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## Employee Assistance and Drug Testing: Fairness and Injustice in the Workplace

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# Employee Assistance and Drug Testing: Fairness and Injustice in the Workplace

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## **Abstract**

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**KEYWORDS:** fairness, workplace, drug

# Employee Assistance and Drug Testing: Fairness and Injustice in the Workplace

William J. Sonnenstuhl,\* Harrison M. Trice,\*\* William J. Staudenmeir, Jr.,\*\*\* and Paul Steele\*\*\*\*

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## I. Introduction

Every few years, the mass media report that a drug epidemic is sweeping America and sapping its economy. In the sixties, marijuana and "speed" were the problems; in the seventies, heroin was the culprit; today, the scourge is cocaine and its powerful derivative, "crack."<sup>1</sup> Despite the evidence that drug use is declining, frightened executives, spurred on by horror stories of cocaine-crazed executives embezzling company money and "whacked-out" workers manufacturing shoddy products, are increasingly implementing drug screening programs,

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1. Reinerman, Waldorf, and Murphy, *Cocaine and the Workplace*, Paper presented at the 36th Annual Meeting of the Society for the Study of Social Problems, New York City (Aug. 1986). See also Martz, *Trying to Say "No"*, NEWSWEEK Aug. 11, 1986 at 14.

which use chemical tests (e.g., blood and urine analyses), to identify drug users, abusers, and addicts. Managers insist that the programs are necessary to insure productivity and safety. Deeply offended by the intrusiveness of blood and urine testing, employees argue that drug screening is an invasion of privacy and violates basic workplace principles.

This paper examines management and employee concerns about drug screening within the context of employee assistance programs and argues that, where companies have well-implemented programs, drug screening is unnecessary. Employee assistance programs provide managers with a proven strategy for identifying, motivating and treating alcoholic, drug-addicted and emotionally disturbed employees, and they protect employees' rights by adhering to standards of judicial jurisprudence. Those standards have grown out of the quasi-legal framework of labor-management relations and parallel many of the standards found in the United States Judicial System.<sup>2</sup> In particular, they include the rights to due process and privacy.

Within constitutional law, due process entails legal interpretations of the fourteenth amendment; in the workplace, it essentially means that employees may not be deprived of their livelihood without "just cause." Collective bargaining agreements spell out the reasons for which management may justly dismiss employees and the procedures which they must follow in doing so. Those procedures entail the use of progressive discipline (e.g., verbal warnings, written warnings, suspension, and discharge) and opportunities for employees to appeal actions perceived as unjust. The last step in the grievance process is arbitration by an impartial third party whose decision is binding on labor and management. As in a court of law, the employee is presumed to be innocent until proven guilty; that is, management must prove that it had "just cause" for its actions.

Likewise, within constitutional law, the right to privacy is an emergent concept dependent upon interpretation of the fourth amendment; in the workplace, the job performance standard evolved to protect employees from unreasonable intrusion by management into their private lives. According to this standard, employees are judged solely on the basis of their performance on the job and cannot be disciplined for off-duty behavior. This is a historical consequence of labor's and management's often stormy relationship. Prior to the National Labor

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2. Stone, *The Post War Paradigm in American Labor Law*, 90 *YALE L.J.* 1509 (1981).

Relations Act of 1935, which guaranteed employees the right to organize and bargain in good faith, employers did capriciously intervene in workers' private lives.<sup>3</sup> Ford Motor Company's personnel department, for example, in the teens and twenties, vigilantly checked the cleanliness of employees' homes, the neatness of their gardens, their attendance at church, and the kind of cars they drove.<sup>4</sup> Employees found lax in any of these areas were often fired. To counteract such paternalism and insure fairness, collective bargaining agreements, arbitration decisions, and company policies, practices, and procedures have hewn to the job performance standard.

Employee assistance programs preserve these workplace standards of jurisprudence by using job performance to identify alcoholic, drug addicted, and emotionally disturbed employees and by using a strategy called "constructive confrontation," which is based upon the concept of due process, to motivate them to change their behavior.

Drug screening programs are intended to deter employees from using drugs. Theoretically, employees will be deterred if they believe that almost all drug offenses will be detected, that offenders will be rapidly brought to justice, and that they will be punished.<sup>4a</sup> The deterrence argument, as we illustrate in this article, is difficult to sustain because of the problems inherent in drug screening — almost all offenses cannot be successfully detected and standards of workplace justice are being threatened by the rush to punish those who test positive.

## II. Employee Assistance

Employee assistance programs are job-based strategies for the identification, motivation, and treatment of alcoholic and other troubled employees.<sup>5</sup> Employee counseling and employee assistance programs are commonly assumed to be the same thing,<sup>6</sup> but this is a mistake because the two possess different strategies for helping employees with personal problems. Counseling relies primarily upon employees to refer themselves voluntarily to the program, where they are treated

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3. R. EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* (1979).

4. S. BRANDES, *AMERICAN WELFARE CAPITALISM* (1970).

4a. J. GIBBS, *CRIME, PUNISHMENT, AND DETERENCE* (1975).

5. W. SONNENSTUHL & H. TRICE, *STRATEGIES FOR EMPLOYEE ASSISTANCE PROGRAMS: THE CRUCIAL BALANCE* (1986).

6. MacLeod, *EAPs and Blue Collar Stress*, in *JOB STRESS AND BLUE COLLAR WORK* (Cooper & Smith ed. 1985).

with a variety of psychotherapeutic techniques. The effectiveness of counseling is unclear. Some researchers claim that all psychotherapy works with all problems;<sup>7</sup> others claim only a few forms of therapy are successful with a small number of problems.<sup>8</sup> Employee assistance programs use a double strategy. First, constructive confrontation, which is based on due process and utilizes job performance, is used to identify troubled employees and motivate them to change their behavior. Second, employees who cannot manage their own problems are encouraged to use the counseling services provided by the program. The synergistic effect of this dual strategy has proven to be very effective in improving the performance of alcoholic and other troubled employees.<sup>9</sup>

In this paper, our remarks apply to employee assistance programs but not to employee counseling programs, even those that call themselves "employee assistance," because they lack the essential constructive confrontation strategy which is necessary to break through the denial of drug users and addicts and motivate them to change their behavior. A test for determining if a program is "employee assistance" or "employee counseling" is to measure the extent to which constructive confrontation has been actually implemented.<sup>10</sup> That is, what proportion of managers, supervisors, and union representatives are familiar with the strategy, understand how to use it, and are prepared to use it. If less than two-thirds are knowledgeable about the strategy and willing to use it, constructive confrontation is not fully implemented and the program should probably be regarded as "employee counseling." This standard means that employee assistance practitioners must give more than lip service to constructive confrontation; they must preserve a balance between the dual strategies.<sup>11</sup>

Companies and unions use employee assistance programs to cope with any personal problem that might adversely affect an employee's job performance, but they generally retain a focus on alcoholism because epidemiological evidence shows it to be very prevalent among

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7. Smith & Glass, *Meta-analysis of Psychotherapy Outcome Studies*, 32 AM. PSYCHOLOGIST 752 (1977). See also M. SMITH, G. GLASS & T. MILLER, *THE BENEFITS OF PSYCHOTHERAPY* (1980).

8. S. RACHMAN & G. WILSON, *THE EFFECTS OF PSYCHOLOGICAL THERAPY* (1980).

9. Trice & Beyer, *Work Related Outcomes of Constructive Confrontation Strategies in a Job-Based Alcoholism Program*, 45 J. STUDIES ON ALCOHOL 393 (1984).

10. J. BEYER & H. TRICE, *IMPLEMENTING CHANGE: ALCOHOLISM POLICIES IN WORK ORGANIZATIONS* (1978).

11. W. SONNENSTUHL & H. TRICE, *supra* note 5.

working populations — consistently more so than emotional and other drug problems.<sup>12</sup> For instance, a large-scale community survey of psychiatric disorders revealed that the most common diagnoses were alcohol abuse and dependency, phobia, major depressive disorders, and drug abuse and dependency, in that order.<sup>13</sup>

### A. *Deteriorating Job Performance*

Employee assistance programs use deteriorating job performance to identify troubled employees because it is the *only* legitimate reason that employers have for intervening in employees' private lives, but it is rarely represented by formal rituals of checking boxes on performance appraisal forms.<sup>14</sup> This is a political act with administrative overtones and typically fails to provide a true picture of the actual performance. Judgments about performance occur in everyday decision-making on the job. Rather, job performance is what supervisors say it is. It grows out of the day in and day out observations and evaluation of performance. To quote Karl Weick's baseball umpires evaluating pitchers' pitches, "They ain't nothing until I calls 'em."<sup>15</sup> This is also true of immediate supervisors. Good or bad performance comes into being with the supervisors' judgments, which are based upon knowledge of the job and experiences with the best and worst performers in their work groups.<sup>16</sup> These criteria are likely to be more accurate reflections of an employee's performance than those in formal appraisal systems because they are specific to the context of a particular job and vary accordingly. In some instances, absenteeism will be the critical indicator of performance; in others, quantity or quality of work may be critical. These points underline that supervisors probably know the criteria that really count in getting a job done and regularly use them to assess how well employees are doing. In sum, line supervisors are probably aware of and willing to try to manage marginal performers.

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12. Roman & Blum, *The Core Technology of Employee Assistance Programs*, 15 THE ALMACAN 8 (1985).

13. Robins, *Lifetime Prevalence of Specific Psychiatric Disorders in Three Sites*, 41 ARCHIVES OF GEN. PSYCH. 949 (1984). See also Myers, *Six-Month Prevalence of Psychiatric Disorders in Three Communities*, 41 ARCHIVES GEN. PSYCHIATRY 959 (1984).

14. Trice & Beyer, *supra* note 9.

15. K. WEICK, *THE SOCIAL PSYCHOLOGY OF ORGANIZING* (2d ed. 1979).

16. Trice, *Reaction of Supervisors to Emotionally Disturbed Employees*, 7 J. OCCUPATIONAL MED. 177 (1965).

If performance is basically a judgment call by supervisors, it is necessary to ask on what basis supervisors discipline employees. According to recent research,<sup>17</sup> there is scant evidence that supervisors use discipline because of certain personal tendencies or to discriminate against certain employees. Instead they use discipline in response to specific behavior — when they consider employees' behaviors to be relatively serious and disruptive and when employees have relatively poor and deteriorating performance. They also use discipline when company policy encourages it.<sup>18</sup>

In administering an employee assistance policy, supervisors are concerned about identifying and managing deteriorating performance. At some point in the natural history of most employees' troubles, their problems will begin to affect their work and their job performance will begin to decline. This is true whether the trouble is drinking,<sup>19</sup> gambling,<sup>20</sup> emotional distress,<sup>21</sup> family and sexual difficulties, or something else such as drug abuse.<sup>22</sup>

Controversy, however, surrounds the question of whether deteriorating job performance is a late or early symptom in the natural progression of employees' personal problems. Health practitioners, who by virtue of their special training are taught to see illness where others see nothing unusual, argue that it is a late symptom.<sup>23</sup> Drawing upon the retrospectively constructed accounts of troubled employees, health practitioners contend that supervisors are often the last to recognize employees' troubles. For instance, Harrison Trice interviewed alcoholic employees and their supervisors about the progression of their alcoholism.<sup>24</sup> The alcoholic employees contended that they were able to cover up their alcoholism so effectively that their supervisors did not recog-

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17. Beyer & Trice, *A Field Study of the Use and Perceived Effects of Discipline in Controlling Work Performance*, 27 ACAD. MGMT. J. 743 (1984).

18. See D. PHILLIPS, A. PURVIS & H. OLDER, *TURNING SUPERVISORS ON TO EMPLOYEE COUNSELING PROGRAMS* (1980).

19. H. TRICE & P. ROMAN, *SPIRITS AND DEMONS AT WORK: ALCOHOL AND OTHER DRUGS ON THE JOB* (1972).

20. H. LESIEUR, *THE CHASE* (1972).

21. Hamburger & Hess, *Work Performance and Emotional Disorders*, in *MENTAL HEALTH AND WORK ORGANIZATIONS* 170 (A. McLean ed. 1970).

22. Reinerman, Waldorf, & Murphy, *supra* note 1.

23. See, e.g., M. SHAIN & J. GROENEVELD, *EMPLOYEE ASSISTANCE PROGRAMS* (1980).

24. Trice, *New Light on Identifying the Alcoholic Employee*, *PERSONNEL*, Sept.-Oct., 1964, at 18.



nize their developing alcoholism until the final stages. Interviews with their supervisors, on the other hand, revealed that they were well aware of developing alcoholism. The difference in perspective is accounted for by the alcoholics' denial. In the early stage, neither the alcoholic employees nor their supervisors were aware of a developing problem. During the middle stage, supervisors became aware of the alcohol problems because the employees' job performance began to deteriorate.

In a recent study,<sup>25</sup> Trice and Beyer found that many of the supervisors interviewed were aware of an employee's developing alcohol problem prior to a job difficulty, were keeping a close eye on the situation, and had not intervened because the problem was not affecting the employee's job performance. Frequently, supervisors become aware of drinking problems because the employees' coworkers or family members tell them about the difficulties.<sup>26</sup> Often employees tell their supervisors about emotional, financial, and family problems.<sup>27</sup> As a concerned friend, supervisors may offer an employee advice about his developing problems, but, as management's representatives, they have no right to intervene unless the trouble adversely affects job performance. Likewise, health practitioners may feel compelled to intervene before job performance is adversely affected, but as long as they act upon behalf of the employer, they cannot do so. Finally, even if they could intervene, there is little evidence that early treatment is correlated with increased recovery from alcoholism. Generally, problem drinkers who are in the early stages of alcoholism do less well in treatment than those who are in the later stages of their illness because they lack motivation to accept such help.<sup>28</sup>

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25. Trice & Beyer, *supra* note 9.

26. Roman, *Job Characteristics and the Identification of Deviant Drinking*, 11 J. DRUG ISSUES 337 (1981). See also Kurtz, Googins & Williams, *Supervisors' Views of an Occupational Alcoholism Program: An Experimental Perspective*, ALCOHOL, HEALTH AND RESEARCH WORLD, Spring, 1980.

27. W. SONNENSTUHL, *INSIDE AN EMOTIONAL HEALTH PROGRAM: A FIELD STUDY OF WORKPLACE ASSISTANCE FOR TROUBLED EMPLOYEES* (1986).

28. Trice, *A Study of the Progress of Affiliation with Alcoholics Anonymous*, 18 Q. J. STUD. ON ALCOHOL 39 (1957); Trice & Wahl, *A Rank Order Analysis of the Symptoms of Alcoholism*, 19 Q. J. STUDIES ON ALCOHOL 636 (1958); Moberg, *Treatment Outcomes for Earlier Phase Alcoholics*, 273 ANNALS N. Y. ACAD. SCI. 543 (1976).

## B. *Constructive Confrontation*

In reacting to unsatisfactory job performance, supervisors generally follow progressive discipline guidelines. In nonunion organizations, the guidelines are normally included within its personnel policies, practices, and procedures; in unionized facilities, they are laid out in collective bargaining agreements and arbitration decisions. The purposes of progressive discipline, of course, are to give employees feedback on their behavior, to discover and correct the underlying causes of poor performance, and to induce employees, by progressive sanctions, to conform to standards in the future. Constructive confrontation complements the normal steps in progressive discipline by incorporating into each step an offer of help. In the confrontation part of the discussion, employees are given feedback on the specifics of their unacceptable work performance and warned that continued unacceptable performance is likely to lead eventually to formal discipline. In the constructive part, supervisors suggest alternative courses that the employee can take to regain satisfactory performance, one of which is to seek help from the employee assistance program. Subsequent steps in the intervention depend on the response of the employee. If performance improves, nothing happens. If unacceptable performance continues, several more informal discussions may follow before formal disciplinary procedures are introduced. At all times, however, employees are free to choose to go to the employee assistance program or not to go.

Constructive confrontation serves two purposes: to identify troubled employees and to motivate them to change their behavior. As we stated earlier, in the early stages of trouble, it often appears as though nothing unusual is happening and it is in the middle stage that troubles begin to affect the job. Constructive confrontation assumes that most employees, when given appropriate feedback on their behavior, possess the resources to resolve their own problems and improve their performance. It further assumes that, when employees are given repeated feedback and are still unable to improve their performance, their problems are beyond their control and require expert advice. At the same time, the gradual build-up of sanctions breaks down the employees' denial systems and increases the likelihood that they will do something constructive about their problems. Medical or psychiatric labeling and treatment of employees' troubles, then, are the last steps in the process, when it is clear that the problems are beyond individual control and the

employee is unable to respond to confrontation.<sup>29</sup>

Controversy surrounds the question of whether supervisors will use the constructive confrontation strategy. Phillips, Purvis, and Older<sup>30</sup> claim that troubled employees beget troubled supervisors who must be counseled before they will use it. Empirical research, however, shows that well-trained supervisors have little difficulty implementing it.<sup>31</sup> The willingness of supervisors to use the strategy is associated with familiarity, age, and experience. Young, inexperienced supervisors are less likely than older, experienced ones to use it. As younger supervisors become familiar with the policy and integrated into a work organization's formal and informal networks, they are more willing to use constructive confrontation. Generally, the most important determinant of whether supervisors use it is the support they receive from management, other supervisors, coworkers, and union representatives. Training programs that teach supervisors to use constructive confrontation as a general technique for managing troubled employees increase familiarity with the policy, integrate supervisors into the formal and informal networks, and increase the willingness of supervisors to use the strategy.<sup>32</sup>

Since the sixties, a large number of outcome studies of constructive confrontation have been completed; all demonstrate that it is effective.<sup>33</sup> These studies were conducted using different populations and re-

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29. H. TRICE & P. ROMAN, *supra* note 19.

30. See D. PHILLIPS, A. PURVIS & H. OLDER, TURNING SUPERVISORS ON TO EMPLOYEE COUNSELING PROGRAMS (1980). See also Phillips & Older, *A Model for Counseling Troubled Supervisors*, 2 ALCOHOL, HEALTH, & RESEARCH WORLD 24 (1977); Purvis, *Getting Rid of the "Lone Ranger" Syndrome in Supervisors' Labor-Management*, 9 ALCOHOLISM J. 25 (1979).

31. See J. BELASCO & H. TRICE, THE ASSESSMENT OF CHANGE IN TRAINING AND THERAPY (1969); J. BEYER & H. TRICE, IMPLEMENTING CHANGE: ALCOHOLISM POLICIES IN WORK ORGANIZATIONS (1978); Googins & Kurtz, *Discriminating Supervisors in Occupational Programs*, 11 J. DRUG ISSUES 199 (1981).

32. See BELASCO & TRICE, *supra* note 31; J. BEYER & H. TRICE, *supra* note 31; Googins & Kurtz, *supra* note 31.

33. See, e.g., Asma, Eggert & Hilker, *Long-Term Experience with Rehabilitation of Alcoholic Employees*, 13 J. OCCUPATIONAL MED. 581 (1971); Franco, *A Company Program for Problem Drinkers: Ten Years Follow-Up*, 2 J. OCCUPATIONAL MED. 157 (1960); Hilker, Asma & Eggert, *A Company Sponsored Alcoholic Rehabilitation Program: Ten Years Evaluation*, 14 J. OCCUPATIONAL MED. 769 (1972); Alander & Campbell, *An Evaluative Study of an Alcohol and Drug Recovery Program*, Paper presented at the Annual Meeting of Alcohol and Drug Problems Association, San Francisco, Cal. (Dec. 1974); Chopra, Preston & Gerson, *The Effects of Constructive Coercion on the Rehabilitative Process*, 21 J. OCCUPATIONAL MED. 749 (1979); Moberg, *Treatment Outcomes for Earlier Phase Alcoholics*, 273 ANNALS N. Y. ACAD.

search methods, and they have yielded remarkably similar results. For instance, Trice and Beyer<sup>34</sup> recently evaluated the strategy using a national, random, stratified sample of supervisors from a company whose employee assistance program dated back to the 1960s. They found that, as a result of the strategy, 75% of the alcoholic employees and 55% of the troubled employees improved their performance—impressive outcomes for any intervention.<sup>35</sup>

### III. Drug Screening

Despite evidence that, since 1979, use of illicit drugs other than cocaine has been declining,<sup>36</sup> a growing number of individuals and work organizations support screening programs because they believe that drug use is dangerously out of control and drastic steps are required to curb it.<sup>37</sup> Managers expect that drug screening will accurately identify drug offenders so that they can be quickly punished, deterring further drug use. Drug screening, however, is a very drastic step because it is based on unreliable technology and raises serious constitutional and social questions about employee rights to due process and privacy.

Most screening tests, such as urine and blood analysis or lie detection, are time consuming and expensive; consequently, testing all employees is not usually considered to be cost effective. To avoid these constraints, companies typically use several tactics. The most widespread use of drug screening is with new applicants. This is intended to weed out potential drug users and is usually considered the least risky use of screening for employers because they do not have to tell applicants why they were rejected for employment. Unfortunately, there is little evidence that such testing can reliably predict who will or will not

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SCI. 543 (1976); Smart, *Employee Alcoholics Treated Voluntarily and Under Constructive Coercion*, 35 Q. J. STUDIES ON ALCOHOLISM 196 (1974); SCHRAM, WORKERS WHO DRINK: THEIR TREATMENT IN AN INDUSTRIAL SOCIETY (1978); M. HEYMAN, ALCOHOLISM PROGRAMS IN INDUSTRY (1978); Freedberg & Johnston, *Changes in Drinking Behavior, Employment Status, and Other Life Areas for Employed Alcoholics After Treatment*, 9 J. DRUG ISSUES 523 (1979).

34. Trice & Beyer, *supra* note 9.

35. W. SONNENSTUHL & H. TRICE, *supra* note 5.

36. Brinkley, *Drug Use Held Mostly Stable or Lower*, N.Y. Times, Oct. 10, 1986, at A14, col. 1.

37. Serrin, *Drug Tests Promote Safety, Many Say*, N.Y. Times, Sept. 16, 1986, at A16, col. 1.

develop a drug problem over the long term. Another technique is to test periodically a random sample of employees to insure that they are drug free. According to this procedure, no employee is exempt from being tested and anyone whose name is drawn at random must submit to the test. Such testing is potentially more risky for employers than screening applicants because it risks alienating productive workers who often feel they have been singled out without reason. Currently, a number of disgruntled employees are suing their employers because of such practice. A third procedure is to test those employees suspected of using and abusing drugs. Refusal to take such tests are usually interpreted by the company as evidence that the employee is guilty of drugging. Testing is often supplemented, by the use of undercover agents and periodic searches with dogs, to ferret out drugs. In each tactic, the objectives are the same — to identify offenders and make an example of them so that other workers will not use and abuse drugs. In some instances, companies have fired employees on the spot who test positive; in others, they sanction them within the progressive discipline process; in still others, they have remanded the offenders to treatment.

### A. *Technical Problems With Drug Testing*

The reliability of drug screening programs is questionable.<sup>38</sup> For instance, Dr. Richard Hawks, chief of the National Institute on Drug Abuse's research and technical branch laments that there is no certification program for companies doing drug testing.<sup>39</sup> Consequently, there are many unskilled laboratories entering the business and eventually there will be a flood of lawsuits challenging the veracity of test results. Those lawsuits will be filed by employees against employers who take action based on the dubious test results. Indeed, there are many questions about the reliability of these tests when done by well-qualified laboratories. Between 1972 and 1981, the U.S. Centers for Disease Control, in conjunction with the National Institute on Drug Abuse, conducted proficiency tests of drug screening laboratories. In the most recent blind study, researchers sent spiked urine samples containing barbiturates, amphetamines, methadone, cocaine, codeine, and mor-

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38. Altman, *Drug Tests Gain Precision, But Can Be Inaccurate*, N.Y. Times, Sept. 16, 1986, at A7, col. 1.

39. BUREAU OF NATIONAL AFFAIRS, *ALCOHOL AND DRUGS IN THE WORKPLACE: COSTS, CONTROLS, AND CONTROVERSIES* (1986).

phine to 13 laboratories.<sup>40</sup> Some laboratories performed very poorly, with false negatives (samples included drugs but tested negative) running as high as 100% on amphetamines, cocaine, codeine and morphine. False positives (samples which were free of drugs but tested positive) ran as high as 37% for amphetamines and 66% for methadone. None of the laboratories was considered to have performed acceptably in testing for amphetamines and only one performed acceptably in identifying barbiturates, cocaine, and morphine. The authors concluded that the results reflect serious shortcomings in the laboratories and estimated the losses due to such errors could cost between \$37.2 million and \$75.6 million.

Urine tests vary widely in cost and it is inexpensive immuno-assay tests that are often the most unreliable. The leading immuno-assay manufacturers, Syva Corporation and Hoffman-LaRoche, claim they are 99% accurate and counsel that positive tests should be confirmed by another, more elaborate and expensive method, such as thin-layer chromatography, gas chromatography, and gas chromatography/mass spectrometry. Syva Corporation and Hoffman-LaRoche, however, challenge the reliability of one another's tests. Double or triple testing of samples makes screening very expensive.

Drug abusers and addicts are very knowledgeable about how to beat the system; consequently drug screening is more likely to catch less experienced than more experienced users. In order to catch those who would invalidate urine tests, a trusted observer must directly watch employees as they urinate. Employees feel that this is degrading, but the observers also feel the same way. For example, a group of New York City Corrections personnel recently filed a grievance because they were disgusted at having to observe employees providing a urine sample. Unfortunately, the suspicion of drug users substituting someone else's clean urine for their own is well-founded. For instance, they will manipulate the observers' embarrassment by encouraging them to turn away momentarily — enough time to make a switch. Another tactic is to fill a condom with clean urine, place it in one's pocket, and run a plastic hose from it underneath one's penis. When asked to provide a sample, the employee squeezes the condom and fills the container. Unless the observer is watching very closely, this technique is not easily detectable. Another technique for avoiding detection is to drink large quantities of water which can dilute one's urine with so much water

40. Hansen, Caldwell & Boone, *Crisis in Drug Testing*, 253 J. A.M.A. 2382 (1985).

that the test is invalidated. The addition of some household chemicals can also invalidate the tests.

Questions also arise about what a positive reading means in terms of job impairment. Urine tests cannot demonstrate current impairment because urine is a waste product and metabolites found in it do not prove that impairing chemicals are still circulating in the blood stream. In addition, some drugs such as marijuana can also be detected in urine days, weeks, or even months after being ingested. Urine testing, then, can tell whether a particular drug was used recently — not whether it is impairing. The option, of course, is to do a blood test, but even here there is little agreement among the experts about what constitutes impairment. For instance, what does a blood alcohol level of .10 mean? Many states use that as the legal definition of intoxication when prosecuting drunken drivers, but impairment levels on some jobs might be set by employers at .05 or less. For the majority of drugs, however, no agreement exists on what blood level constitutes impairment or intoxication. Small amounts of amphetamines and cocaine, for instance, may actually improve performance temporarily.

Another question bedeviling screening is how the drug got into someone's body in the first place. The assumption, of course, is that the individual ingested it intentionally, but that reasoning may not be accurate. Train conductors, for instance, sometimes fear that walking through a marijuana-smoke-filled car and inhaling the fumes could cause them to test positively. Hoffman-La Roche and Syva Corporation acknowledge this potential and say they have taken precautions against it by instructing laboratories not to label "positive" those urine tests with minute quantities of marijuana residues. Similarly, drinking herbal teas containing coca leaves can cause one to test positively for cocaine, and taking some over-the-counter drugs can cause one to test positively for phenobarbital, an illegal drug present in small amounts in the products. In some instances, eating poppy seed cake will cause one to test positively for heroin.

Additionally, hundreds of drugs which have a potential for abuse exist, and every week new synthetic ones are being added to the list. Practical tests for most of these drugs, however, do not exist, and testing laboratories do not screen for all of those where the technology exists. For example, M.L.L. Diagnostic Laboratory, Inc. tests for 50 "drugs frequently suspect in abuse and overdose" including: (1) illicit ones such as cocaine, heroin, LSD, and marijuana; (2) prescription drugs and barbiturates, methaqualone (*e.g.*, Quaalude, Sopor), benzodiazepines (*e.g.*, Valium, Librium), meprobamate (*e.g.*, Miltown),

and meperidine (e.g., Demerol); (3) over-the-counter medications such as acetaminophen (e.g., Tylenol, Datril), salicylates (e.g., aspirin), phenylpropanolamine (e.g., Contac, Alka Seltzer Plus, Dexatrim), ephedrine/pseudoephedrine (e.g., Primatene M, Bronkaid, Sudafed). On the surface, the list is impressive, but it represents only a small proportion of the potentially addictive drugs available and many of those on the list are only suspected of being abused. Some, such as phenylpropanolamine and ephedrine/pseudoephedrine, are included on the list because they are often misrepresented in illicit preparations of "speed" or a common adulteration of cocaine. Consequently, employees taking Contac for a cold might be suspected of using illicit preparations of "speed" and those taking Sudafed for their allergies could be suspected of using adulterated cocaine. Because of limited technology, no screening program, then, can detect all drugs, and when they do detect certain drugs, the nagging question of what it means remains.

Another quandary facing screening programs is proving that the hundreds of test samples processed in a day are not mixed up and that the results attributed to a particular person are indeed based on that person's own urine sample. Once the specimen has been obtained, it should be carefully sealed, labeled, and safeguarded so that no one is able to tamper with it. This is important because, if the sample is found to have drugs and the employer disciplines the employee, a court trial or arbitration hearing may follow. In these instances, the employer will be required to show the chain of custody — that is, to demonstrate that the urine is the sample provided by the employee and that it has not been misidentified or contaminated. This is not an easy task for the employer because there are many opportunities in the workplace and laboratory for mixing up and contaminating specimens. For example, Tia Schneider Denenberg, a full-time arbitrator, told students at Cornell University that when she was researching her book *Alcohol and Drugs: Issues in the Workplace*,<sup>41</sup> she visited a number of drug screening laboratories and was surprised to find thousands of specimens for testing casually piled in unsecured areas. She had expected to find them safely locked away.

## B. Constitutional Issues

Drug screening raises constitutional issues about the rights of due

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41. T. DENENBERG & R. DENENBERG, *ALCOHOL AND DRUGS: ISSUES IN THE WORKPLACE* (1983).



process and privacy. Constitutional experts agree that citizens are protected from unreasonable search and seizure by government officials. Accordingly, the courts struck down attempts by school officials in Becton Regional High School, Bergen County, New Jersey to conduct mandatory drug screening on students.<sup>42</sup> One of the clearest judicial decisions on these constitutional rights, however, was delivered by federal district court Judge H. Lee Sarokin in a case brought by 17 police and fire personnel of Plainfield, New Jersey.<sup>43</sup> In May 1986, Plainfield officials conducted surprise urine tests. In the case of the firefighters, they were locked into their fire station without notice, forced to give urine samples within the presence of all the firefighters and, if they tested positively, were discharged without being given a chance to appeal. Judge Sarokin found that the Plainfield officials had violated the police and firefighters' fourth amendment rights against unreasonable search and seizure and fourteenth amendment rights to due process. He wrote:

The invidious effects of such mass, roundup urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some large public interest. . . . Such an unfounded presumption of guilt is contrary to the protections against arbitrary and intrusive government interference set forth in the constitution.<sup>44</sup>

According to Sarokin, prior court cases sanctioned urine tests where there were strong suspicions of drug use on the job and, under the fourth amendment, urine sampling should be allowed "only on the basis of a reasonable suspicion predicated upon specific facts and reasonable inferences drawn from those facts in light of experience."<sup>45</sup> Other judges have reached similar conclusions. For instance, Justice Stanley Parness of the New York State Supreme Court found in *Caruso v. Ward*<sup>46</sup> that the New York City Police Department's mandatory test-

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42. Applebome, *Plan for School Drug Testing Divides Texas Town*, N.Y. Times, Sept. 30, 1986, at A16, col. 1.

43. See *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); see also Navarez, *U.S. Judge Blocks Urine Drug Tests*, N.Y. Times, Sept. 19, 1986, at A2, col. 1, B2, col. 1; Shipp, *Jersey Ruling Follows Similar Decisions in Government Drug Tests*, N.Y. Times, Sept. 19, 1986, at B2, col. 1.

44. *Capua*, 643 F. Supp. at 1517.

45. *Id.*

46. 133 Misc. 2d 544, 506 N.Y.S.2d 789 (1986). See also Shipp, *supra* note 43.

ing program violated the officers' fourth amendment rights. He wrote:

That such testing may have some incalculable deterrent effect, turn up an occasional abuser or improve public confidence in the police does not constitute that degree of justification required under the reasonableness test . . . or the weight of case authority.<sup>47</sup>

Despite court rulings that mandatory drug screening is unconstitutional for government employees, many agencies are still trying to prove that their drug screening programs are reasonable under the fourth amendment. For instance, the superintendent of Beaumont, Texas Schools has proposed mandatory drug testing for 10,000 students in the 6th through 12th grades and the district's 2,400 employees, trustees, and administrators.<sup>48</sup> Similarly, the Boston Police Department will be defending its mandatory random drug testing program in federal district court.<sup>49</sup> The plan calls for testing the department's 1,800 officers and civilian employees once a year without warning. A computer would randomly select the employees to be tested. They would be required to provide a sample of their urine, which would be divided into six laboratory samples for testing and verification. Those whose tests were positive would be subject to a range of disciplinary measures, including suspension and termination, and be given an opportunity to appeal. The Boston Police Patrolman's Association contends that the proposed tests are a violation of the fourth amendment because it requires all employees to submit to tests and claims that its members could live with a drug screening program based upon probable cause of reasonable suspicion. In a brief filed as a friend of the court, the Justice Department is supporting the police department's drug screening plan as constitutional. Responding to the Justice Department's brief, Frank McGee, a lawyer for the Patrolman's Association, stated, "The Justice Department sees this as an opportunity to establish that random, unannounced, without-cause drug testing is valid constitutionally. Firemen are next, school teachers and right behind them, the students. And the next day, you'll be saying good morning to George Orwell."<sup>50</sup>

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47. 133 Misc. 2d at 553, 506 N.Y.S. 2d at 798.

48. Applebome, *supra* note 42.

49. Shenon, *U.S. Backs Boston Plan for Drug Tests of Police*, N.Y. Times, Sept. 20, 1986, at A32, col. 1.

50. *Id.*

### C. *Safeguards in the Private Sector*

While the constitution provides some safeguards against drug screening for public employees, legal scholars generally agree that it does not cover private sector employees.<sup>51</sup> Consequently, private sector employers are relatively free to require employees to provide urine samples on demand and to fire them if they refuse or if they test positively.

One safeguard for private sector employees comes from judicial precedents which have been affected by arbitral decisions. For instance, numerous state and federal courts have steadily abrogated the historic right of employers to dismiss their employees at will, for any reason or no reason.<sup>52</sup> Although the courts have not created a just cause standard for discharges, they have created so many exceptions that the employment-at-will doctrine may no longer be viable. Some courts have found an implied covenant of good faith and fair dealing in the employment relationship. The essence of this doctrine appears to be fair treatment analogous to just cause, particularly for long-term employees who have been satisfactory workers. In the future, this doctrine could be used to attack drug screening. For example, Barbara Luck, whose job performance was satisfactory, was fired for refusing to take a random drug test; currently she is suing Southern Pacific for wrongful discharge. The California Superior Court will decide whether or not Southern Pacific treated her fairly when it fired her for refusing the random test.

Meanwhile, the San Francisco Board of Supervisors was prompted to pass the first local legislation restricting drug screening by private sector employers.<sup>53</sup> This "privacy act" prohibits private employers in the city and county of San Francisco from taking blood, urine, or encephalographic tests as a condition of employment unless there are reasonable grounds to believe an employee's faculties are impaired and that such impairment presents a clear and present danger to the safety of the employee, another employee, or a member of the general public. Employers are also required to give employees the opportunity to have samples tested or evaluated at state licensed, independent laboratories

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51. Menaker, *Drug Screening: Protecting the Workplace and the Employee*, ILR REPORT, Spring, 1986, at 18; Spitzer, *Drug Screening: Usually Unnecessary, Frequently Unreliable, and Perhaps Unlawful*, ILR REPORT, Spring, 1986 at 21; Klein, *Legal/Legislative Developments*, in BUREAU OF NATIONAL AFFAIRS, *supra* note 39, at 59.

52. Klein, *supra* note 51.

53. See Palefsky, *Corporate Vice Precedents: The California Constitution and San Francisco's Worker Privacy Ordinance*, 11 NOVA L. REV. 699 (1987).

and a chance for employees to rebut the findings. Such legislation is being considered in other jurisdictions as well. Maine legislators, for instance, are considering barring pre-employment testing as well as any current testing which is not done for probable cause. Recently, in New York State, Suffolk County legislators approved a bill banning mandatory drug testing of county and private sector employees, but it was vetoed by the County Executive.<sup>54</sup> The legislators are seeking a two-thirds majority to override the veto.

In some cases, the best protection is a union contract.<sup>55</sup> Unions can negotiate with management about all aspects of drug screening. They can restrict it to cases in which employees' job performance is impaired and insure that employees are not discharged without just cause. In the grievance and arbitration process, they can also raise questions about the accuracy and relevance of test results. These protections, of course, are not available to non-unionized employees.

Trust is an essential ingredient in management-labor peace and many employees complain that random testing without cause demonstrates management's distrust. Some employees would rather resign than submit to testing, but few have the resources to do so and are forced to undergo the perceived indignities of drug testing. Considering these circumstances, it is little wonder that company announcements of drug screenings often turn morale sour as it did recently at Capital Cities/ABC, Inc., where employees were angered and confused by the new anti-drug policy and the possible use of undercover agents and drug-sniffing dogs.

Pointing to opinion polls showing that Americans support drug screening, managers claim that concerns about employee discontent are overstated. Many of these surveys, however, have serious methodological errors making interpretation of responses impossible. For instance, a recent New York Times-CBS News national poll, which is widely quoted in the media, purports to show that 72 percent of Americans are willing to undergo urine testing. These findings were based upon the responses to the question, "If your employer wanted to test all employees to determine if they had used illegal drugs recently, would you be willing to be tested, or would you consider this an invasion of your privacy?"

According to Lloyd D. Johnson, a research director at the Univer-

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54. *Cohalan Vetoes Ban on Drug Testing*, N.Y. Times, Sept. 24, 1986, at B7, col. 1.

55. Spitzer, *supra* note 51.

sity of Michigan's Survey Research Center:

This structure violates several of the canons of scientific survey research. Most important, the answer categories constitute neither a mutually exclusive nor collectively exhaustive set of answers. This is because they derive from the answer sets to two questions. The first is: "How would you feel if your employer required urine tests of all employees to see if they use drugs? Would you think that was a reasonable requirement, or would you think it was an invasion of privacy?" The second question is, "Would you comply if your employer required such urine tests?"

Many would comply rather than lose their jobs, even if they thought the procedure constituted a massive invasion of their rights. The single question in your poll does not permit you to discover this.<sup>56</sup>

In addition, surveys ask respondents to give answers to complex issues to which they may have given little thought. It is doubtful that respondents, when asked about supporting some vague concept called drug testing, conjured up images of being required to provide a urine sample without just cause, being watched by someone while urinating in a cup, and being fired because of an unreliable finding.

Considering the serious questions raised about drug screening, what does a positive reading mean and who will decide its meaning? More to the point, perhaps, is the meaning attached to an innocent employee's refusal to submit to a test whose results are not as clear cut as advertised? Denenberg and Denenberg contemplated those questions within the light of arbitration cases and concluded:

Some of this conflict might be avoided if the rules against substance abuse, wherever compatible with the needs of individual industries, were to be drawn in terms of impairment. The issue in arbitration then would become whether the employee was working or reporting for work while "impaired," that is, unable to perform his duties safely and effectively. The impairment standard could be coupled with progressive discipline culminating in discharge after warnings and suspensions for a series of similar infractions.

The impairment standard would offer a number of advantages in both alcohol and drug cases. The nature of the substance used and the level of dosage would no longer be critical issues; establishing impairment does not necessarily require interpretation of ar-

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56. Johnston, *Questioning a Survey*, N.Y. Times, Sept. 24, 1986, at A30, col. 1.

cane laboratory procedures, and the eyewitness evidence of those working with the grievant normally would suffice . . . .<sup>57</sup>

#### IV. Conclusions and Recommendations

Employee assistance programs, built upon the standards of industrial jurisprudence, safeguard employees' rights to privacy and due process by using job performance to identify alcoholic, drug addicted, and emotionally disturbed employees and constructive confrontation to motivate them to change their behavior. This process insures that programs are both fair and compassionate. Since 1960, employee assistance programs have been widely evaluated using different research populations and methods, and social scientists have consistently found them to be very effective, especially in dealing with alcohol problems. Consequently, they are a proven and potent alternative for combating the drug hysteria currently sweeping the American workplace. A company whose management stands firmly behind its employee assistance policy and whose managers, supervisors, and stewards are well-trained in the identification of job performance problems and are aware of, accept, and are willing to use constructive confrontation as a general technique for managing troubled employees will not need a drug screening program.

Despite adherents' claims that urine testing is an effective deterrent to drug use, there is no scientific evidence to support such a proposition. Drug screening, however, fails on theoretical grounds. It simply cannot meet the three previously stated principles of deterrence theory. First, almost all offenses cannot be detected. The incidences of false negatives in testing are very high and knowledgeable drug offenders can learn to beat the system. At the same time, the incidences of false positives are so high that the innocent are inadvertently caught up in the same dragnet as the guilty. Second, the crazy quilt of safeguards surrounding drug screening cannot guarantee justice to those who test positive. Employees generally assume that the constitution will protect them, but that protection is guaranteed to public employees only. Private sector employees have few safeguards aside from sympathetic legislators, courts, and unions. As employees become aware of these deficiencies and their consequences become known, they will probably come to view drug screening as unfair and morale will plummet.

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57. T. DENENBERG & R. DENENBERG, *supra* note 41, at 145.

Two justifications are frequently given for continuing drug testing in the face of their inadequacies. First, some occupations such as nuclear reactor operators, airline pilots, and truckers represent such danger to the public that they must submit to mandatory urine testing in order to be sure that they are drug free and able to perform properly. Second, testing is believed to be justified when the employer has reason to suspect an employee is using drugs because of an accident or other performance problem. Here, testing is used to confirm suspicious behavior. While there is some support for testing in both of these instances,<sup>58</sup> it is not necessary if a company has a well-run employee assistance program.

In the case of dangerous occupations, employee assistance programs target job impairment directly. An actual test of impairment would be for supervisors to randomly, periodically, or regularly conduct brief, on-the-job checks to insure that employees are reporting to work without their faculties being impaired.<sup>59</sup> For instance, they might check employees' eyes to see if they are dilated or pinpoint and their motor coordination to see if they can perform satisfactorily. In most arbitration cases, such eyewitness accounts have been sufficient evidence for arbitrators to uphold disciplinary decisions. For example, a fork-lift operator appeared to be acting abnormally when he reported to work.<sup>60</sup> The foreman and other company witnesses testified that the operator "was in a staggering and unbalanced condition and that his speech was slurred and thick tongued." He was sent home and ultimately discharged for violation of a plant rule against "reporting to work under the influence of intoxicants or drugs." The union defended the employee by attributing his condition to taking tranquilizers and a sleeping pill prescribed by the employee's doctor. The arbitrator upheld the discharge, reasoning that, however the condition had been produced, the testimony established a violation of the rule in as much as the grievant was unfit to work. The arbitrator also upheld the discharge because the employee knowingly disregarded his doctor's prescription which prevented him from performing his job and because the employee had been progressively disciplined for similar misconduct three times within the last fifteen months. Supervisors working in dangerous occupations should make such impairment checks a routine part of their jobs. Combined with a well-implemented employee assistance pro-

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58. See generally T. DENENBERG & R. DENENBERG, *supra* note 41.

59. *Id.*

60. *Id.*

gram, impairment checks are a potent defense against drug use and make testing unnecessary.

In cases where management has good reason to suspect an employee's performance is impaired by drugs, testing is not really necessary. Well-run employee assistance programs are sufficient for the identification of drug users because they focus on deteriorating job performance and supervisors properly trained in constructive confrontation are equipped to break through the denial system of users, abusers, and addicts — regardless of the drug in question. It is important to emphasize, however, that managers, supervisors, and union representatives must be well-trained in constructive confrontation and that many companies have mastered these intricacies.

Despite our arguments that testing is not necessary, many companies will choose to implement drug screening programs. In order to protect the rights of employers and employees, companies should consider the lesson drawn from employee assistance programs — develop testing according to the standards of industrial jurisprudence. The following safeguards are recommended:

First, companies need written policies on drug screening in which its limitations are openly and plainly discussed. While emphasizing safety issues, policies should acknowledge employees' legitimate right to fairness and privacy. They should state that in the interest of both managers and employees, the use and sale of illicit and licit (but not properly prescribed) drugs are prohibited at work. At the same time, they should address the shortcomings of drug screening — lack of tests for many abused drugs, incidences of false positives and difficulties in interpreting results — and list the steps that will be taken to protect employees from being falsely accused. Such steps would include retesting by alternative methods to insure against false positives.

Second, it should be clear to employees that they will not be asked to submit to tests unless their performance is unsatisfactory and there is reason to suspect that they are using or abusing drugs.

Third, all drug offenses should be handled within the contexts of due process, progressive discipline, and constructive confrontation. This would insure that employees would not be summarily fired for a first offense and that they would be given feedback on, and sanctioned for, misbehavior, including evidence of drug use. At the same time, it would act as a means for understanding what the tests mean. As in the employee assistance program, the meaning of the test becomes clearer when employees are given feedback on, and disciplined for, their behavior.



In the case of dangerous jobs, the individual who tests positively might be temporarily transferred to a nondangerous one until the test's meaning can be sorted out. If the positive result is false, the employee should be quickly returned to the original job; however, if it becomes clear that the employee is a user, abuser, or an addict, they should be confronted with the consequences of their behavior, offered rehabilitation, and closely supervised until such time as they are deemed safe to return to their dangerous work. If the employee's behavior continues to be unsatisfactory and future testing suggests continued drug use, those offenses could be handled within the company's regular disciplinary process. At each step, however, the employee should be offered an opportunity for help. In nondangerous cases, where companies choose to exercise their right to test employees whose performance is unsatisfactory and whom they suspect of drug use, positive findings should always be handled within the regular progressive discipline process.

Fourth, policies should make provision for appealing drug screening offenses to an outside impartial arbitrator. This is essential because of the many problems surrounding drug screening — particularly the meaning to be attached to a positive result and the appropriate sanctions to be imposed. In unionized companies, this function would be handled within the normal arbitration procedures; in nonunion facilities, mediation arrangements can be worked out with professional arbitrators acting through such neutral agencies as the American Arbitration Association. In either case, such a provision is a potent guarantee to employees that they will be treated justly by management, a guarantee that they do not now have under many testing programs.

Fairness and compassion are important ingredients in labor-management peace. Drug screening as practiced in many work organizations is neither because, in the rush to punish drug users, management is all too willing to abandon standards of workplace justice. Employee assistance, on the other hand, entails both. Constructive confrontation provides employees a square deal and counseling provides them opportunities for rehabilitation.