restricted by handicap or disability discrimination laws.

A. *Vocational Rehabilitation Act of 1973*

The Vocational Rehabilitation Act of 1973[68] (Rehabilitation Act) is a federal law prohibiting discrimination in employment against "otherwise qualified handicapped individuals" solely on the basis of their handicap.[69] The law applies only to employers with federal contracts[70] and recipients of federal grants.[71] Its reach, however, is broader. Many state handicap discrimination laws are either patterned on or interpreted consistent with the Rehabilitation Act. Those laws are examined in Section II B of this Article. Two key terms in the Rehabilitation Act, "handicapped" and "otherwise qualified," must be examined further.

1. "Handicapped" Defined

The Rehabilitation Act defines a "handicapped individual" as one "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[72] Congress amended the Rehabilitation Act in 1978, adding the following limitation to the definition of "handicapped individual":

> [S]uch term does not include any individual who is an alcoholic or drug abuser whose *current* use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such *current* alcohol or drug abuse, would constitute a direct threat to property or the safety of others.[73]

To the extent this amendment leaves any doubt that alcohol and drug addition are handicaps under the Rehabilitation Act, that doubt has been dispelled by subsequent administrative and judicial interpretations. The United States Attorney General, in a formal opinion, concluded that alcohol and drug addiction are handicaps under the Rehabilitation Act.[74] This conclusion has been endorsed by numerous judicial decisions.[75]

66 *See infra* notes 68-88 and accompanying text.

67 *See infra* notes 99-103 and accompanying text.

68 Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-796 (1982)).

69 29 U.S.C.A. § 794 (West 1985 & Supp. 1987).

70 *Id.* § 793.

71 *Id.* § 794.

72 *Id.* § 706(8)(B).

73 *Id.* (emphasis added).

74 43 Op. Att'y Gen. 12 (1977).

75 *See, e.g.*, Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226 (7th Cir. 1980); Tinch v. Walters, 573 F. Supp. 346 (E.D. Tenn. 1983), *aff'd*, 765 F.2d 599 (6th Cir. 1985), *cert. granted sub nom.*, Traynor v. Turnage, 107 S. Ct. 1368 (1987); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978).

2. "Otherwise Qualified" Defined

The Rehabilitation Act protects from employment discrimination only those handicapped individuals who are "otherwise qualified". A handicapped individual is "otherwise qualified" where: (a) notwithstanding the handicap, he or she can perform the essential duties of the job in question, or (b) is capable of performing those duties with reasonable accommodation by the employer, provided such accommodation would not impose an undue hardship on the employer, and (c) his or her performance would not pose a direct threat to the health or safety of the handicapped person or others.[76] Whether a handicapped individual is "otherwise qualified" is a factual question to be determined on a case-by-case basis.[77]

In *Davis v. Bucher*,[78] the City of Philadelphia promulgated an employment policy which provided in pertinent part that the City could refuse to examine a job applicant or could disqualify one who was addicted to alcohol or drugs. The plaintiffs were former drug addicts. They claimed they were denied employment solely on the basis of their past drug abuse without regard to their qualifications and ability to do the job for which they applied.[79] This, they argued, violated the Rehabilitation Act. The court granted the plaintiffs' motion for summary judgment relying on United States Department of Health, Education and Welfare regulations promulgated under the Rehabilitation Act.[80] It found that the plaintiffs were handicapped under the Rehabilitation Act in that they had records of prior physical impairment (drug addiction). It further found that the City's blanket disqualification of the plaintiffs for employment based *solely* on those records, and without regard to their abilities to perform the jobs in question, constituted handicap discrimination in violation of the Rehabilitation Act.[81]

The Second Circuit reached a similar result in *Whittaker v. Board of Higher Education*.[82] There, the New York City Board of Higher Education denied the plaintiff, a college teacher, tenure and the use of an honorary title because of his alcoholism. Whittaker challenged the Board's action under the Rehabilitation Act. He argued that, although he was an alcoholic, the condition was under control and did not interfere with his ability to satisfactorily perform the duties of his job. The court agreed, finding that if the Board's action was based solely on the plaintiff's alcoholism, without any showing that the impairment prevented him from performing his job duties, it was handicap discrimination under the Rehabilitation Act.[83]

Where, however, alcoholism or drug addiction *does* prevent an employee from satisfactorily performing his or her job, a different outcome

76 School Bd. of Nassau County v. Arline, 107 S. Ct. 1123, 1131 n.17 (1987).
77 *Id.* at 1311.
78 451 F. Supp. 791 (E.D. Pa. 1978).
79 *Id.* at 793.
80 *Id.* at 796. *See also* 42 Fed. Reg. 22,686 (1977).
81 *Id.* at 801.
82 461 F. Supp. 99 (E.D.N.Y. 1978).
83 *Id.* at 106.

will result. In *Heron v. McGuire*,[84] a New York City police officer was suspended and subjected to disciplinary proceedings because a sample of his blood obtained by the police department showed traces of heroin. The department based the blood test on its suspicion that the officer was abusing drugs. This suspicion arose when the officer's attendance became erratic and his job performance declined.[85]

The officer brought suit under the Rehabilitation Act. He claimed his heroin addiction was a handicap entitling him to the protection of the Rehabilitation Act. The court disagreed, finding that the officer's addiction rendered him unfit for police work. Among other things, it "impaired . . . his ability to respond to emergency and life threatening situations."[86] The behavioral manifestations of the addiction prevented the officer's successful performance on the job.[87] This finding was entirely consistent with, if not mandated by, the 1978 amendment to the Rehabilitation Act.[88]

Since alcohol or drug addiction is a handicap under the Act, any substance abuse testing by employers covered by the Act is subject to its provisions and the regulations promulgated thereunder.

3. Substance Abuse Testing Under the Rehabilitation Act and the Regulations Thereunder

Under the Rehabilitation Act, medical examinations may be conducted in connection with employment decisions, notwithstanding the Rehabilitation Act's prohibition against handicap discrimination.[89] Of course, employer actions based on the results of such medical examinations are circumscribed. Thus, for example, an employer may not, solely because of a handicap revealed during such an examination, deny employment where: (i) the handicap does not prevent the individual from performing the essential functions of the job in question; or (ii) reasonable accommodation of the handicap will enable the individual to perform those functions; and (iii) the handicap does not pose a direct threat to the property or safety of others.[90]

The Rehabilitation Act specifies that such examination may take place *after* an offer of employment has been made.[91] Thus, an employer may "condition an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty."[92] The Rehabilitation Act also does not appear to prohibit subsequent annual physicals for all employees. The scope of the physical may be comprehensive. At least insofar as private employers are concerned, it may in-

84 802 F.2d 67 (2d Cir. 1986).
85 *Id.* at 68.
86 *Id.*
87 *Id.* at 69.
88 Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 122, 92 Stat. 2984, 2985 (1985) (codified as amended at 29 U.S.C.A. § 706(8)(B) (West Supp. 1987)).
89 45 C.F.R. § 84.14(c) (1986).
90 29 U.S.C.A. § 706(8)(B) (West Supp. 1987).
91 45 C.F.R. § 84.14(c) (1986).
92 *Id.*

clude substance abuse testing.[93] Inclusion of such testing by *public sector employers* would be subject to fourth amendment restrictions previously discussed.[94]

Applicants or employees should be informed of the purpose of the test before the actual examination. The test should be to determine whether the employee or applicant is suffering from any medical conditions that impairs his or her ability to perform the essential duties of the job in question or would pose a direct threat to the property or safety of themselves or others. The more prudent course for an employer is to apprise each individual of the specific conditions (such as substance abuse) for which the examination will be conducted. The most efficient means of disclosure would be providing a written list of conditions being tested for at the time of and immediately prior to the examination. Absent communication of this information, the employee's consent to the examination may be uninformed, and therefore ineffective.[95] Ineffective consent can result in a claim for battery.[96]

In addition to such comprehensive physicals by private employers, specific testing for substance abuse may be conducted any time by public or private employers where the employer has a reasonable suspicion of such abuse. The suspicion must be founded upon objective evidence such as deteriorating job performance, erratic attendance or other similar behavior.[97]

Consistent with the employer's right to base employment decisions on the results of the examination, test results should be kept confidential. Only those managers participating in employment decision making should have access to the findings. Broader publication could expose employers to invasion of privacy or defamation claims, depending upon the nature of the findings and the law of the jurisdiction in question. Therefore, any analysis of the legal implications of substance abuse testing in the workplace would be incomplete without an overview of pertinent state laws.[98]

B. *State Handicap Discrimination Laws*

An overwhelming majority of states prohibit handicap or disability employment discrimination by public and private employers. The provisions of those laws vary from state to state. All of the laws reach medical impairments or conditions. However, the state definition of handicap or disability can be as broad as those contained in the Rehabilitation Act or can be narrower. The statutes and administrative interpretations may be categorized as follows:

93 Association of W. Pulp and Paper Workers v. Boise Cascade Corp., 644 F. Supp. 183 (D.C. Or. 1986); IBEW Local Union No. 1900 v. Potomac Elec. Power Co., 634 F. Supp. 642 (D. Colo. 1986).

94 U.S. CONST. amend. IV; Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

95 Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905).

96 *Id.*

97 McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985).

98 *See supra* notes 64-65 and *infra* notes 99-103.

Model A: Some states specifically exclude current substance abusers from their definition of handicap. These include California, Georgia, Kentucky, Maryland, North Carolina, South Carolina, Texas and Virginia.[99] North Carolina, however, prohibits discrimination based on an individual's *history* of drug or alcohol abuse where he or she is not *currently* using drugs or alcohol.[100]

Model B: Some states protect alcoholics and drug addicts as handicapped. These states include Illinois, Massachusetts, Minnesota, Montana, New Jersey, New York, Ohio, Rhode Island, and Wisconsin.[101]

Model C: Some states distinguish between addicts, who are covered by the handicap laws, and "recreational users," who are not within the ambit of the handicap laws. New Jersey is one example.[102]

Model D: Some states remain silent on the issue. Such states include, Connecticut, Idaho, Indiana, Michigan, New Hampshire, Pennsylvania, Tennessee and the District of Columbia.[103]

Unless drug and alcohol addiction are expressly excluded from the ambit of a state's handicap discrimination law, private and public employers in all states prohibiting handicap or disability discrimination are well advised to presume alcohol and drug addiction are included under those laws. Thus, any testing programs in such states should be implemented within the parameters discussed under the Rehabilitation Act, even though that Act is not itself applicable to those employers who do not have government contracts or receive federal funds.

C. *Reasonable Accommodation*

Even though substance abuse testing may be lawfully conducted within the limitations discussed earlier, actions based upon the testing results are circumscribed. Adverse employment decisions may not be based solely on the fact that the individual is an alcohol or drug abuser where the abuse does not prevent performance of the essential functions

99 CAL. GOV'T CODE § 12926 (West 1980 & Supp. 1987); GA. CODE ANN. § 66-502(2) (Harrison Supp. 1986); KY. REV. STAT. ANN. § 207.140(2)(b) (Baldwin 1986); MD. ANN. CODE art. 49B, § 15(g) and its interpretation at 63 Op. Md. Att'y Gen. 408 (1978); N.C. GEN. STAT. § 168A-3(4)(iii) (Supp. 1985); S.C. CODE ANN. § 43-33-560 (Law. Co-op. 1985); TEX. LAB. CODE ANN. art. 5221k, § 2.01(7)(A) (Vernon 1987); VA. CODE ANN. § 51.01-3 (Supp. 1986).

100 N.C. GEN. STAT. § 168A-3(4) (Supp. 1985).

101 ILL. ANN. STAT. ch. 68, para. 1-103(I) (Smith-Hurd Supp. 1986); MASS. ANN. LAWS ch. 6, § 77 (Law. Co-op. Supp. 1987); MONT. CODE ANN. § 49-2-101(16) (1985); MINN. STAT. ANN. § 363.01(25a) (West Supp. 1987) (excluding from protection drug or alcohol abuse which prevents a person from performing the essential functions of the job or constitutes a direct threat to property or the safety of others); N.J. STAT. ANN. § 10:5-5(q) (West 1976); N.Y. EXEC. LAW § 292(21) (McKinney 1982 & Supp. 1987); OHIO REV. CODE ANN. § 4112.01(A)(13) (Anderson 1980); R.I. GEN. LAWS § 28-5-6(7) (1986); WIS. STAT. ANN. § 111.32(8) (West Supp. 1986).

102 Opinion letter by Pamela S. Poff, Director, State of New Jersey Department of Civil Law and Public Safety Division on Civil Rights, January 23, 1986.

103 CONN. GEN. STAT. ANN. § 46a-60 (West. 1986); FLA. STAT. ANN. § 413.20(2) (West 1986); IDAHO CODE § 56-707 (1976 & Supp. 1986); IND. CODE ANN. § 22-9-1-3(q)(II) (Supp. 1986); MICH. STAT. ANN. § 3.550 (103) (Callaghan 1985); N.H. REV. STAT. ANN. § 275-c:1 (Purdon 1964 & Supp. 1986); PA. STAT. ANN. § 954 (Purdon 1964 & Supp. 1986); TENN. CODE ANN. § 8-50-103 (Supp. 1986); D.C. CODE ANN. § 1-2502(23) (1981). It should be noted, however, through telephone conversations with representatives, that the Connecticut Commission of Human Rights and Opportunities, the Pennsylvania Human Relations Commission and the Florida Commission on Human Relations have at least indicated that they regard alcohol and/or drug abuse as protected handicaps (the Florida agency has, thus far, so indicated only for alcoholism).

of the job in question, or where reasonable accommodation of the condition will allow the individual to perform those job functions, and does not pose a direct threat to the property or safety of others.

The Rehabilitation Act and state handicap or disability discrimination laws impose upon covered employers the duty to reasonably accommodate handicapped individuals so as to make available employment and advancement opportunities.[104] Employers are relieved of this duty where they can show accommodation would impose an undue hardship on the operation of the business or enterprise.[105] In addition, federal agencies must satisfy the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970[106] which requires federal agencies to provide alcoholism treatment programs for federal employees. Reading this 1970 statute in conjunction with the Rehabilitation Act makes clear Congress' intent that federal agencies make affirmative efforts to assist alcoholic employees in overcoming their handicap before undertaking adverse employment action.

The regulations promulgated under the Rehabilitation Act list various actions that may be required as reasonable accommodation, depending upon the circumstances:

> (1) [M]aking facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.[107]

The above list is merely illustrative, and should not be considered all inclusive.

In determining whether accommodation would impose undue hardship, the size and type of the employer's operation (including the number of employees, facilities, and nature of work or services performed) and the nature and cost of the accommodation needed are considered.[108] Several recent cases illustrate the principles of reasonable accommodation and undue hardship.

In *Whitlock v. Donovan*,[109] an employee of the U.S. Department of Labor was an alcoholic. The employee's drinking problem seriously affected his work performance and attendance. After experiencing an alcoholic seizure at work, he was referred by his supervisor for counselling. After the worker participated in an alcoholism out-patient program, his attendance and performance improved. However, about three years later, he relapsed. He was again suspended and referred for counselling and treatment. Upon his return to work, over the ensuing four-year period, the Department took other steps to accommodate his condition. It

104 45 C.F.R. § 84.12(a) (1986).
105 *Id.*
106 Pub. L. No. 91-616, § 201, 84 Stat. 1848, 1849 (codified as amended at 42 U.S.C.A. §§ 290aa-290ee (West 1985 & Supp. 1987)).
107 42 U.S.C.A. § 84.12(b)(1), (2) (West 1985 & Supp. 1987).
108 *Id.* § 84.12(c)(1), (2), (3).
109 598 F. Supp. 126 (D.D.C. 1984), *aff'd sub nom.*, Whitlock v. Brock, 790 F.2d 964 (D.C. Cir. 1986).

adjusted his work hours so he could continue in a rehabilitation program and offered to transfer him to a less stressful job. Despite these efforts, his work record worsened. Eventually, the worker was discharged.

The employee sued the Department under the Rehabilitation Act, claiming that he was handicapped (alcoholism) and the Department failed to make reasonable accommodation before firing him.[110] The court agreed, finding that while the Department treated the employee with compassion and tolerance, its actions fell short of the Rehabilitation Act's reasonable accommodation requirement.[111] Furthermore, the Department had not shown that reasonable accommodation would have imposed an undue hardship.[112] The employee was allowed to reapply for employment with the Department subject to a fitness-for-duty examination. If found fit, he was to be rehired; if not, he was to be paid disability retirement.[113]

In another case, *Walker v. Weinberger*[114] a recovered alcoholic brought action against his employer, the United States Department of Defense. He alleged handicap discrimination in violation of the Rehabilitation Act and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act. The employee argued that the Department did not reasonably accommodate him as mandated by the two acts.

The Department discharged Walker for repeated absences from his work as a "printed-materials packer" for the Defense Printing Service (DPS). The DPS, prior to Walker's termination, gave Walker permission to be hospitalized under a government alcohol counseling and assistance program. Thereafter, Walker's problems at work increased. However, these subsequent problems were unrelated to his alcoholism. In discharging Walker, the Department treated his pre-treatment and post-treatment absences cumulatively.[115]

The court ruled that by considering both pre-treatment and post-treatment behavior together, the Department failed to reasonably accommodate Walker.[116] The court stated that "an agency does not 'reasonably accommodate' an alcoholic employee by keeping score of alcohol-induced, pre-treatment transgressions for purposes of cumulation with non-alcoholic related misconduct to produce an aggregate disciplinary record warranting more severe punishment."[117] The court concluded that reasonable accommodation of an alcoholic employee "requires forgiveness of his past alcohol-induced misconduct in proportion to his willingness to undergo and favorable response to treatment."[118]

There are limits, however, to an employer's duty to reasonably accommodate. The previous accommodation cases should be contrasted

110 *Id.* at 128.
111 *Id.* at 136.
112 *Id.* at 137.
113 *Id.* at 137-38.
114 600 F. Supp. 757 (D.D.C. 1985).
115 *Id.* at 759-60, 761-62.
116 *Id.* at 762.
117 *Id.*
118 *Id.*

against *Richardson v. United States Postal Service*.[119] There, the United States Postal Service discharged an alcoholic employee who had been charged with assault with intent to kill. He had attempted to kill his wife and himself. The plaintiff alleged that "if he had been accommodated for his alcohol problem, his offense might not have happened, and thus his difficulties arose from the Postal Service's inadequate attention to his alcohol handicap."[120]

The court held that Richardson's claim that the Postal Service failed to reasonably accommodate him was without merit.[121] The court found that Richardson was not discharged because of poor performance due to alcohol abuse or for being an alcoholic, but for his criminal conduct instead. The court noted that the Rehabilitation Act, "does not create a duty to accommodate an alcoholic who . . . commits an act which standing alone disqualifies him from service and is not entirely a manifestation of alcohol abuse."[122]

Although these cases deal with the duty of reasonable accommodation under the Rehabilitation Act, the concepts of reasonable accommodation and undue hardship under state laws are generally consistent with those under the Rehabilitation Act. Accordingly, cases decided under the Rehabilitation Act, like *Whitlock*,[123] *Walker*,[124] and *Richardson*,[125] provide guidance even for employers not covered under the Rehabilitation Act.

III. Substance Abuse Testing and Collective Bargaining Agreements

Unionized employees present additional problems for employers seeking to impose substance abuse testing programs. Pursuant to the National Labor Relations Act (NLRA), a unionized employer has a duty to bargain with the employees' representative over "wages, hours and other terms and conditions of employment."[126] Although the National Labor Relations Board (NLRB) has not ruled on the issue, a substance abuse testing program is likely to be considered a mandatory subject of collective bargaining within the above definition.[127] A clear and unequivocal waiver (in contract language and/or past practice) may permit an employer to move forward without consultation with the union. However, it is generally advisable for the employer *not* to unilaterally implement a substance abuse testing program without bargaining. Such an action may violate the NLRA.

In *Lockheed Shipbuilding and Construction Co.*[128] for example, the NLRB

119 613 F. Supp. 1213 (D.D.C. 1985).
120 *Id.* at 1215.
121 *Id.* at 1215-16.
122 *Id.* at 1216.
123 *See supra* notes 109-13 and accompanying text.
124 *See supra* notes 114-18 and accompanying text.
125 *See supra* notes 119-22 and accompanying text.
126 National Labor Relations Act ch. 37, § 1, 49 Stat. 449, 450 (1947) (codified as amended at 29 U.S.C. § 158(d) (1982)).
127 Electri-Flex Co. v. NLRB, 570 F.2d 1327, 1333 (7th Cir. 1978), *cert. denied*, 439 U.S. 911 (1978).
128 273 N.L.R.B. 171 (1984), *proceeded by* 282 N.L.R.B. 41 (1986).

ruled that an employer violated the Labor Management Relations Act[129] when it unilaterally implemented a pulmonary function and audiometric medical screening program. Employees who failed the test were denied employment. The Board held that the employer's action violated the NLRA. The employees' collective bargaining agreement in effect contained specific restrictions on physical examinations. The employer had unequivocally sought the right to establish the screening tests for a different purpose during registrations.[130]

In contrast, the Eighth Circuit vacated an injunction against a unilaterally implemented drug testing program in *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.*[131] The court found that the program represented only a minor change in working conditions and analogized it to a standard medical examination aimed to ensure fitness for duty.

Accordingly, employers of union labor should review their existing collective bargaining agreements to ascertain whether a substance abuse testing program is expressly or impliedly prohibited. If such a program is expressly or impliedly prohibited, at a minimum, good-faith bargaining is required before such a program may be implemented. Even in the absence of such a prohibition, however, it may be advisable to notify the union in advance of implementing the program for legal and practical reasons.

IV. Criteria for an Effective Substance Abuse Testing Program

Mindful of the legal implications under both federal and state law previously discussed, this Article will now summarize the criteria for a substance abuse testing program that would likely survive judicial scrutiny.

A. *Public Employer*

1. Legitimate State Interest

In order to implement what is otherwise a search and seizure and/or invasion of privacy under the fourth and fourteenth amendments, a government employer must have a legitimate interest for establishing a substance abuse testing program. Generally, such interest is found in the public employer's duty to provide a safe working environment and ensure the public welfare. Those public employers (*e.g.*, transportation), whose "mission" is such that a mistake poses significant dangers to the public welfare have the strongest interest in seeing that its employees are "fit for duty." Substance abuse testing is *one* means of addressing that interest.

2. Reasonable Suspicion

While some "across-the-board" or even random testing programs

129 29 U.S.C. § 141 (1982).
130 273 N.L.R.B. 171.
131 802 F.2d 1016 (8th Cir. 1986).

have been upheld by the courts,[132] unless there is a particularly compelling state interest, such testing should be generally administered only where there is reasonable suspicion, supported by objective evidence, that a particular individual is using drugs and/or alcohol.

3. Equal Treatment

Since the chief purposes of substance abuse testing are "fitness for duty" and safety, tests should be conducted for other medical conditions that could impair an employee's ability to perform his job safely. Substance abuse should not be treated differently than other disabling conditions.

4. Policy Statement

Testing should be conducted pursuant to a written, published policy. Applicants and employees should be apprised of the policy prior to such testing. This notice, which may be accomplished during interviewing or orientation, will reduce expectations of privacy by individuals being tested.[133] The policy should define:

> (a) the standards of conduct to which employees are expected to adhere;
> (b) the methods of detection to be used and the circumstances under which testing will be conducted; and
> (c) the consequences of positive results or an individual's refusal to be tested.

Care should be taken to minimize the "intrusion" into the individual's privacy and ensure the "reasonableness" of the search and seizure. While it can be argued that urinalysis is less intrusive than blood testing,[134] if the procedure involved unreasonably infringes upon an individual's expectation of privacy such that it "detracts from human dignity and self respect," it will not pass constitutional muster.[135]

The employer's policy should indicate that testing is a condition of employment and specify the consequences of a positive result. The policy should provide reasonable accommodation, such as flexible work hours, transfers, and employee assistance programs, although not imposing undue hardship on the employer. Discipline also may be specified where accommodation would impose undue hardship, or where the individual refuses the accommodation offered and the substance abuse either prevents performance of the essential functions of the position or poses a direct threat to the property or safety of others. Refusal to test may re-

132 Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986); Rushton v. Nebraska Pub. Power Dist., 654 F. Supp. 1510 (D. Neb. 1987). *See supra* notes 23-28 and accompanying text.

133 *See* Capua v. City of Plainfied, 643 F. Supp. 1507, 1515 (D.N.J. 1986). *See also supra* notes 32-40 and accompanying text.

134 *See* Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985), *aff'd*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986).

135 National Treasury Employees Union v. Von Raab, 649 F.Supp 380 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir.), *emergency stay denied*, 107 S. Ct. 3182 (1987). *See also* text accompanying notes 41-52.

sult in the same degree of discipline, which can range from supervision to termination, imposed for positive test results.

5. Consent

Knowing and voluntary consent to the testing by each individual tested will substantially reduce constitutional concerns. Informed consent cannot be accomplished without full prior disclosure of the purposes of the testing, the methodology to be utilized, and the potential consequences.[136] It may be argued that a voluntary consent is impossible where submission to testing is made a condition of employment, since such consent would be provided under duress. Nevertheless, this Article still recommends use of consent forms in connection with such testing.

6. Chain of Custody

The program should contain safeguards to ensure no break in the chain of custody of the test specimen. This minimizes the opportunity for error in the test result (*e.g.*, misidentification of the sample) and specimen tampering. Safeguarding the chain of custody also reduces exposure to fourteenth amendment claims that an employer denied the employee due process.[137]

7. Reputable Laboratory

Careful selection of the testing laboratory and appropriate confirmation (usually Gas Chromatography Mass Spectometry, GCMS) of a positive result will ensure reliability. This procedure will also reduce exposure to denial of due process claims.

8. Confidentiality

Test results should be kept confidential. Only those management officials with a "need to know" (usually those who participate in decision making based on the results) and the individual tested should be afforded access to the results.[138]

The Supreme Court has recognized a right of privacy in medical information.[139] In addition, in *Shoemaker*, the Third Circuit acknowledged that medical disclosure resulting as a by-product of urinalysis created grave confidentiality concerns.[140] The *Shoemaker* court, however, upheld urine testing of jockeys as constitutionally permissible. The court based its decision on the fact that such confidentiality concerns had been carefully addressed in statutory regulations strictly limiting the use and publication of test results so as to guarantee the jockeys' utmost

136 *See* Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905). *See also* text accompanying notes 95-96.
137 *Von Raab*, 649 F. Supp at 389.
138 45 C.F.R. § 84.14(d)(1) (1986).
139 Whalen v. Roe, 429 U.S. 589, 602 (1977).
140 *Shoemaker*, 795 F.2d at 1144.

confidentiality.[141] In contrast, the district court in *Capua v. City of Plainfield* struck down urine testing as unconstitutional because the City had not established any procedural safeguards for testing and, in particular, confidentiality of the results.[142]

B. *Private Employer*

The criteria for a succesful private employer program generally parallel those for public employer programs. However, the criteria are somewhat more liberal in several material respects. Public employers generally may not test absent reasonable suspicion. Private employers (in the absence of state action), on the other hand, may conduct across-the-board testing (even absent reasonable suspicion) without the constitutional implications discussed above. Private employers are not subject to the limitations imposed by the fourth and fourteenth amendments.[143]

Thus, absent other laws, contracts or judicially-created restrictions,[144] private employers may test all job applicants and all employees on a regular basis. Therefore, of course, they may test also individual employees based on reasonable suspicion. However, private employers should be careful to avoid singling out individuals of protected racial or ethnic groups for drug testing or exposure to disparate treatment claims will result.[145] Further, while random testing by private employers may be spared constitutional scrutiny, such testing is more likely to result in the disproportionate testing of protected groups. Moreover, it may be destructive of employee morale (and, hence, productivity) in some companies. Therefore, random testing should be carefully considered before implementation.

* * * *

Substance abuse is a societal problem of crisis proportions. The workplace is no exception. Substance abuse testing, within the legal criteria discussed in this Article, is but one way an employer (and thereby, society) can address the problem. Testing programs are not a cure; but they can be a form of damage control.

141 *Id.* at 1144.

142 643 F. Supp 1507, 1521 (D.N.J. 1986).

143 Central Hardware Co. v. NLRB, 407 U.S. 539 (1972); Burdeau v. McDowell, 256 U.S. 465 (1921).

144 Other legal theories, such as negligence, wrongful discharge and defamation of character have not been considered in this Article but may impact on the implementation or administration of a substance abuse program.

145 New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (disparate impact theory); Teamsters v. United States, 431 U.S. 324, 335-36 (1977) (disparate treatment theory).