NOTES

DRUG TESTING OF PUBLIC AND PRIVATE EMPLOYEES IN ALASKA

I. INTRODUCTION

On December 10, 1987, Kenai school bus driver Georgia Hodge lost her job for refusing to submit to a urine test.[1] Ms. Hodge was not concerned that her urinalysis would indicate drug use; rather, she objected on principle: "I'm not going to humiliate myself by peeing in a bottle in front of anybody. I feel it's a violation of my constitutional rights. It's a very humiliating thing to have to submit to."[2]

The firing of Georgia Hodge illustrates the conflicting policy considerations that underlie the controversial issue of employee drug testing. On one hand, Ms. Hodge was not suspected of drug use, and the City of Kenai had no evidence that any of its school bus drivers were using drugs.[3] On the other hand, Ms. Hodge's job falls into that category of occupations in which the need for drug-free employees is most evident. The City of Kenai had entrusted the lives of its children to Ms. Hodge, and its desire that she not be under the influence of drugs is understandable.

Drug testing in the workplace is becoming increasingly pervasive. Close to half of the Fortune 500 companies have instituted or are considering instituting some type of alcohol and drug abuse testing procedure.[4] Many government agencies are also testing workers.[5] Both private and public employers are responding to the enormous costs of drug and alcohol abuse, which have been estimated as ranging between $60 billion a year[6] and $100 billion a year.[7] The resulting costs

1. Anchorage Daily News, Jan. 8, 1987, at B1.
2. *Id.*
3. *Id.*
4. Wood, *Employee Drug Testing: Practical and Legal Considerations,* 66 MICH. B.J. 158 (1987).
5. President Ronald Reagan has required all federal agencies to adopt programs designed to eliminate drugs from the federal workplace. Exec. Order No. 12,564, 3 C.F.R. 224 (1986), *reprinted in* 5 U.S.C.A. § 7301 (Supp. 1987).
6. Castro, *Battling Drugs on the Job,* TIME, Jan. 27, 1986, at 43.
7. Note, *Employee Drug Testing — Issues Facing Private Sector Employers.* 65 N.C.L. REV. 832, 832 (1987) (citing D. COPUS, ALCOHOL AND DRUGS IN THE

arise from, among other things, increased absenteeism and medical claims, reduced productivity, increases in defective products, and lower morale.[8] Nearly forty percent of workplace deaths and one-half of workplace injuries are directly related to drug or alcohol use.[9]

This note analyzes the legal and practical problems facing Alaska employers as they decide whether to test their workers for drug use. It discusses private sector issues in light of Alaska labor law and then focuses on the constitutional issues facing public employers. After a survey of current federal drug-testing law, this note analyzes how the broad rights of privacy[10] and freedom from unreasonable searches and seizures[11] under the Alaska Constitution will affect the way in which the Alaska courts respond to the drug-testing of public employees. Finally, this note discusses the practical considerations that underlie the testing of employees and concludes by providing the employer with a list of questions to consider before instituting such a program.

II. PRIVATE EMPLOYERS

A. Constitutional Issues

The prohibition against unreasonable searches and seizures in the fourth amendment to the United States Constitution[12] does not apply to actions by private employers.[13] Similarly, the right of privacy emanating from the federal Constitution regulates only state activity, not private.[14] Although the rights of privacy and freedom from unreasonable searches and seizures preserved by the Alaska Constitution[15] are broader than those preserved by the federal Constitution,[16] they still

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WORKPLACE 1 (1986) (unpublished manuscript available from the National Employment Law Institute)).

8. D. COPUS, *supra* note 7, at 4; Dugan, *Affirmative Action for Alcoholics & Addicts,* 5 EMPL. RELAT. L.J. 234, 238 (1979); Note, *Workers, Drinks and Drugs: Can Employers Test?,* 55 U. CIN. L. REV. 127 (1986).

9. Tyson & Vaughn, *Drug Testing in the Workplace,* 50 OCCUPATIONAL HEALTH AND SAFETY 24 (Apr. 1987). One survey has estimated that between 10% and 23% of all workers use drugs at work. Note, *supra* note 7, at 1.

10. ALASKA CONST. art. I, § 22.

11. *Id.* § 14.

12. The fourth amendment provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

13. United States v. Jacobsen, 466 U.S. 109, 113 (1984) (searches by employees of private freight company not governed by fourth amendment).

14. Carey v. Population Services Int'l, 431 U.S. 678, 684-85 (1977) (right of privacy includes independence in making certain kinds of decisions without unjustified government interference).

15. ALASKA CONST. art. I, §§ 14, 22.

16. *See infra* note 127 and accompanying text.

do not extend to intrusions that are not instigated under state authority.[17]

Because the Alaska courts have interpreted the individual liberties embodied in the Alaska Constitution broadly,[18] private employers should be forewarned that the Alaska courts may in the future expand constitutional guarantees to include protection from private intrusion. Indeed, one state has already expanded its explicit constitutional right to privacy[19] to include private action. In *Porten v. University of San Francisco,*[20] a California appeals court held that: "Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone."[21] The court found that the purpose of the privacy amendment was to create "effective restraint on the information activities of government and *business.*"[22] Even if the Alaska courts do not follow California's lead, private employers should still be aware of the constitutional standards discussed below[23] because they may influence some areas of the employment relationship.[24]

B. Statutory Issues

Although drug testing within the private sector in Alaska is not constitutionally prohibited, private employers face other legal hurdles. Under the National Labor Relations Act,[25] unionized workers may

17. McConnell v. State, 595 P.2d 147, 151 (Alaska) (search and seizure provision of constitution applies only to government action), *cert. denied,* 444 U.S. 918 (1979); D.R.C. v. State, 646 P.2d 252 (Alaska Ct. App. 1982) (state action required to present constitutional question under privacy provision).

18. *See infra* notes 126-30, 158 and accompanying text.

19. CAL. CONST. art. I, § I provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy.*" *Id.* (emphasis added).

20. 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976) (a case involving improper disclosure of student records).

21. *Id.* at 829, 134 Cal. Rptr. at 842.

22. *Id.* at 829 n.2, 134 Cal. Rptr. at 842 n.2 (quoting CALIFORNIA VOTERS PAMPHLET, at 26 (1972) (emphasis added)).

23. *See infra* notes 65-107 and accompanying text.

24. *See infra* notes 57-59 and accompanying text. *See also* Brotherhood of Locomotive Engineers v. Burlington Northern R.R. Co., No. 85-4137 (9th Cir. Feb. 11, 1988) (WESTLAW, CTA9 database) (extent of privacy protection under collective bargaining agreement is influenced by fourth amendment).

25. 29 U.S.C. §§ 151-158, 159-168 (1982). Also, the United States Court of Appeals for the Ninth Circuit recently held that the Railway Labor Act, 30 U.S.C. §§ 801-962 (1982 & Supp. III 1985), prohibited private railroad companies from unilaterally implementing mandatory drug-testing programs. Brotherhood of Locomotive Engineers v. Burlington Northern R.R. Co., No. 85-4137 (9th Cir. Feb. 11, 1988) (WESTLAW, CTA9 database).

refuse to submit to drug testing if such testing constitutes a condition of employment, thereby making it a mandatory subject of bargaining.[26] The National Labor Relations Board has yet to decide if drug testing is a condition of employment. Until it does, employers may be able to impose testing without prior bargaining under existing bargaining agreement provisions that give management control over such things as safety in the workplace and employee discipline.[27] Employers should be aware, however, that some arbitrators have forbidden testing when employers have failed to notify their employees that they may be subject to drug testing.[28]

The legality of drug testing has also been challenged on the basis of Title VII,[29] which prohibits discriminatory hiring practices. The United States Supreme Court addressed employee drug use under Title VII in *New York City Transit Authority v. Beazer.*[30] The transit authority had refused to hire persons using methadone, a narcotic used to treat heroin addicts. The Court noted: "A prima facie violation of the Act may be established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities."[31] Eighty-one percent of the employees testing positive for methadone use were black or hispanic.[32] The Court found that the employer had rebutted plaintiff's prima facie case by establishing that its drug program bore a "manifest relationship to the employment in question."[33] The transit authority's legitimate employment goals of safety and efficiency required the exclusion of users of narcotics.[34] Also, the district court specifically found that the employer was not motivated by any racial animus, foreclosing any claim that the drug testing was a mere pretext for intentional discrimination.[35] Thus, according to *Beazer,* although drug testing ultimately may have a discriminatory impact, employers can avoid Title VII problems by showing that the testing is job related and by showing that racial animus played no part in the institution or administration of the drug-testing program.

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26. 29 U.S.C. § 158(a)(5), (d) (1982).

27. *See* Note, *supra* note 8, at 138. Arbitrators have upheld testing in the absence of prior bargaining. *See, e.g.,* Alameda-Contra Costa Transit Dist., 80-1 Lab. Arb. Awards (CCH) 3264, 3265, 3285 (1979) (Randall, Arb.).

28. Capital Area Transit Auth., 69 Lab. Arb. (BNA) 811, 815 (1977) (Ellman, Arb.); Grief Brothers Corp., 79-1 Lab. Arb. Awards (CCH) 4011, 4015 (1979) (Whyte, Arb.).

29. 42 U.S.C. § 2000(e) (1982).

30. 440 U.S. 568 (1979).

31. *Id.* at 584.

32. *Id.*

33. *Id.* at 587 n.31 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

34. *Id.*

35. *Id.* at 587.

Although the Alaska courts have not yet decided a drug-testing case under the parallel state employment discrimination statute,[36] the Alaska Supreme Court has stated that this statute is "intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination."[37] Moreover, the Alaska Legislature intended "to put as many 'teeth' into the statute as possible."[38] The requirement for rebutting the employee's prima facie case of discrimination, however, is no stricter under Alaska law than under federal law. Alaska law similarly requires the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[39]

Once an employee has tested positive for drug use, the employer may choose to provide counseling or therapy or may terminate the employment. Those employers who wish to retain the option of firing their drug-using employees must make sure that they do not violate Alaska employment law.

C. The Employment-At-Will Doctrine

Alaska purports to be an employment-at-will state, which means that an employer may fire an employee at any time for any reason.[40] However, the Alaska courts have established major exceptions to the general rule which may very well consume it entirely. In *Eales v. Tanana Valley Medical-Surgical Group, Inc.*,[41] the Alaska Supreme Court established the good cause exception to the employment-at-will rule. The court noted that an employee who has been hired for some

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36. ALASKA STAT. § 18.80.220 (1986).

37. Wondzell v. Alaska Wood Prod., Inc., 601 P.2d 584, 585 (Alaska 1979).

38. McLean v. State, 583 P.2d 867, 869 (Alaska 1978).

39. Alaska State Comm'n for Human Rights v. Yellow Cab, 611 P.2d 487, 492 (Alaska 1980) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). An additional discrimination theory has been suggested by black police cadets in The Shield Club v. Cleveland, 647 F. Supp. 274, 277 (N.D. Ohio 1986), *rev'd on other grounds,* No. 86-4108 (6th Cir. Dec. 4, 1987) (WESTLAW, CTA6 database). Their theory is that melanin, a skin pigment, is frequently found in the urine of black people and may be confused with the active ingredients in marijuana. The case has been remanded to the trial court and is pending. Shield Club v. Cleveland, No. 86-4108 (6th Cir. Dec. 4, 1987) (WESTLAW, CTA6 database).

40. For a general discussion of the at-will rule in Alaska, see Crook, *Employment at Will: The "American Rule" and its Application in Alaska,* 2 ALASKA L. REV. 23 (1985). The general rule is expressed in the often-quoted passage: "[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se." Payne v. Western & Atl. R.R., 81 Tenn. 507, 518-19 (1884), *overruled on other grounds,* Hutton v. Waters, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915).

41. 663 P.2d 958 (Alaska 1983).

definite period of time is not an at-will employee and may be terminated only for good cause.[42] The primary significance of the *Eales* opinion is in its holding that the employer's representation to the employee that he would be retained as long as he properly performed his duties precluded that employee from being fired except for good cause: "This representation may be found to be a part of Eales' employment contract, even if the employment contract was for an indefinite period of time."[43] The court did not address the issue of what constitutes such a representation, or whether such a representation may be implied or must be expressly stated; however, since the courts may imply from the employment contract an agreement that the employment is for a definite period of time,[44] it is reasonable to assume that an agreement that the employee will not be fired as long as he properly performs his duties may also be implied.

As a practical matter, the good cause exception to the at-will doctrine covers most employment situations. If an employee has been hired for a definite period of time, he or she is protected by the good-cause exception. If the employee is not hired for a definite period, the employer must expressly state that the employment is in fact at will, or the employer risks that a court will imply from the contract a representation that the employee will not be fired provided he properly performs his duties. Since the good cause exception covers most employment situations, it is necessary to determine whether failure to pass a drug test constitutes good cause.

A material breach of the express terms of the employment contract constitutes good cause.[45] The failure to obey a reasonable order that is consistent with the contract is a material breach.[46] In *Conway, Inc. v. Ross,*[47] the Alaska Supreme Court focused on the express terms of the contract in holding that a topless stripper could not be fired for an act of prostitution because the terms of the contract did not prohibit such conduct.[48] Even the employee's admission that such a provision was "understood for every contract" was not sufficient to justify

42. *Id.* at 959. The employee had been offered a job until he reached retirement age. The court decided this was sufficient to constitute employment for a definite period of time.

43. *Id.*

44. *Id.* at 960. The court quotes from 1A A. CORBIN, CONTRACTS § 152, at 14 (1963). If the employer made a promise, express or implied, not only to pay for the service, but also to continue the employment for a period of time that is either definite or capable of being determined, the employment is not terminable at will.

45. Central Alaska Broadcasting, Inc. v. Bracale, 637 P.2d 711, 713 (Alaska 1981).

46. *Id.*

47. 627 P.2d 1029 (Alaska 1981).

48. *Id.* at 1030.

the termination.[49] The policy justifications underlying this decision were clarified by the Alaska Supreme Court in *Rutledge v. Alyeska Pipeline Service Co.*,[50] in which an employee was fired for fighting, even though fighting violated none of the terms of the contract. The court upheld a directed verdict in favor of the employer because an employee handbook listed fighting as a possible ground for termination.[51]

An analysis of *Conway* and *Rutledge* in conjunction suggests that the Alaska courts want employees to have prior notice of the possible grounds for termination. Although including these grounds in the contract provides effective notice, *Rutledge* establishes that notice in some other form can be sufficient.[52] To retain the option of firing an employee who fails a drug test, an employer should include a drug-testing provision in the employment contract. Alternatively, the employer should give notice in some form to the employee that refusing to submit to a drug test, or failing a drug test, is grounds for termination.

The Alaska Supreme Court has created a second exception to the at-will doctrine by reading into every employment contract a covenant of good faith and fair dealing. In *Mitford v. de LaSala*,[53] the court held that because of the implied covenant of good faith, an employee with a profit-sharing incentive plan could not be fired for the purpose of preventing him from sharing in future profits. The *Mitford* court does not define the contours of the good faith exception, and whether termination based on a drug test would violate this implicit covenant is uncertain.[54]

Another possible exception to the at-will doctrine prohibits discharges that contravene public policy. In *Knight v. American Guard & Alert, Inc.*,[55] the Alaska Supreme Court, though not expressly adopting the public policy theory, held that such an exception might exist in Alaska. The court stated that "the public policy approach is largely

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49. *Id.* at 1030 n.2.

50. 727 P.2d 1050 (Alaska 1986).

51. *Id.* at 1056.

52. *Id.* A leading case in this area is Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980) (employee handbooks can give rise to contractual rights). For a general discussion of employee handbooks, see Note, *Employee Handbooks and Employment-At-Will Contracts,* 1985 DUKE L.J. 196.

53. 666 P.2d 1000, 1007 (Alaska 1983).

54. The case law from other jurisdictions indicates that the good faith exception has not yet been applied to employee drug testing. *See generally* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith,* 93 HARV. L. REV. 1816 (1980).

55. 714 P.2d 788, 792 (Alaska 1986); *see generally* Lopatka, *The Emerging Law of Wrongful Discharge — A Quadrennial Assessment of the Labor Law Issues of the 80's,* 40 BUS. LAW 1, 6-17 (1984) (22 states prohibit discharges that violate public policy).

encompassed within the implied covenant of good faith and fair dealing."[56] However, because of Alaska's strong commitment to individual freedom,[57] a discharged employee in Alaska might have a stronger argument under the public-policy exception than under the good-faith exception. An employee could argue persuasively that although private employers are not controlled directly by the Alaska Constitution,[58] a discharge based on a search that unduly invaded his privacy violates Alaska's public policy as embodied in its broad constitutional guarantees.[59]

In conclusion, although private employers who wish to test their employees are less restricted than public employers,[60] they still face significant legal hurdles. Because the Alaska courts have yet to address the issue of employee drug testing, private employers should proceed with caution and consider the alternative responses to employee drug use discussed below.[61]

III. PUBLIC EMPLOYERS

A. The United States Constitution

Historically, individuals were protected from unreasonable searches and seizures only in the context of law enforcement. Recently, however, the United States Supreme Court has been extending the restrictions in the fourth amendment to government officials acting in various civil capacities.[62] The Supreme Court also held recently in *O'Connor v. Ortega*[63] that searches by government employers are subject to constitutional restraints. Thus, public employees not suspected of criminal activity are protected by the fourth amendment.

Although the Supreme Court has never addressed the issue of employee drug testing, the lower federal courts have unanimously held that such testing constitutes a search for purposes of the fourth

56. 714 P.2d at 792. In other jurisdictions, however, the public policy exception is separate and distinct from the implied covenant of good faith and fair dealing. *See, e.g.,* Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (Ariz. 1985); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

57. *See infra* notes 127-30 and accompanying text.

58. *See supra* notes 15-17 and accompanying text.

59. *See infra* notes 127-30 and accompanying text; *see also* Novosel v. Nationwide Ins. Co., 721 F.2d 894, 900 (3d Cir. 1983) (public policy exception may be based on constitutional grounds).

60. *See infra* notes 65-107 and accompanying text.

61. *See infra* Section IV.

62. New Jersey v. T.L.O., 469 U.S. 325, 333 (1985) (school officials); Marshall v. Barlow's, Inc., 436 U.S. 307, 312-13 (1978) (Occupational Safety and Health Act inspectors); Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (building inspectors).

63. ___ U.S. ___, 107 S. Ct. 1492, 1497 (1987) (plurality opinion).

amendment.[64] Because the Constitution prohibits only unreasonable searches, it is necessary to analyze the balancing tests employed by the federal courts to separate reasonable drug testing from unreasonable drug testing.

The Supreme Court has stated that determination of the standard of reasonableness requires "balanc[ing] the nature and quality of the intrusion on the individual's [f]ourth [a]mendment interests against the importance of the governmental interests alleged to justify the intrusion."[65] Traditionally, to be considered reasonable under the fourth amendment, a search had to be authorized by a finding of probable cause.[66] However, the requirement is not absolute and "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a fourth amendment standard of reasonableness that stops short of probable cause, [the Court has] not hesitated to adopt such a standard."[67]

In *O'Connor,* the plurality noted that the government as an employer has an interest substantially different from law enforcement, which makes the probable cause requirement impractical: "The delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work."[68] The plurality held that the standard for judging the reasonableness of work-related intrusions on the fourth amendment rights of government employees is reasonableness under all the circumstances.[69] In a caveat important for drug-testing purposes, the Court noted that it was not deciding whether individualized suspicion is an essential element of the reasonableness standard.[70]

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64. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 176 (5th Cir. 1987); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976).

65. *O'Connor,* __ U.S. at __, 107 S.Ct. at 1499 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

66. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1972).

67. *O'Connor,* __ U.S. at __, 107 S.Ct. at 1501 (quoting New Jersey v. T.L.O., 469 U.S. at 341).

68. *O'Connor,* __ U.S. at __, 107 S. Ct. at 1502. The government faces the same problems in enforcing the criminal law. The Court seems to imply that the government has a greater interest in seeing that an agency operates efficiently than it does in protecting society from criminals. A better rationale for the Court's decision is that the employee who is being searched will not be subject to criminal sanctions, only loss of his job, and so a lesser constitutional standard is allowable.

69. *Id.*

70. *Id.* at 1503.

The requirement of individualized suspicion is important because a drug-testing program will be more effective in exposing drug use if employers can test randomly, without individualized suspicion. The federal courts are split on whether individualized suspicion is a prerequisite to drug testing. In *National Treasury Employees Union v. Von Raab,*[71] the United States Court of Appeals for the Fifth Circuit upheld mandatory drug testing by a federal agency of all current employees who were seeking transfers to sensitive positions, regardless of whether any of the employees were suspected of drug use. The court noted that the fourth amendment imposes no irreducible requirement of individualized suspicion.[72]

In applying its balancing test, the Fifth Circuit found that three factors weighed heavily in favor of allowing the testing. First, the nature of the job demanded that the employees be drug-free. The tested employees were seeking positions as Customs Service agents who would be involved in the interdiction of illicit drugs and who would have access to classified information.[73] Second, because the testing was not to be used to bring criminal charges, the employee had a diminished need for protection against government intrusion.[74] Third, the test was voluntary; the employee could avoid it by not applying for the transfer.[75] Since the intrusion into the privacy of the tested individuals was limited, the court held that an employee not suspected of drug use could be tested for drugs.[76]

The United States Court of Appeals for the Third Circuit reached a similar result in *Shoemaker v. Handel.*[77] The New Jersey Racing Commission had instituted a program requiring horse jockeys competing at public race tracks to submit to breathalyzer tests daily and to urine tests as often as three times a week. In upholding the testing, the court applied a two-part test that required that the state must have a strong interest in conducting an unannounced search and that the pervasive regulation in the industry must have reduced the privacy expectation of the subject of the search.[78] The strong interest claimed by

71. 816 F.2d 170, 173 (5th Cir. 1987).

72. *Id.* at 176 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976)).

73. *Id.* at 173, 178. The court felt that drug users would be more susceptible to bribes than non-users, would harm the public confidence in the service, and would pose a greater danger to their fellow employees when carrying firearms. *Id.*

74. *Id.* at 178.

75. *Id.* The court, perhaps to a fault, downplays the employee's interest in earning a living and his interest in professional advancement.

76. *Id.* at 176. Petition for certiorari was filed on May 27, 1987. National Treasury Employees Union v. Von Raab, 55 U.S.L.W. 3822 (U.S. 1987).

77. 795 F.2d 1136 (3d Cir.), *cert. denied,* __ U.S. __, 107 S.Ct. 577 (1986).

78. *Id.* at 1142.

the state to justify the testing was in "assuring the public of the integrity of the persons in the horse racing industry."[79] The court satisfied the second part of the test by noting that warrantless administrative searches of the stable[80] and testing of the horses[81] had occurred in the past. The court concluded that such regulation had diminished the jockey's expectation of privacy.[82]

In *McDonell v. Hunter,*[83] the United States Court of Appeals for the Eighth Circuit upheld drug testing of correctional institution employees absent individualized suspicion of drug use. The court applied the same two-part test and concluded that the state had a strong interest in preserving prison security. The court further held that it is reasonable to conclude that the very nature of corrections work diminished the prison guards' expectation of privacy.[84] Similarly, the United States Court of Appeals for the District of Columbia Circuit upheld mandatory testing of school bus attendants in *Jones v. McKenzie.*[85] The court held that it was reasonable to require drug testing of employees who have a direct impact on the safety of young children.[86] The court also noted that the testing was part of annual medical examinations[87] and stressed the strong evidence which showed that a "drug culture" existed among the group of tested employees.[88]

In contrast, the United States Court of Appeals for the Ninth Circuit is the only federal appellate court to strike down a drug-testing program because it was not based upon individualized suspicion. In

79. *Id.* Apparently, New Jersey has a strong interest in demonstrating to the public that horse jockeys are not "subject to certain outside influences." *Id.* The court does not tell us who or what these "certain" outside influences are. Note the similarity to the *Von Raab* court's reasoning that federal agents are uniquely subject to bribery and corruption. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 178 (5th Cir. 1987).

80. *Id.*

81. *Id.* at 138.

82. This reasoning seems to be a boot-strapping argument; the state justifies its regulation by the very fact of its regulation. Even so, none of the prior regulations approached the severity of warrantless searches of the jockeys' persons.

83. 809 F.2d 1302 (8th Cir. 1987).

84. *Id.* at 1308.

85. 833 F.2d 335 (D.C. Cir. 1987).

86. *Id.* at 341.

87. *Id.* at 340. The court does not address what level of suspicion would be required for random testing outside the context of regularly scheduled medical examinations. This court is the first to make such a distinction and the first to state that testing only during annual medical exams "has the effect of ensuring that the intrusion on the employee's privacy interest is minimized." *Id.*

88. *Id.* The court seems to create a new level of suspicion. It is not requiring individual suspicion, but emphasizes that the employer had a generalized suspicion that drug use existed among the group of employees in question.

Railway Labor Executives' Association v. Burnley,[89] the court held that federal regulations requiring drug testing of all railroad workers involved in accidents were unreasonable. The court noted that tests could be performed only if there were grounds for suspicion that a worker was under the influence of drugs or alcohol.[90] The court further held that accidents by themselves do not create reasonable grounds for suspicion that an employee was under the influence of drugs.[91]

The Ninth Circuit agreed that the railroad workers, like the jockeys in *Shoemaker,* were voluntary participants in a highly-regulated industry. However, the court distinguished *Shoemaker* on the grounds that the government regulation in the railroad industry "has always been geared to assuring the safety and proper maintenance of equipment and facilities."[92] Since government regulation did not affect the workers personally, the court reasoned, the workers did not have a diminished expectation of privacy.[93] This distinction is improper, however, because the ultimate end of the government regulation was the protection of public safety; proper maintenance of the equipment and facilities was merely a means to that end.[94] Also, the court fails to mention that railroad workers have, in fact, been subject to extensive government regulation for some 80 years.[95] Finally, the Ninth Circuit dismissed the other decisions upholding testing absent individualized suspicion as being improperly reasoned.[96]

Significantly, while most federal appellate courts have upheld testing absent individualized suspicion, the majority of district courts have not. In *Feliciano v. City of Cleveland,*[97] a district court in Ohio explicitly declined to follow *Von Raab.* Though the court takes issue with much of the *Von Raab* opinion, it ultimately holds that ordinary police officers have greater expectations of privacy than do the *Von Raab* plaintiffs who were applying for more "sensitive" Customs Service positions.[98]

89. No. 85-2891 (9th Cir. Feb. 11, 1988) (WESTLAW, CTA9 database).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* (Alarcon, J., dissenting).
96. *Id.*
97. 661 F. Supp. 578, 592 (N.D. Ohio 1987).
98. *Id.* at 592. The court expresses doubts as to the validity of the "voluntariness" and "regulated industry" factors in *Von Raab,* and states that the Fifth Circuit did not identify any employee interests. *Id.* However, the *Feliciano* court also does not identify employee interests and does not explain why police officers have a greater expectation of privacy than do Customs Service agents.

In *Capua v. City of Plainfield,*[99] a New Jersey district court refused to follow its own court of appeals' decision in *Shoemaker.* The court held that random testing of fire fighters and police officers was unconstitutional absent reasonable suspicion. The court distinguished *Shoemaker* on the grounds that fire fighters were not "voluntary participants in a regulated industry" and had not been subjected to pervasive regulation.[100]

In *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency,*[101] a California district court held that bus drivers and maintenance workers could not be tested absent reasonable suspicion.[102] The court concluded that the state's interest in the promotion of public safety was outweighed by the employees' privacy interest in their bodily waste.[103] Two flaws existed in the testing program: the agency employed only about fifty workers and the court felt that the drivers could be monitored by a "less draconian program"; and the agency officials testing the workers had too much discretion as to whom they tested.[104] Importantly, the court leaves open the possibility that drug testing absent individualized suspicion may be appropriate in some circumstances: "[T]his court can conceive of certain mass-transit settings where mandatory drug and alcohol testing would be reasonable under a more generalized quantum of proof."[105]

Without question, the cases discussed above cause considerable confusion. For example, the Third Circuit has held that a state has a sufficiently strong interest in preserving the appearance of integrity in the horse-racing industry to justify random testing.[106] During that same year, a New Jersey district court within the Third Circuit held that a state's interest in protecting the public safety does not justify such testing in the field of fire protection.[107] As a result of this inconsistency, an Alaska public employer cannot be certain whether a federal court will allow random testing or whether it will condition

99. 643 F. Supp. 1507 (D.N.J. 1986).

100. *Id.* at 1519.

101. 663 F. Supp. 1560 (C.D. Cal. 1987).

102. *Id.* at 1568.

103. *Id.* at 1569.

104. *Id.* at 1568, 1569.

105. *Id.* at 1568 n.4.

106. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied,* __ U.S. __, 107 S.Ct. 577 (1986).

107. Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986). For other cases banning drug testing in the absence of individualized suspicion, see, *e.g.,* American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986) (civilian employees of the U.S. Army in critical positions); Bostic v. McClendon, 650 F. Supp. 245 (N.D. Ga. 1986) (police officers); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986) (fire fighters).

testing on reasonable suspicion. Quite simply, in most public employment situations, a court could decide either way and have ample case law to support its holding. The following section suggests a solution to the problem, which Alaska public employers can use to design the scope and procedure of their drug-testing programs and to defend them in court.

B. A Proposed Solution to the Reasonable Suspicion Requirement

The constitutional standard for public employer intrusions on the privacy interests of employees for non-investigatory, work-related purposes is reasonableness under all the circumstances.[108] This inquiry necessarily involves a balancing of governmental interests against individual interests, not only as to their relative importance, but also as to the impact of the selected means of intrusion on each. In ruling on the constitutionality of drug-testing programs, courts must make practical determinations as to the real value of the alleged state interests and the beneficial impact of drug-testing on these interests. At the same time, courts must determine the employee's legitimate expectation of privacy and the extent to which drug testing intrudes on this privacy.

The application of this balancing test suggests that random, mandatory drug testing should be justified by nothing less than the state's interest in protecting the public's safety.[109] Because members of society entrust their lives to public employees, such as law enforcement officials and public transportation workers, society has a right to demand that such state employees be drug free. In contrast, other state interests less important than public safety, such as preserving the appearance of integrity in a particular industry, should not justify a search absent reasonable suspicion.[110]

The *Sunline Transit* court, while acknowledging that public safety might in some circumstances justify a search absent reasonable suspicion,[111] found that because only fifty employees were at issue, the transit agency could have monitored drug use by less intrusive means. However, the court misses the significance of the nature of the bus drivers' employment. Random drug testing is justified in this situation because workers such as bus drivers are not subject to close supervision while performing their duties. The state has only a limited time

108. O'Connor v. Ortega, ___ U.S. ___, 107 S. Ct. 1492, 1502 (1987).

109. Of course this does not preclude the possibility that drug testing may be necessary for an interest greater than public safety, such as national security. It is the position of this note that public safety is the weakest interest that will qualify.

110. Such an interest was used to justify a search absent individual suspicion in Shoemaker v. Handel, 795 F.2d at 1142.

111. *See supra* note 105 and accompanying text.

to observe the employee and, therefore, will have inadequate opportunity to form a reasonable suspicion of drug use. That the agency hires only fifty people instead of 150 does not change this fact. Thus, a state interest sufficient to justify random testing arises when employee drug use will endanger the public safety and when insufficient opportunity exists for the state employer properly to observe the employee and form a reasonable suspicion of drug use.[112]

In addressing the employee's privacy interest, several courts have reasoned that if a particular industry has a history of heavy governmental regulation, the employee in turn can expect a diminished expectation of privacy.[113] The weaknesses in this analysis are evident in *Shoemaker v. Handel.*[114] The *Shoemaker* court concluded that since New Jersey required jockeys to be licensed and required horses to be tested, the jockeys came into the business with a diminished expectation of privacy as to their own bodies. These regulations, however, are not of the same quality or severity as the intrusion implicated by urine testing of the jockeys; the jockeys' expectations of privacy were, therefore, not diminished to an extent that would permit mandatory drug testing.[115]

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112. Such a formula probably will allow random testing of drivers but not mechanics since mechanics are more amenable to supervision. Likewise, clerical workers in a mass transit agency could not be tested without reasonable suspicion because no threat to public safety exists. In Railway Labor Executives' Association v. Burnley, No. 85-2891 (9th Cir. Feb. 11, 1988) (WESTLAW, CTA9 database), the Ninth Circuit failed to consider the public safety interests implicated by drug use of railroad workers:

> The majority in the instant matter has failed to engage in the balancing of interests required by the [Supreme Court]. Instead, the majority focuses solely on the degree of impairment of the workers' privacy interests. Finding that the blood and urine tests are intrusive, the majority quickly proceeds to the conclusion that the tests are not justified at the inception because they are not initiated as the result of individualized suspicion of drug or alcohol use.

Id. (Alarcon, J., dissenting).

113. *See Shoemaker,* 795 F.2d 1136; Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

114. 795 F.2d at 1141, 1142.

115. The *Shoemaker* court claims to be following Donovan v. Dewey, 452 U.S. 594, 600 (1981). In that case, however, the Supreme Court merely allowed warrantless inspections of mines pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 (1982 & Supp. III 1985). The *Shoemaker* court also mentions the following cases as exceptions to the warrant requirement in highly regulated industries: United States v. Biswell, 406 U.S. 311 (1972) (gun dealer's expectation of privacy diminished by Gun Control Act); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970) (liquor industry). In both of these cases, the diminished expectation of privacy was directly limited to the specific areas of regulation. The regulations did not affect privacy in general.

Furthermore, trying to measure the pervasiveness of government regulation when the government itself is the employer presents an awkward analysis, as evidenced by *Capua v. City of Plainfield.* In its holding that city fire fighters could not be tested randomly, the court distinguished *Shoemaker* on the grounds that city fire fighters were not "voluntary participants in a highly-regulated industry."[116] Thus, government employees have an expectation that the government will regulate them less than it regulates some private-sector employees. The court's analysis is indefensible, particularly in view of the critical role that fire fighters play in protecting the public.

A more logical procedure of judging the employee's expectation of privacy would be to analyze the nature of the job itself. If a job places a particular employee in a position where members of the public or co-workers depend upon him for their safety, the employee should know that society has a greater interest in regulating his conduct and in ensuring that he perform his duties free from the influence of drugs.[117] Thus, the analysis for the second part of the test, the determination of the employee's legitimate expectation of privacy, is consumed in the analysis for the first part of the test, the state interests implicated by the employment. If a public employee will be put in a position in which other individuals are dependent upon him for their safety, and if no other adequate means of supervision exist, then the state has a sufficiently strong interest to test for drugs absent reasonable suspicion. At the same time, the employee will have a diminished expectation of privacy.

Two factors concerning the drug-testing procedure may help to reconcile some of the conflicting results. The first concerns the actual taking of the urine sample. In *Capua v. City of Plainfield,* the fire fighters at issue were forced to urinate in the presence of a government agent, which significantly heightened the intrusiveness of the search: "The requirement of surveillance during urine collection forces those tested to expose parts of their anatomy to the testing official in a manner akin to strip search exposure."[118] Such intrusive surveillance is unnecessary. For example, the Customs Service developed a procedure that prevented tampering with the specimen but that did not involve visual observation of the urination. The *Von Raab* court found

116. *Capua,* 643 F. Supp. at 1518 (quoting *Shoemaker,* 795 F.2d at 1142).

117. Several courts have stressed the importance of the "voluntariness" of drug-testing programs, reasoning that if the employee wishes to avoid being tested, he need only work at jobs not requiring testing. *See, e.g.,* National Treasury Employees Union v. Von Raab, 816 F.2d 170, 178 (5th Cir. 1987); *Shoemaker,* 795 F.2d at 1142. This note proposes to drop this factor from the analysis on the grounds that it underestimates the employee's need to earn a living and that it misunderstands the economic realities facing most employees.

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

this fact significant in determining that the extent of the privacy intrusion was minimal.[119]

The second procedural factor often considered by the courts is the amount of discretion given to the official in the field: "[R]andom alcohol and drug tests . . . provide officials with too much discretion to be reasonable under the Constitution."[120] However, this problem may be rectified by restricting the testing to certain classes of employees[121] or by eliminating discretion from the determination of who will be tested.[122] The goal is to protect employees from government officials who enjoy "almost unbridled discretion . . . as to when . . . and whom to search."[123] To help shelter their drug-testing programs from constitutional attack, public employers should minimize the privacy intrusion and should safeguard the testing procedure from abuse by government officials.

In conclusion, it is well established that under the United States Constitution public employers with reasonable suspicion may test their employees for drug use.[124] The Supreme Court has intimated that testing absent reasonable suspicion may be constitutional in some circumstances,[125] and the lower federal courts seemingly are split on the circumstances under which random drug testing is permissible. This note takes the position that the standards elucidated by the Supreme Court will be fulfilled best by a constitutional formulation allowing testing in the absence of individualized suspicion when such testing is necessary to further the state's interest in protecting the public safety, provided that the state tests in a manner that intrudes minimally on the employee's diminished expectation of privacy.

C. The Alaska Constitution

1. *Search and Seizure.* Alaska public employees are protected from unreasonable searches and seizures not only by the fourth

119. *Von Raab,* 816 F.2d at 174. "The employee . . . enters a restroom stall and produces the urine sample. In order to prevent tampering, the observer remains in the restroom to listen for the normal sounds of urination . . . but the observer does not visually observe the act of urination. The employee then leaves the stall and presents the bottle containing the specimen to the observer. To insure that a previously collected sample has not been proffered, the observer is instructed to reject an unusually hot or cold sample." *Id.*

120. Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, 663 F. Supp. 1550, 1569 (C.D. Cal. 1987).

121. See *Von Raab,* 816 F.2d at 177, in which only those employees seeking transfer to sensitive positions were tested.

122. Shoemaker v. Handel, 795 F.2d 1136, 1143 (3rd Cir.), *cert. denied* __ U.S. __, 107 S. Ct. 577 (1986) (testing done by lottery).

123. Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978).

124. *See supra* notes 65-107 and accompanying text.

125. O'Connor v. Ortega, __ U.S. __, 107 S. Ct. 1492, 1503 (1987).

amendment of the United States Constitution, but also by article I, section 14, of the Alaska Constitution.[126] The Alaska courts have construed the state constitution to provide broader privacy rights under its search and seizure provision than those provided by the federal Constitution.[127] Unlike the federal provision, the Alaska provision contains language which protects "other property,"[128] and the Alaska Constitution contains an explicit guarantee of privacy.[129] Therefore, even if drug-testing programs meet federal standards, they also must not interfere with the freedoms preserved in the Alaska Constitution, because, as to such liberties, "[federal] authority is questionable and . . . not persuasive as to the construction of Alaska's analogous provision."[130]

The Alaska Supreme Court has held that a search or seizure is unreasonable if a person has exhibited an actual, subjective expectation of privacy that society is prepared to accept as reasonable.[131] Although the Alaska courts have yet to address employee drug testing, they will likely hold that such activity constitutes a search for purposes of article I, section 14. Because of the expansive reach of that provision, the Alaska courts may allow drug testing in fewer circumstances than do the federal courts. In an effort to forecast how the Alaska courts will respond when the issue is brought before them, this Section analyzes Alaska search and seizure cases arising out of situations analogous to employee drug testing.

The Alaska courts have repeatedly stated that "a search without a warrant is per se unreasonable unless it clearly falls within one of the narrowly defined exceptions to the warrant requirement."[132] One exception is exigent circumstances, which the Alaska Supreme Court used in *Schultz v. State*[133] to allow the entry of fire fighters into the defendant's house. The *Schultz* court found a "compelling need for official action and no time to secure a warrant."[134] Drug testing might

126. ALASKA CONST. art. I., § 14.

127. *See, e.g.,* Ellison v. State, 383 P.2d 716, 718 (Alaska 1963); *see also* Zehrung v. State, 569 P.2d 189, 199-200 (Alaska 1977) (holding that property inventory of arrestees constitutes search under section 14, even though it does not under the fourth amendment).

128. Woods & Rohde, Inc. v. State, 565 P.2d 138, 148 (Alaska 1977).

129. *Id.*; ALASKA CONST., art. I, § 22. The United States Supreme Court has recognized the power of the states to create broader rights of privacy than existed under the federal Constitution. Katz v. United States, 389 U.S. 347, 350-51 (1967).

130. State v. Glass, 583 P.2d 872, 874-75 (Alaska 1978).

131. *See Glass,* 583 P.2d at 875; Smith v. State, 510 P.2d 793, 796-97 (Alaska), *cert. denied,* 414 U.S. 1086 (1973). Mr. Justice Harlan used this standard in his concurrence in Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

132. *See, e.g.,* Woods & Rohde, 565 P.2d at 149.

133. 593 P.2d 640 (Alaska 1979).

134. 593 P.2d at 642 (quoting Michigan v. Tyler, 436 U.S. 499, 509 (1978)).

similarly qualify under this exception if the employer can show that it is necessary to test an employee immediately to protect the public safety. For example, public transportation employers could argue that exigent circumstances are always present. The danger to public safety creates the compelling need for official action and the nature of the danger provides no time to secure a warrant. The exigent circumstances exception, however, has been restricted to unforeseen emergencies and unexpected dangers.[135] Allowing a comprehensive drug-testing program would require an expansion of this exception.

A second exception to the warrant requirement is the abandonment doctrine, under which an individual relinquishes the right of privacy in property he abandons.[136] To abandon property, one must clearly indicate "an intention to relinquish all title, possession, or claim to property."[137] It is unlikely, however, that the Alaska courts will hold by way of analogy that an employee has the requisite intention to abandon urine that has been produced for testing purposes.

A third exception allows a search in the absence of a warrant if the individual consents.[138] The Alaska courts define consent narrowly: "Consent to a search . . . must be unequivocal, specific and intelligently given, uncontaminated by any duress and coercion, and is not to be lightly inferred."[139] In *State v. Salit,*[140] the Alaska Supreme Court held that consent may not be implied from the mere fact that persons are on notice that they may be searched. This holding suggests that merely putting a drug-testing provision in an employment contract might not constitute consent. Thus, even if an employee expresses consent to a drug-testing provision, the courts may view the imbalance of power in the employer-employee relationship as coercive.

The final exception allows warrantless administrative searches where specifically authorized by statute.[141] Thus, the Alaska Legislature could in fact authorize warrantless administrative searches of public employees.[142] An example of such legislation has occurred on

135. *See generally Tyler,* 436 U.S. 499.

136. Smith v. State, 510 P.2d 793, 795 (Alaska 1973).

137. *Id.* at 796 (quoting Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis,* 20 BUFF. L. REV. 399, 401 (1970)).

138. Erickson v. State, 507 P.2d 508, 515 (Alaska 1973).

139. *Id.* (quoting Sleziak v. State, 454 P.2d 252, 257-58, *cert. denied,* 396 U.S. 921 (1969)).

140. 613 P.2d 245, 254 (Alaska 1980).

141. State v. Salit, 613 P.2d 245, 250 (Alaska 1980).

142. The legislature would have to follow the guidelines set out in Woods & Rohde, Inc. v. State, 565 P.2d 138, 145 (Alaska 1977). Not all administrative searches are constitutional; indeed, the holding in *Woods & Rohde* was that warrantless searches pursuant to the state OSHA regulations are not constitutional. *Id.* at 151.

the federal level. In 1974, Congress passed the Air Transportation Security Act ("ATSA"), which requires screening for weapons of all passengers and their luggage, even absent individualized suspicion.[143] Congress passed ATSA in response to a dramatic increase in hijackings. In *State v. Salit,* the Alaska Supreme Court held that warrantless searches conducted pursuant to ATSA did not violate the Alaska Constitution. "[W]here . . . regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant . . . ."[144] The great dangers presented to the public by hijackings, and the absence of any other viable response to the problem, necessitated mandatory searches of all passengers. The court recognized that searching all passengers was an "extraordinary response to an extraordinary situation,"[145] but noted that "the fourth amendment permits necessary responses to new dangers."[146]

The hijacking situation is somewhat analogous to drug abuse in the workplace. The government has a strong, if not urgent, interest in controlling drug use in the workplace.[147] Similar safety and health dangers to the public exist, and, at least in some types of public employment, it may be impossible for the government to combat the problem through less intrusive means.[148] Urine testing is perhaps a more intrusive invasion than the weapon-detecting procedures employed under ATSA; however, the search of airline passengers often includes hand searches of luggage,[149] searches that are more than minimally intrusive. Also, ATSA requires searching passengers, who, as private citizens, have a much greater expectation of privacy than do public employees. Thus, state legislation allowing public employers to

143. This statute enacted 49 U.S.C. §§ 1356, 1357 (1982 & Supp. III 1985) and amended 49 U.S.C. §§ 1301, 1472, 1511 (1982 & Supp. III 1985).

144. *Salit,* 613 P.2d at 251 (quoting United States v. Biswell, 406 U.S. 311, 317 (1982)).

145. *Id.* at 250.

146. *Id.*

147. *See infra* notes 4-9 and accompanying text. Marijuana use by the pilot was implicated in a recent fatal commercial airline crash. Yesavage, Leirer, Denari & Hollister, *Carry Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report,* 142 AM. J. PSYCHIATRY 1325, 1325 (1985). The government is willing to search all passengers to protect them from being injured or killed by hijackers; however, passengers must also be protected from impaired pilots. *See also* Note, *supra* note 7, at 832 (drug and alcohol use implicated in 37 deaths in the railroad industry).

148. *See supra* notes 111-12 and accompanying text.

149. State v. Salit, 613 P.2d 245, 247 (Alaska 1980).

impose mandatory drug testing may very well pass constitutional standards, especially if the legislation limits the scope of the testing to "the circumstances which rendered its initiation permissible."[150]

If public employers want to test their employees randomly for drug use, they must lobby for legislation. Otherwise, public employers must wait until they have reasonable suspicion that a particular employee is using drugs. In the absence of statutory authority, even a minimally intrusive search must be based on reasonable suspicion.[151]

It should be noted that in *D.R.C. v. State*[152] the Alaska Court of Appeals held that government officials who were not involved in law enforcement were not subject to the fourth amendment or to section 14. Technically, this case is still good law, and it supports the premise that a government employer would be able to test his employees completely free of search and seizure limitations. However, subsequent to *D.R.C.*, the United States Supreme Court held in *New Jersey v. T.L.O.*[153] that school officials are restrained by the fourth amendment, directly contradicting the holding in *D.R.C.* Since Alaska's search and seizure protections have always been interpreted to extend at least as far as the federal protections,[154] the Alaska courts might disregard the *D.R.C.* ruling and hold government officials acting outside the scope of law enforcement subject to section 14.

2. *The Right to Privacy.* The privacy amendment of the Alaska Constitution, article I, section 22, has been applied to situations that do not fit within the traditional law enforcement search and seizure framework.[155] Although the Alaska courts will probably analyze public employer drug testing as a search,[156] they undoubtedly will do so in light of their prior decisions under the privacy amendment. This section analyzes the scope of the right to privacy under section 22, particularly as it relates to the right of public employees to be free from drug testing.

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150. *Id.* at 251 (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)). It should also be noted that the testing must not be used to impose criminal penalties. *Id.*

151. Pooley v. State, 705 P.2d 1293, 1311 (Alaska Ct. App. 1985) (criminal case).

152. 646 P.2d 252, 256 (Alaska Ct. App. 1982).

153. 469 U.S. 325, 334-35 (1985).

154. *See supra* notes 127-30 and accompanying text. *See also* Lowry v. State, 707 P.2d 280, 285 (Alaska Ct. App. 1985) (noting that *D.R.C.* was incorrectly decided).

155. *See, e.g.*, Messerli v. State, 626 P.2d 81 (Alaska 1980) (privacy may include anonymity with respect to ballot advertising); Gunnerud v. State, 611 P.2d 69 (Alaska 1980) (release of psychiatric report subject to privacy protection where irrelevant to issue of witness's credibility); Falcon v. Alaska Public Offices Comm'n, 570 P.2d 469 (Alaska 1977) (doctor-patient relationship); Ravin v. State, 537 P.2d 494 (Alaska 1975) (consumption of marijuana in the home).

156. *See supra* notes 152-54 and accompanying text.

Section 22 cases are important in forecasting how the Alaska courts will respond to employer searches because the standards under section 14 and section 22 are identical: for a search to be invalid, there must be an actual expectation of privacy, and this expectation must be one that society is prepared to accept as reasonable.[157] The balancing test employed by the Alaska courts to determine what privacy expectations are protected differs substantially from the federal test: "Under the language of the federal cases, it must be found that the privacy invasion is necessary to a compelling state interest.... Under the Alaska Constitution, the required level of justification turns on the precise nature of the privacy interest involved."[158] Thus, the Alaska courts apply a more flexible test than the two-tier constitutional analysis employed by the federal courts. Also, while the federal test focuses on the needs of the state, Alaska's test is more concerned with the individual.

The public employee can assert several privacy interests that drug testing will invade. The employee can argue that the right to privacy includes the right to do as one pleases in the confines of one's home and that drug testing violates this right because it divulges not only work-related drug use, but also off-duty drug use.[159] Although the right to privacy protects people and not places, the Alaska Supreme Court has preached on the sanctity of the home: "If there is any area of human activity to which privacy pertains more than any other, it is the home."[160] In *Ravin v. State,*[161] the supreme court held that Alaska citizens have a right to consume substances such as marijuana in non-commercial contexts in the home. Thus, since urinalysis cannot distinguish between marijuana use during work hours and marijuana use off-duty, drug testing as a prerequisite for public employment may violate this right. This victory is a narrow one for the public employee because the Alaska courts have also held that the right to privacy does not extend to the non-commercial use of cocaine,[162] or, interestingly enough, alcohol.[163]

However, the mere fact that drug testing may detect activities occurring in the privacy of one's home does not make it unconstitutional. Although in *Ravin v. State* the Alaska Supreme Court held

157. State v. Glass, 583 P.2d 872, 875 (Alaska 1978).

158. *Falcon,* 570 P.2d at 476.

159. Marijuana may be detected for as long as 20 days after consumption. Panner & Christakis, *The Limits of Science in On-The-Job Drug Screening,* 1986 HASTINGS CENTER REP. 7, 9 (Dec.).

160. Ravin v. State, 537 P.2d 494, 503 (Alaska 1975).

161. *Id.* at 504.

162. State v. Erickson, 574 P.2d 1 (Alaska 1978).

163. Harrison v. State, 687 P.2d 332 (Alaska Ct. App. 1984).

that personal consumption of marijuana in the home is constitutionally protected,[164] the right of privacy in Alaska is not absolute.[165] The *Ravin* court stated that the right does not include any activity, even in one's home, which will affect that individual or others adversely.[166] The right of privacy must yield when the activity affects the public health and general welfare.[167] Thus, the state may prohibit driving while under the influence of marijuana,[168] the possession of marijuana in a public place,[169] and the possession of marijuana by a minor.[170]

To say that disciplining an employee for off-duty drug use violates the right of privacy implies that such use does not affect job performance. However, when a public employee consumes marijuana in the home and then proceeds directly to his employment, certainly that conduct has lost its wholly private character. It is not clear how much time must elapse between use of the drug and the beginning of the public activity before the drug use becomes wholly private. Current medical evidence indicates that marijuana causes severe long and short term physical and mental effects:

> [M]any drugs cause significant impairment for several hours or days after ingestion . . . . Illegal drugs lack any assurance as to potency or contaminants, and therefore, may create potential safety and performance problems long after ingestion. . . . Thus, off-the-job drug use may have on-the-job consequences, especially when used by employees who hold jobs of trust or high responsibility or who work with potentially dangerous machinery.[171]

The length of the impairment cannot be predicted accurately because it depends upon the physical make-up of the individual and the potency of the drug.[172] Because marijuana can cause severe, permanent impairment, the state has a sufficient interest in testing its employees, particularly those in safety-related jobs, even if the testing cannot distinguish between on-duty and off-duty drug use.

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164. 537 P.2d 494, 504 (Alaska 1975).

165. Falcon v. Alaska Pub. Offices Comm'n, 570 P.2d 469, 476 (Alaska 1977).

166. *Ravin,* 537 P.2d at 504.

167. *Id.*

168. *Id.* at 511.

169. Belgarde v. State, 543 P.2d 206, 207 (Alaska 1975).

170. *Id.*

171. Tyson & Vaughn, *Drug Testing in the Workplace,* 560 OCCUPATIONAL HEALTH AND SAFETY 24, 26 (Apr. 1987). Marijuana smoke contains more carcinogens and more tar than does cigarette smoke. Possible effects of marijuana include alterations in immune system function, cellular chromosomes, and cell metabolism; abnormalities in the reproductive system or in development of the fetuses of marijuana-smoking pregnant women; cardiovascular system alterations; and changes in brain histology. Schwartz, *Marijuana: An Overview,* 34 PEDIATRIC CLINICS OF NORTH AM. 305, 310 (Apr. 1987).

172. City of Palm Bay v. Bauman, 475 So. 2d 1322, 1325 (Fla. Dist. Ct. App. 1985).

Furthermore, the *Ravin* decision is weakly supported[173] and based on the then-current scientific evidence concerning marijuana: "It appears that there is no firm evidence that marijuana, as presently used in this country, is generally a danger to the user or to others."[174] Even assuming that *Ravin* is still good law, drug testing of public employees should not be precluded by *Ravin* because of new medical evidence showing the harmful effects of off-duty drug use on job performance.[175]

The employee can also argue that drug testing invades an employee's privacy because it exposes to others the personal information that body fluids contain. Urinalysis may disclose whether the employee is diabetic, pregnant, under treatment for depression or epilepsy, and it may reveal the use of other prescribed medication.[176] The federal courts have stated that "each individual has a reasonable expectation of privacy in the personal 'information' bodily fluids contain."[177] Similarly, the Alaska courts have held that information concerning an individual's medical condition and treatment is protected by the right to privacy: "An individual's physical ills and disabilities and the medication he takes . . . are among the most sensitive of

173. In Gray v. State, 525 P.2d 524, 528 (Alaska 1974), the Alaska Supreme Court noted that there was no available recorded history of the privacy amendment. The court then, in dictum, stated that "clearly it shields the ingestion of food, beverages or other substances." *Id.* The court did not state why this fact is so clear, and it provided no support for its conclusion. A right to ingest substances is so far removed from prior Alaska law and the federal right to privacy, that the court should not create such a right in the absence of some legislative or constitutional intent. The *Ravin* court bases its opinion on this dictum in *Gray. Ravin,* 537 P.2d at 502.

174. *Ravin,* 537 P.2d at 508. The most common type of marijuana used today is six times more potent than the marijuana of the 1970's. Schwartz, *supra* note 157, at 315.

175. A preliminary study concluded that marijuana caused impairment of airline pilots up to 24 hours after ingestion. The pilots were tested on a flight simulator landing task. The pilots showed significant impairment in many variables, including distance off center in landing, and vertical and lateral deviation on approach. Despite these deviations, the pilots reported no awareness of their own impaired performance. Yesavage, Leirer, Denari, & Hollister, *supra* note 147, at 1328. In Railway Labor Executives' Association v. Burnley, No. 85-2891 (9th Cir. Feb. 11, 1988) (WESTLAW CTA9 database), the Ninth Circuit found that the drug testing plan was not reasonably related to its stated purpose because the tests cannot measure current intoxication. *Id.* This objection may be insignificant in light of medical evidence showing that impairment may last well beyond the actual intoxication.

176. National Treasury Employees Union v.Von Raab, 816 F.2d 170, 176 (5th Cir. 1987); *see also* Luck v. Southern Pac. Transp. Co., No. C84-230 (Cal. Sup. Ct., San Francisco County 1985) (employee discharged because she refused to submit to testing through fear that her pregnancy would become known to the company).

177. Railway Labor Executives' Ass'n v. Burnley, No. 85-2891 (9th Cir. Feb. 11, 1988) (WESTLAW, CTA9 database); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

personal and psychological sensibilities."[178] Therefore, public employees in Alaska do, in fact, have the right not to have their physiological secrets exposed through drug testing.

However, the potential disclosure of personal facts concerning the employee's physical and emotional state does not necessarily preclude drug testing. The dissemination of personal information may be restricted such that the invasion of privacy is minimal. The testing should be performed on anonymous samples by an independent laboratory, which should report to the employer only the test results relating to drug use, not the results that might indicate other personal information about the employee. The test results should not be disclosed to any individual outside the employment relationship and should be disclosed internally only on a "need-to-know" basis.[179] In this way, the amount of personal information disclosed is strictly tailored to meet the needs of the drug-testing program, and the information is disclosed to the fewest people possible.[180]

A third ground for attack is that the process itself is an unconstitutional invasion of privacy. In ruling upon the validity of drug tests, the federal courts have analyzed the intrusiveness of the actual testing procedure.[181] The employee may argue that forced urination is an invasion of one's personal dignity comparable to a strip search or body cavity search, and that the severity of such an invasion outweighs any justification the state can assert.[182] The employee may also argue that the inaccuracies inherent in presently available drug-testing techniques violate procedural due process.[183]

The drug-testing procedure may, however, be conducted so as to preserve the dignity of the employee and to satisfy procedural due process requirements. Most importantly, urinalysis should not involve a

178. *Falcon*, 570 P.2d at 478 (1977) (quoting Roe v. Ingraham, 403 F. Supp. 931, 937 (S.D.N.Y. 1975), *rev'd sub nom.* Whalen v. Roe, 429 U.S. 589 (1977)).

179. D. COPUS, *supra* note 7, at 56; *see also* Houston Belt & Terminal Ry. Co. v. Wherry, 548 S.W.2d 743 (Tex. Civ. App. 1976), *appeal dismissed*, 434 U.S. 962 (1977) (employee awarded $200,000 for defamation because employee's test results, which were later found to be inaccurate, were publicized throughout the company and to outsiders).

180. *See* Gunnerud v. State, 611 P.2d 69, 72 (Alaska 1980) (invasion of privacy would have been allowed if the evidence had been relevant to trial).

181. *See supra* notes 118-23 and accompanying text.

182. *See supra* note 118 and accompanying text.

183. Even the most accurate drug screening tests have significant false-positive rates. The sophisticated and widely used radioimmunoassay blood test may yield false-positive rates of 43% for cocaine, 21% for opiates, 51% for marijuana, and 42% for barbituates. The most widely used urinalysis procedure is the EMIT, which has false-positive rates of 10% for cocaine, 5.6% for opiates, 5.1% for barbituates, 12.5% for amphetamines, and 19% for marijuana. Panner & Christakis, *supra* note 159.

witness observing the subject while the specimen is provided. Employers have developed procedures to protect the specimen from adulteration that do not involve an undue invasion of the employee's privacy.[184] To satisfy due process, proper care must be taken to preserve the chain of custody during the collection, shipping, and testing of the samples. Proper chain of custody includes ensuring both the identity and the integrity of each sample. The testing should be performed by qualified, outside professionals. Although some drug detection systems can be performed at the job site,[185] such systems may lead to confidentiality and accuracy problems.[186]

Due process also requires specific guidelines that protect employees from abuse of the system by the employer. The testing program should outline specifically the class of employees subject to testing and the method by which each employee is chosen for testing.[187] The testing procedure should provide for a second test by a different method to check all positive test results,[188] and the employer should preserve the specimen to allow the employee to have it tested independently.[189]

In short, drug testing of employees may be conducted so that it does not violate the employee's right to privacy. In the absence of legislation, however, it is unlikely that the Alaska courts will allow random drug testing under the search and seizure provision. Employers will probably be restricted to testing only on the basis of reasonable suspicion. In a best case scenario, reasonable suspicion will arise from unusual behavior, slurred speech, or other similar conduct. Reasonable suspicion may not arise so harmlessly, however. The testing program developed for the City of Kenai school bus drivers called for testing *after* any accident.[190] Needless to say, in such an event, the testing very well may be too late.

IV. CONCLUSION

In deciding whether to test their employees for drug use, both private and public employers face a great deal of legal uncertainty. This uncertainty makes the development of a drug-testing program

184. *See supra* note 119 and accompanying text.

185. Note, *supra* note 7, at 838.

186. *Id.* The United States Court of Appeals for the Seventh Circuit concluded that by administering drug tests in hospitals, the employer prevented the tests from being an unreasonable search. Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976).

187. *See supra* notes 120-23 and accompanying text.

188. For example, the false-positive rate for a two-stage analysis using EMIT followed by thin-layer chromatography is approximately 2-3%. This procedure costs about $50 per sample. Panner & Christakis, *supra* note 159, at 9.

189. Banks v. Federal Aviation Admin., 687 F.2d 92, 93 (5th Cir. 1982).

190. Anchorage Daily News, Jan. 8, 1987, at B1.

difficult, and it gives employers ample reason not to test at all. With the caveat discussed above in Section II, private employers in Alaska should be able to test their employees. Public employers, on the other hand, will probably be able to test certain employees only on the basis of reasonable suspicion. However, even if the Alaska courts do in fact allow testing, employers must consider several other factors:

(1) Will the testing be cost effective? Urine can be tested for a limited number of drugs for about $10 to $25 per specimen. Adequate confirmation tests, however, cost two to five times more for each drug requiring identification.[191]

(2) How will employees react? The implementation of a drug testing program may lower morale and irreparably harm worker-management relations.

(3) Can drug abuse be detected by other measures? Closer supervision may make actual testing unnecessary, especially for non-critical workers.

(4) Besides facing constitutional challenges, will drug testing expose the employer to other types of legal liability, including defamation,[192] negligence,[193] and wrongful discharge?[194]

If after considering these other pertinent issues, an employer still decides to test its employees, the employer should then consider the following guidelines:

(1) Decide Whom to Test: Because of the expense and the potential legal liability involved with testing, employers should test only when necessary. Proper supervision should suffice for many non-critical workers. For workers who cannot be supervised adequately and who occupy safety-sensitive positions, the employer must decide whether to test randomly or only on the basis of reasonable suspicion;

(2) Notify Employees: Before implementing a testing program, present employees should be notified as far in advance as possible to minimize resentment and to help protect the program from legal attacks. All job applicants should be notified that they will be subject to testing. Along with notification, it should be explained to the employees why such testing is necessary;

(3) Union Sector: Testing is such a sensitive matter that even if it is held not to be a mandatory subject of bargaining, employers should still seek union support for the program;

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191. McBay, *Efficient Drug Testing: Addressing the Basic Issues,* 11 NOVA L. REV. 647, 648 (1987). An NCAA plan to test college athletes for 81 drugs is estimated to cost $1,000 per athlete. *Id.*

192. *See* Armstrong v. Morgan, 545 S.W.2d 45 (Tex. Civ. App. 1976).

193. *See* Herman & Bernholz, *Negligence in Employee Drug Testing,* 92 CASE & COMMENT 3 (1987).

194. *See supra* notes 25-57 and accompanying text.

(4) Testing Procedure: The integrity of the sample should be ensured without visual observation of the urination. All positive first tests should be confirmed by a second, more accurate test. Analysis of the specimen should be performed by a reputable laboratory, with chain of custody adequately protected;

(5) The Drug Abuser: Employers should receive greater employee support for the program if they provide rehabilitation for those who test positive. Rehabilitating the affected employee actually may be less costly than training a new employee, and should operate to improve worker-management relations.

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