Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool for Helping Resolve the Nation's Drug Problem If Competing Interests of Employer and Employee Are Equitably Balanced

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The damnable character of illicit drugs should not blind our eyes to the mischief which will surely follow any attempt to destroy them by unwarranted methods. "To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; ... in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice."*

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I. INTRODUCTION

American history is marked by alternating periods of drug indulgence and abstinence; currently, the nation is in the throes of a crusade for a "drug free America." Thundering exhortations from their pulpits, evangelists preach against the evils of drug abuse on national television, while parents hold church vigils for drug victims and children march in the streets in anti-drug parades. First Lady Nancy Reagan resolutely supports an anti-drug campaign dubbed "Just Say No" while the President canvasses the nation with presidential homilies against drug abuse. In a joint, nationally televised address to the nation, the First Family call upon America to mount a unified effort to stamp out drug abuse from all segments of society. Meanwhile, local officials across the country are proposing and implementing drug education and abuse prevention programs in primary and secondary schools. Billboards

1. For a brief sketch of the history of drug abuse in America, see TIME MAGAZINE, Sept. 15, 1986, America's Crusade: What is behind the latest war on drugs, (hereinafter referred to as TIME, America's Crusade), 60, at 64-66; see also ADAMS, BLANKEN, FERGUSON & REZNICKOV, OVERVIEW OF SELECTED DRUG TRENDS 1 (1985) (available from the National Institute on Drug Abuse).

Recent White House polls indicate that the American public is more concerned with drug abuse than such matters as the federal deficit budget and arms control, and more willing to spend tax dollars on combatting drug abuse than developing STAR WARS, the United States Military Space program. TIME MAGAZINE, Aug. 18, 1986, Crackdown, Reagan Declares War on Drugs and Proposes Test for Key Officials, (hereinafter referred to as TIME, Crackdown), 12; NEWSWEEK, Aug. 18, 1986, Grabbing the Drug Issue: A Scramble to Take Credit for New Programs, (hereinafter referred to as NEWSWEEK, Grabbing the Drug Issue), 16.


3. TIME, America's Crusade, supra note 1, at 61; NEWSWEEK, Aug. 11, 1986, Trying to Say 'No', 14, at 15 (hereinafter referred to as NEWSWEEK, Trying to Say 'No'); TIME, Crackdown, supra note 1, at 13.

4. NEWSWEEK, Drug Fever, supra note 2, at 39. Joining his wife's battle cry for "outspoken intolerance" toward drug abuse of all sorts, the president remarked: "[w]hen we all come together... for this cause, then those who are killing America and terrorizing it with slow but sure chemical destruction will see that they are up against the mightiest force for good. They will have no dark alleyways to hide in." Id.

5. The President mounted the bully pulpit in August, 1986, calling for a "national mobilization" against drug abuse. In a nationally broadcast press conference on August 15, 1986, Reagan set forth a six-point program proposal for eradicating drug abuse in the nation. The second point emphasized by the President called for drug-free schools:
around the nation advertise drug counselling and rehabilitation programs for the abuser, family, and friends; and, stories concerning America's drug problem command cover attention in national magazines and prime coverage in televised national news. The response to America's drug abuse epidemic has itself reached epidemic proportions.

"[e]veryone should be made aware from Day 1 that drugs on campus used or sold by anyone are a thing of the past." Reagan instructed Department of Education Secretary William Bennett to develop proposals that would enlist school administrators, PTAs, college presidents and student organizations in cracking down on drug use in the nation's schools.

The President's plea for help in this area has not gone unheeded. In Los Angeles, California, officials have announced that they will expend $500,000 in an elementary school drug education program. Id. at 13. In a more drastic measure, the local school board in Hawkins, Texas has decided to require students to pass a urinalysis screen before they can sign up for band, cheerleading, and other extra-curricular activities. Meanwhile, Maryland state troopers, using drug sniffing dogs, plan to periodically scan the lockers and halls of Washington County schools and high school students in Georgia must complete a drug abuse course before becoming eligible for a driver's license.

These measures, however, pale in the face of recommendations made by Education Secretary Bennett in a 79-page guide entitled "What Works: Schools Without Drugs," which was mailed to the nation's 160,000 school superintendents in September, 1986. In the guide, the Secretary advocates monitoring school bathrooms and playgrounds by school authorities, and randomly inspecting lockers. Administrative blessing is given to student searches and urinalysis when authorities have reason to suspect drug use, and suspension for first-time offenders and expulsion for second-time offenders is also recommended. Id. The legal and constitutional implications of these proposals in the context of the educational arena are beyond the scope of this Comment and, therefore, will not be addressed.

6. See TIME MAGAZINE, Oct. 6, 1986, Reporting the Drug Problem, 73. NBC has aired more than 400 reports on drug abuse since the beginning of March, 1986; ABC, in the middle of August, 1986, highlighted drugs for a week on all its news programs. Cocaine and CRACK, a cocaine-product, have been front page news in daily newspapers ranging from tabloids to the Wall Street Journal. CRACK has repeatedly reached the front page of the New York Times and Washington Post, and the drug crisis has rated two cover issues within one month at Newsweek. Time has given cover attention to drug use in the workplace and the anti-drug crusade of President and Nancy Reagan. Id. Some critics chide the media for blatant sensationalism on the issue. Id.

7. Illicit drugs are the current public bane, a fact which is well attested by the fever-pitched activity within the political arena. Capitalizing on what they perceived to be a hot, broad national issue, candidates for offices from school boards to the U.S. Senate, as well as presumptive 1988 presidential contenders, proposed solutions to America's drug problem and then argued about who got toughest first. See NEWSWEEK, Grabbing the Drug Issue, supra note 1, at 16.

In an overwhelming 392 - to - 16 vote, the U.S. House of Representatives in early September, 1986, approved a sweeping omnibus bill that called for the immediate deployment of enough military force to halt the flow of drugs into this country within 45 days. The cost of
The newest campaign recruits are the nation's employers, both

the program had not been determined at the time the bill was put to vote; price seemed to be no object, despite Graham Rudman and the current emphasis on federal fiscal integrity. See NEWSWEEK, Drug Fever, supra, note 2, at 39; NEWSWEEK, Aug. 11, 1986, Trying to Say 'No', supra note 3, at 15.

Also included in the legislation were provisions for a mandatory death penalty for drug rackateers who commit murder, mandatory life sentences for those convicted for the second time of selling drugs to children and a controversial provision to slacken the rules of evidence in all federal prosecutions by virtually eliminating the "exclusionary rule." The exclusionary rule prohibits the use of evidence that has been obtained by improper searches and seizures in the trial of a federal criminal case. The bill also proposed to limit the right of habeas corpus in federal drug crime prosecutions. Id. Commenting on the substantial modification of the exclusionary rule, House Judiciary Committee Chairman Peter Rodino, who has resisted even conservative attempts at modifying the rule over the years, stated: "[t]oday we have been fighting the war on drugs, and now it seems to me the attack is on the Constitution of the United States." NEWSWEEK, Drug Fever, supra note 2, at 39; NEWSWEEK, Sept. 29, 1986, A Question of Privacy, 18, 21.

Whether the bill would pass through the Senate without major revisions was unsure in September 1986; however, observers were certain that a major anti-drug bill was forthcoming. Id. In a rush to pass some form of legislation before the upcoming congressional elections in November, Congress could have been expected to eliminate the more controversial aspects of the bill in order to avoid legislative filibuster and impasse, and to ensure enactment of a federal anti-drug abuse law. Indeed, this is exactly what happened. EMPLOYEE TESTING & the Law, Dec. 1986, Legislation & Policy, at 4 (hereinafter referred to as EMPLOYEE TESTING, Dec., 1986, Legislation).


The Anti-Drug Abuse Act of 1986 also did not go as far as President Reagan had sought in combating drug abuse in the federal workplace. The President's plan for a "drug-free America," see infra note 9, included provisions designed to facilitate the government's testing, disciplining, and, in appropriate cases, firing of federal workers who abuse drugs on or off the job. Although the President did not specifically request Congress to authorize drug testing of federal employees, the legislators deleted two Administration proposals intended to pave the way for federal employee drug testing. See EMPLOYEE TESTING, Dec., 1986, Legislation, supra, at 4. The first proposal of the President omitted by Congress sought an amendment to the Civil Service Reform Act allowing the government to discipline any federal employee using drugs on or off the job. Id. The various federal agencies were to determine the appropriate disciplinary scheme. Id. The second proposal not included in the Act was to amend the federal Rehabilitation Act of 1973 which provides employment protection for handicapped employees. Id. The proposed amendment would have specifically excluded illicit drug addiction or abuse from the Rehabilitation Act's schedule of handicaps. Id.

Meanwhile, Congressmen have also been applying political pressure on the film, television and music industries to deglamorize the use of drugs. In a letter signed by more than
300 Congressmen and delivered to ABC, NBC, CBS and Cable News Network in late August, 1986, the politicians urged:

"We believe that many fewer younger Americans would turn to drugs if they were aware of the stark histories of hopeful lives snuffed out by drugs. We are therefore calling upon the television networks. . . to design and broadcast a major national campaign against drug abuse . . . an unprecedented coordinated offensive against the culture that encourages the use of cocaine, crack and other dangerous drugs."

NEWSWEEK, Aug. 11, 1986, Going after Drugs: Critics call for the deglamorization of drugs, 20.

The anti-drug fever has spread into the state political arena also, particularly in drug plagued cities such as New York, where Mayor Edward Koch has summoned the Army, Navy and Air Force to join the city's war to eliminate drug abuse. TIME, America's Crusade, supra note 1, at 62. Meanwhile, in other states, stiff jail sentences for drug pushers are in vogue: Alabama's new "drug barons law," for instance, mandates a life sentence without parole for high volume drug traffickers. Id.

A fine line exists between conviction and fanaticism. Occasionally, the anti-drug crusade has slipped over the line, producing ludicrous results. For example, the manufacturer of the toy "Madballs," a best selling set of eight rubber balls with hideous faces and equally dis-tasteful names, has recently felt the effect of the nation's drug campaign. One of the more grotesque "Madballs," depicting a creature whose skull was split wide open and who was named "Crack Head," has been renamed to "Bash Brain" because the toymakers were fear-ful that the toy's name might be accused of glorifying drug use. TIME, America's Crusade, supra note 1, at 62. Politicians, who have made drugs a political plank have been dubbed "drugocrats" and their campaign methods "jar wars." Id. The attack on the politicians is not unwarranted. Los Angeles Mayor Tom Bradley, in an effort to unseat California Governor George Deikmejian, made an athletic bag full of crack paraphernalia a principle part of his campaign speech in which he ceremoniously smashes the drug devices with a hammer. See NEWSWEEK, Sept. 29, 1986, Jar Wars: Candidates Make Drugs an Issue, 21.

Employers are taking strong action: On July 7, 1986, National Football League Commissioner Pete Rozell announced that the League would impose mandatory random testing of all NFL players. David Copus, Esq., Alcohol And Drugs In The Workplace, 6-9 (unpublished manuscript) (Copus is an attorney for Seyfarth, Shaw, Fairweather & Geraldson, 1111 19th Street, N.W., Washington, D.C. 20036) (hereinafter referred to as Copus, Alcohol and Drugs). In February, 1986, the Commissioner of Baseball indefinitely suspended from major league baseball 11 players involved with drugs. Id. at 7. In February, 1986, New York state courts adopted, with union agreement, program of drug testing for court officers and clerks. Id. at 7. In February, 1986, New York state courts adopted, with union agreement, program of drug testing for court officers and clerks. Id. See also BNA Special Report, supra, at 113 (New York State case study). In February, 1986, the U.S. Customs Service and Drug Enforcement Administration proposed drug tests for their employees. See infra note 9 and accompanying text. See also infra text accompanying notes 888-932; 1238-59, 1376-1415 for a discussion of the constitutional challenges to the Customs Service's drug screening program. On February 10, 1986, the Federal govern-ment imposed regulations prohibiting railroad workers from reporting to work drunk or drugged and from using alcohol or drugs on the job. Railroad unions vowed to fight the rules. See Copus, Alcohol and Drugs, supra at 7. In the Spring of 1986, the Federal Aviation Administration began annual drug testing of 14,000 air traffic controllers. Id.

In January, 1986, the Miami Herald implemented pre-employment drug testing. In 1985, after conducting its own undercover investigation, the Miami Herald fired 18 workers
for using or selling drugs on the job. *Id.* The Los Angeles Times adopted a pre-employment testing policy in November, 1985. The L.A. Times also tests employees suspected of drug abuse. *Id.* at 8. The New York Times and the Chicago Tribune have had pre-employment drug tests for several years. *Id.* In January, 1986, the Kansas City Times and Star adopted, and quickly abandoned after employee objections, a program of sending drug-sniffing dogs into the news room. *Id.* On January 19, 1986, the Nashville (Tenn.) Banner dismissed two news staffers for substance abuse while on assignment. *Id.* The San Diego Union and Tribune have also recently adopted pre-employment drug testing. *Id.*

In January, 1986, the Baltimore Orioles became the first professional baseball team to institute voluntary drug tests. *Id.* Beginning March 1, 1986, DuPont Company began pre-employment urine testing of applicants to check for drugs, including marijuana, cocaine and amphetamines. Current employees will also be tested if drug problems are suspected. *Id.* In late June, 1986, the U.S. Army began urine testing for drugs of 12,000 civilian employees in a dozen critical jobs. The Army requires a witness to the urine collection. *See infra* text accompanying notes 933-93 for a discussion of the constitutional challenges to the Army's program. During 1986, the Army will administer more than 3 million urinalysis tests to active-duty soldiers. *See Copus, Alcohol and Drugs, supra* at 7. Beginning June 1, 1986, HCB Contractors in Dallas required urinalysis for anyone receiving an on-the-job injury requiring medical attention. *Id.* On August 2, 1984 the trucking industry and Teamster's union adopted a program allowing employers with reason to believe an employee is intoxicated to request blood and urinal samples; the employee's refusal constitutes a presumption of intoxication. *Id.* In 1984, IBM and American Airlines began pre-employment drug testing of applicants. *Id.* at 9. *See also infra* notes 13-14 and accompanying text. Burlington Northern Railroad began testing applicants and employees for alcohol and drugs after both were implicated in train accidents in Colorado and Wyoming that killed seven people in 1984. *Copus, Alcohol and Drugs, supra* at 9.

In July, 1985, Alabama Power Company began pre-employment drug tests. Employees have been subject to such tests since 1983, following an undercover probe at one power plant that discovered 40 casual users of drugs and 12 dealers. *Id.* In mid-1984, Georgia Power Company began to test employees working on the construction of its nuclear power station. Since then, 300 people have been fired for failing the test or refusing to take it. Three of them have fought back, claiming they were fired for reporting safety violations to the Nuclear Regulatory Commission. *Id.; see also BNA Special Report, supra,* at 105 (Georgia Power case study). In the summer of 1985, Southern Pacific Transportation Company required 500 workers to take surprise urine tests. *Copus, Alcohol and Drugs, supra* at 9. On April 1, 1986, New Hampshire Yankee, Inc., which is building the Seabrook nuclear power plant, instituted mandatory drug testing for all employees. *Id.*

9. In March, 1986, the President's Commission on Organized Crime issued the following statement as part of a report studying the drug abuse problem in America:

> Every employer, public and private, and public education institutions at all levels should have clearly stated policies prohibiting drug use, possession of drugs, or being under the influence of drugs on their premises. The consequences of violating these prohibitions should be clearly explained.

> The President should direct the heads of all the federal agencies to formulate immediately clear policy statements, with implementing programs, expressing the utter unacceptability of drug abuse by Federal employees. State and local governments and leaders in the private sector should support unequivocally a similar policy that any and all drugs are unacceptable. Government contracts should not be awarded to companies that fail to implement drug programs, including suitable drug testing . . . .

> Government and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness
gressively moving to contain drug use in the workplace along with

of such a program.


On August 15, 1986, the President, declaring a "national mobilization" against drug abuse on nationally broadcast television, set forth a six-point program proposal for eradicating drug abuse in America. At the top of this list, point one called for a "drug free workplace for all Americans" and an integral part of this proposal included mandatory and voluntary drug screening in both public and private sector employment. See TIME, Crackdown, supra note 1, at 12; Address by President Reagan to the United States Congress (August 15, 1986). This recommendation was heavily criticized on Capitol Hill. Representative Peter Rodino (D-N.J.), chairman of the House Judiciary Committee and a member of the commission, stated: "While drug testing may be appropriate in certain circumstances and in certain industries, wholesale testing is unwarranted and raises serious civil liberty concerns." Chicago Tribune, Mar. 9, 1986, § 5, at 1, col. 1. Representative Charles Schumer (D-N.J.) agreed: "Trying to stop organized crime's multimillion dollar drug business by creating a police state in federal office buildings would be virtually ineffective and would create one crime to stop another." TIME MAGAZINE, Mar. 7, 1986, Battling the Enemy Within, at 53. Also, in a letter to President Reagan, Representative Patricia Schroeder (C-Colo.), who heads a House civil service subcommittee, said: "The foolishness of the commission's approach is demonstrated by the fact that no one is proposing testing for off-duty use of the two most addictive and destructive drugs known to society—alcohol and tobacco." Chicago Tribune, Mar. 9, 1986, § 5, at 1, col. 1.

It is interesting that at a recent hearing concerning mandatory drug testing for all federal workers, the deputy executive director of the President's commission, Rodney Smith, refused to give a urine sample prior to testifying. He complained that he was not warned in advance and called the request "a cheap stunt." Such criticism is ironic, since under the commission's proposal federal workers would have no warning, and is indicative of the general public's response to such a request. Chicago Tribune, Mar. 19, 1986, § 1, at 10, col. 1.

As a token of his commitment to his proposal, the President submitted to a voluntary drug screen over the August 9, 1986 weekend. See, TIME, Crackdown, supra note 1, at 12. Vice-President George Bush and seventy-eight other senior White House officials underwent a similar screening during the week of August 11, 1986 at the President's request. Id.; Nelson, Bush receives test for drugs, Associated Press, August 12, 1986. Lower level federal employees have been less willing to "join the cause." See infra text accompanying notes 888-932, 1376-1415 (Customs Service); 933-93 (U.S. Army civilian employees).

Then on September 15, 1986, the President announced a mandatory drug testing program for federal employees who occupy "sensitive" positions that demand a high degree of public trust and confidence. Representative positions include law enforcement, public health and safety, and air traffic control. Also included within this classification are presidential appointees and those individuals with access to classified information. ABA JOURNAL, Nov. 1, 1986, Reagan's Drug Testing Policy, at 53.

Executive Order No. 12564, outlining the President's drug screening program, grants agency heads considerable discretion in implementing the program, but the potential pool of federal employees subject to the random drug screen is nearly 1.2 million. Id. The Office of Personnel Management has issued guidelines which allow federal workers in sensitive positions to be fired for first-time drug use and require an offender to be dismissed for a second offense. The OPM rules for federal workers, developed in response to President Reagan's Executive Order, went into effect at the beginning of December. EMPLOYER TESTING and the Law, Dec. 1986, News Update, at 8. For the actual text of Executive Order No. 12564, see Individual Employee Relations Manual (BNA), Mar. 1987, at ¶ 595:501.
the social and economic evils associated with it. In the past, employers have used trained dogs, unannounced searches of company property, polygraphs, electronic video surveillance, and undercover personnel to ferret out drug users, but a relatively new and highly controversial addition to the employers' arsenal against drug abuse is drug screening. The exact number of employers using drug

Under the guidelines employees found to be using illegal drugs on or off the job will be referred to an employee assistance program and given the chance to undergo rehabilitation. However, the guidelines leave to the discretion of the agency head the authority to terminate the employee. In such a case there is no requirement to demonstrate that the employee's job performance has been affected by the drug use. Id.

Agency heads have been directed to define which jobs are to be considered "sensitive positions." Under the OPM guidelines agency heads are authorized but not required to test any job applicant for drug use. No applicant who refuses to take a drug test or who fails to pass one can be hired for federal employment. Id. For a first hand reading of the guidelines, see EMPLOYEE TESTING and the Law, Jan. 1987, OPM Guidelines: Establishing a Drug-Free Federal Workplace, at 1-3. One such program adopted by the United States Customs Service, in an attempt to make the federal government "an example for all employers" in the creation of a drug-free workplace, was recently declared unconstitutional by a federal district court in a suit filed by the National Treasury Employees Union the day after the President issued the Order. See infra text accompanying notes 888-932, 1238-59, 1376-1415; also NEWSWEEK, A Question of Privacy, supra note 7, at 18.


12. In the 1970s a new front was opened up in the battle against drug abuse when companies began marketing relatively inexpensive scientific processes that purported to detect the presence of drugs in urine samples. First used by crime laboratories, hospitals, and drug therapy programs, by the early 1980s, the United States Navy and a few private employers were using the drug screens, commonly called urinalysis. By 1985, drug testing emerged as a major tool in the war against drug abuse in the workplace. BNA Special Report, supra note 8, at 27. Drug screening is ordinarily a two step process, although the second step is sometimes bypassed by employers in order to reduce costs. See infra text accompanying notes 122-25; see also infra this note.

First, an inexpensive urine screen, not unlike a home pregnancy test, is administered. The most well known and widely used urine screen is the EMIT test (Enzyme Multiplied Immunoassay Test), which is manufactured by Syva Laboratories, a subsidiary of Syntex Corporation of Palo Alto, California. These screens can cost as little as $10 a sample. The scientific basis of the test is quite simple: antibodies specific for certain drugs are added to the vials of urine, which change color if the by products of a particular drug are present. Id. at 30; TIME, Oct. 21, 1985, Putting Them All to the Test, at 61; NEWSWEEK, May 5, 1986, Can You Pass the Job Test?, at 50 (hereinafter referred to as NEWSWEEK, Can You Pass?); ABA JOURNAL, Nov. 1, 1986, Drug Testing: The Legal Dilemma, at 51 (hereinafter referred to as ABA JOURNAL, The Legal Dilemma).

The second step of the process comes into play if the urine sample tests “positive” (drug is present). A popular confirmatory test, gas chromatography/mass spectrometry (GC/MS),
screens is yet unknown; however, several recent surveys of the nation's largest employers shed some light on the extent of application of these tests. The National Institute Against Drug Abuse (NIDA) reports that the percentage of Fortune 500 companies screening applicants for drug abuse rose from three percent in 1982 to nearly thirty percent in 1985. In a similar survey by Noel Dunivant & Associates for CompuChem Laboratories, Incorporated, a major drug testing firm, the results indicate that of one hundred eighty Fortune 500 firms interviewed, eighteen percent acknowledged testing current employees or job applicants while another nineteen percent stated that they anticipate drug testing programs being implemented within the next two years. Despite the difference in statistics, it is clear that drug screening by the nation's largest employers has expanded at a rapid rate in recent years with no reversal of the trend in sight; and, many smaller em-

reduces the constituent chemicals to their molecular levels and identifies the "fingerprint" of a specific drug. ABA JOURNAL, The Legal Dilemma, at 52. While the first process is inexpensive, the GC/MS test is not, ranging in cost from $100 to $200 per specimen. Id. Unfortunately, some employers take the cheap shortcut of simply relying upon the results of the initial urine screen, or merely repeating the first test and never performing a different confirmatory test. Id.; Bishop, Flunking the Drug Test, 4 CAL. LAW., April 1986, at 30; Rothstein, Screening Workers for Drugs: A Legal and Ethical Framework, 11 EMP. REL. L. J. 421, 427 (1985)(hereinafter referred to as Rothstein, Screening Workers). Although urinalysis is presently the most common clinical method used to detect employee drug use, it is not the only one. Tests range from skill-based exercises, such as walking a straight line, to a number of sophisticated bio-medical tests. For a description of these various testing procedures, see BNA Special Report, supra note 8, at 31-32.

13. BNA Special Report, supra note 8, at 27.

14. Noel Dunivant & Associates, Drug Testing in Major Corporations: A Survey of the Fortune 500, at 4, 6 (October, 1985) (Conducted for Compuchem Laboratories) (hereinafter referred to as Noel Dunivant, Fortune 500 Study). Of the Fortune 500 companies surveyed, 80% indicated that they had programs which screened job applicants, 47% indicated that they tested employees following involvement in accidents, and 13% indicated that they subjected employees to random drug tests to discover drug use. Id. at 3-5. In another survey conducted by the American Society of Personnel Administrators (ASPA), of three hundred ninety firms interviewed, twelve percent of the firms screen current employees for drug use, nine percent screen job applicants for drug use and thirteen percent screen applicants for alcohol use. In addition, the ASPA survey isolated several regional and sectoral variations in the use of screens. The survey demonstrated that screening was not as common in the Southeast and Southwest and non-manufacturing enterprises. BNA Special Report, supra note 8, at 27. See Washington Post, Feb. 2, 1986, Many Employers Test Workers for Drug Use, at A14. Typical among the companies screening their employees for drug use are the International Business Machines Corporation (IBM), Kidder Peabody, DuPont and the New York Times. NEWSWEEK, Taking Drugs on the Job, supra note 11, at 52; ABA JOURNAL, Aug. 1, 1986, Protect Safety, Not Drug Abuse, at 35 (hereinafter referred to as ABA JOURNAL, Protect Safety). See also supra note 8 for a more comprehensive listing of representative testing companies.
ployers are expected to follow suit.\footnote{15}

Initially, drug screening was piloted in the United States Military and quickly spread to the transportation, manufacturing, public safety and health-care industries, as well as various areas of public-sector employment.\footnote{16} Next, school teachers, retail sales em-


ployees and major league sports figures were engulfed by the drug testing movement along with a large portion of private-sector employees. While several reasons for the employers' new interest in drug testing have been advanced, the chief factor appears to be the employers' perception of the relatively inexpensive urinalysis as a panacea for a plethora of workplace afflictions: lost career op-


The Tennessee Valley Authority began using urinalysis to check all new nuclear plant employees for drug use out of a strong concern about nuclear plant safety and a desire to rid the workplace of alcohol and drug abuse. See TIME, Putting Them All to the Text, supra note 12 at 61 (quoting Joseph Grass, chief of Employment at TVA).

17. Bishop, Drug Testing, supra note 10 at 29. See also supra note 8 and accompanying text.

See BNA Special Report, supra note 8 at 27; id. at 79 (Bath Iron Works case study); id. at 88 (Capital Cities/ABC case study) (communications employees); id. at 105 (Georgia Power (utility company testing employees from laborers to legal counsel since 1983); id. at 103 (General Motors/UAW) (post-accident drug testing of union auto workers); id. at 114 (Northwestern Bell); id. at 123 (Union Oil Company of California - UNOCAL).


18. One author suggests that the increase in drug testing can be traced to the concurrence of two factors: the growing drug abuse problem and the introduction of new testing procedures that permit fast and inexpensive drug screening. Urinalysis is capable of identifying the presence of amphetamines, barbituates, tranquilizers, cocaine, heroin, methadone, morphine, and phenylcycledine (PCP) in urine samples. Rothstein, Screening Workers, supra note 12, at 423.

Others suggest that the employers' concern over drug abuse has been heightened by the high profile drug deaths (for example, University of Maryland basketball superstar Len Bias' cocaine overdose in the Spring of 1986), and indictments of star athletes [not to mention the conviction of the Pittsburgh Parrot mascot for drug trafficking!] which have made employers more keenly aware of drug impairment and abuse and the availability of testing procedures. ABA JOURNAL, The Legal Dilemma, supra note 12, at 51. Yet others blame the drug abuse hyperbole created by the news media. TIME, Reporting the Drug Problem, supra note 6, at 73.
opportunities, morale problems, job-related injuries, illnesses and deaths, bankruptcies, tardiness, absenteeism, lost productivity, shoddy workmanship, increased health insurance and workers' compensation expense, property damage and theft, and employee replacement and training expenses, not to mention lost goodwill. According to Peter Bensinger, President of Bensinger DuPont & Associates, a Chicago-based policy advisory group, an employer pays, whether aware of it or not, "anywhere from $500 to $1,000 an employee because of America's drug abuse problem in the workplace." The losses attributable to lost productivity alone have been estimated at thirty-three billion dollars annually.

19. The losses associated with drug abuse are quite extensive as demonstrated by the list. For a discussion of the contours of each category of loss, see BNA Special Report, supra note 8, The Costs of Chemical Abuse, at 7-9; U.S. NEWS & WORLD REPORT, May 16, 1983, How Drugs Sap the Nation's Strength, at 55 (drug abuse costs the economy as much as $25 billion annually in lost productivity absenteeism, mistakes and sick leave); NEWSWEEK, Taking Drugs on the Job, supra note 11, at 52; KRISTIANSEN & COLLINS, ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS: 1980 (June 1984)(prepared under contract with the Alcohol, Drug Abuse and Mental Health Administration for Research Triangle Institute (RTI) of North Carolina).

20. BNA Special Report, supra note 8, at 7.

21. Notably, the statistics demonstrate that overall, alcohol is a more pervasive problem among the work force. As noted by one author, research in the area of accidents due to substance abuse disclosed that there were more alcohol-related accidents than accidents caused by all the illicit drugs combined. Rothstein, Screening Workers, supra note 12, at 423. Productivity loss figures comparing alcohol-related losses to drug-related losses also demonstrate the greater seriousness of alcoholism in the workplace: RTI estimates that while productivity losses attributable to drug abuse annually approach thirty-three billion dollars, the costs of alcohol abuse are nearly double, approaching sixty-five billion dollars annually. BNA Special Report, supra note 8, at 8; compare estimates in a report by the Employee Assistance Society of North America, id., at 7; where alcohol-related losses are nearly four-fold those related to drug abuse.

This notwithstanding, the employers of the nation seem more willing to pursue the drug abuser than the alcoholic with screening methods designed to ferret out drug users in the workplace. Mark A. Rothstein, occupational safety law expert, postulates several reasons for this phenomenon: (1) the presence of illicit drugs in an individual's system are detectable for longer periods of time than alcohol; (2) use of drugs such as cocaine, heroin, etc. are illegal while drinking alcohol is not; (3) there is less social stigma attached to the use of alcohol, particularly small amounts; and (4) "horror stories [of drug-related accidents], the productivity losses, absenteeism, health insurance costs ... and the likelihood that [drug dependent] workers will steal and accept bribes." Rothstein, Screening Workers, supra note 12, at 423; Allen, Side Effects, 5 CAL. LAW. 21 (Oct. 1985)(quoting point four from Rothstein); compare TIME, Reporting the Drug Problem, supra note 6, at 73.

While the costs related to drug abuse are undoubtedly enormous, a word of caution is necessary when viewing these statistics. The majority of the figures cited in the foregoing notes have been compiled by associations and organizations which depend on such figures for their livelihoods. The statistic suppliers possess vested interests and cannot help but bring a jaundiced eye to their observations. This author does not suggest that these compilers intentionally or even negligently misstated the statistics, however; many of the cost/loss categories are intangible in nature - absenteeism, turnover - that depend on many factors
As these stark estimates of business losses due to drug abuse by American workers are more widely publicized, more employers are resorting to drug screening as a method of detecting abuse and preventing losses. While employers assuredly have a legitimate interest in promoting workplace safety and efficiency, the employers' use of drug screening on the job has clashed head on with the countervailing interests of employees.

Employees and civil liberty advocates argue that the drug screening methods are inaccurate as well as constitute an impermissible deprivation of constitutionally guaranteed rights and an unwarranted invasion of individual privacy. The controversy over which set of competing interests should prevail promises to be among the most hotly contested and complex issues in employment law of the decade. Since statutory and less than complete objectivity may cause the compilers of such figures to assign more adverse impact to drug abuse than it may actually deserve. Thus, the user of these statistics should closely scrutinize the sources of the figures, the purpose of their compilation, and the method of compilation before adopting them as a totally accurate portrayal of the problem.

22. See supra notes 13-15 and accompanying text.

Noel Dunivant reports:

The level of management's satisfaction is high among the companies that have implemented testing programs. The interviews revealed that companies have generally experienced positive results, such as increased worker safety and a decrease in the number of poor job applicants. In fact, positive effects outnumbered negatives by more than 3 to 1.

Noel Dunivant, Fortune 500 Study, supra note 14, at 12.


24. See, e.g., NEWSWEEK, Can You Pass?, supra note 12, at 47 ("Can you imagine the Founding Fathers saying that the major source of authority in [your] life - your employer - 'can make you drop your pants and urinate as a condition of getting or keeping a job? . . . It's ridiculous.'"); id. at 52 (San Francisco Supervisor Alfred Maher, sponsor of a local ordinance prohibiting use of drug screens in private employment - see infra notes and accompanying text - says that only through such measures will companies be barred from "rummaging through another person's biology," unless absolutely necessary.) See ABA JOURNAL, Testing Violates Privacy, supra note 23; contra ABA JOURNAL, Protect Safety, supra note 14 at 35. See also TIME, Putting Them All to the Test, supra note 12 at 61; NLJ, Drug Testing, supra note 16 at 1; Bishop, Drug Testing, supra note 10 at 29, 30; ABA JOURNAL, Reasonable Suspicion, supra note 23 at 20.

25. NLJ, Drug Testing, supra note 16 at 1 ("With forces on both sides picking up steam, the scene is set for a dramatic head on collision in the courts as the nation tries to sort out the employer's right to a drug free workplace and the worker's right to privacy."); Bishop, Drug Testing, supra note 10 at 29 ("Employers' efforts run head-on into employees' determination to protect their privacy rights. The controversy has become one of the most
regulation of public and private employers’ use of drug screens in the workplace is virtually non-existent at present, the courts have largely inherited the unenviable mission of balancing the employees’ right to privacy against the employers’ interest in having a drug-free work force and their duty to provide a safe workplace.

26. San Francisco, California and the state of Utah have passed the only legislation to date which tackles the issue of drug testing. For the text of the San Francisco ordinance, San Francisco Municipal Code, Ch. VIII, Art. 33A (1986), and the Utah statute, UTAH Code Ann. 1953 §§ 34-38-1 - 34-38-13, see infra notes 2020 and 2021 respectively. Several other employment drug-testing regulatory bills are under consideration in state legislatures in California, Massachusetts, Maine and New Jersey. See infra notes 2022-27. In California the state legislature passed a drug licensing and certification bill, AB-4242, introduced by Assemblyman Johan Klehs, see infra note 2022, which prescribed various guidelines for drug testing laboratories including a mandate that if an employer requires drug testing of both current employees, he must utilize a state licensed testing laboratory. Additional requirements of the bill include advance notice to all affected employees in writing of the testing policy and maintenance of confidentiality of all test samples and test results. Id. The bill, however, was subsequently vetoed by the Governor of California. See supra note 2023. Assemblyman Klehs has vowed to reintroduce drug testing laboratory regulation in the next session of the Legislature and to secure the Governor’s involvement in drafting such legislation. Id. A companion Senate bill, SB-2175, still under consideration by the California Legislature, loosely regulates the employer’s ability to test, delineating broad circumstances under which the drug tests can be required, including provisions for random testing. See infra note 2024 for the text of the bill.

In Massachusetts, Congressman Hynes, of Marshfield, Mass., introduced a bill into the Massachusetts legislature which makes no attempt to balance the competing interests of employer and employee, rather it prohibits the use of urinalysis by any employer and provides the employee with a private cause of action. House Bill, H.B. 5583, Mass. Legis., 1986. For a complete text of the Massachusetts Bill, see infra note 2025 and accompanying text. As of this writing, the bill has not been reported out of committee. The Maine Legislature and the New Jersey Senate Labor Industry are also each considering drug-testing bills but as of January, 1987 neither state had passed a law. EMPLOYEE TESTING and the Law, Jan., 1987, Legislation and Policy, at 4 (hereinafter referred to as EMPLOYEE TESTING, Jan., 1987, Legislation). For a brief description of these bills see infra notes 2026-27 respectively. See also infra note 199 and accompanying text.

27. Bishop, Drug Testing, supra note 10 at 29 (“Because of the legislative vacuum, the courts have been left with the difficult job of balancing the employees’ right to privacy with the employers’ interest in having a drug-free work force and their duty to provide a safe workplace”); see infra discussion beginning at note 485 and accompanying text.

Many states place a duty on employers to use reasonable care in the selection (and retention) of employees. See, e.g., Colwell v. Oatman, 32 Colo. App. 171, 510 P.2d 464 (1973) (employer found to have breached duty when it hire an intoxicated laborer who could not physically perform the work and injured another employee). The Colwell decision is in line with the majority view which recognizes a cause of action for negligent hiring or retention of an employee where the employer knew or should have known of the employee’s dangerous proclivities: Swacek v. Shelby, 359 P.2d 127 (Alaska 1961); Kassman v. Bushfield Enterprises, Inc., 131 Ariz. 163, 639 P.2d 353 (App. 1981); Shore v. Town of Stonington, 187
This Comment will focus on current efforts, both judicial and legislative, to establish guide posts for balancing competing employer and employee interests in the relatively uncharted area of drug screening in the workplace. First, it will address the problem of accuracy in urinalysis testing and its legal implications in litigation and arbitration. As a preface to the remaining discussion, this Comment will explain the ramifications of the distinction between public and private sector employers under the federal constitutional doctrine of "state action." Examining a rapidly developing body of judicial pronouncements on the issue of drug screening in public employment, this Comment will then seek to identify jurisprudential trends in balancing competing employer and employee interests within the federal constitutional framework.

Since the truly private employer is not constrained by federal constitutional limitations, private sector employees will have to seek alternative routes in safeguarding their privacy interests. Po-
tential alternatives may include claims for violation of collective bargaining agreements, state constitutional and statutory privacy provisions, and common law rights of privacy. This Comment will explore each of these alternatives in seriatum, and also discuss the pending case of *Luck v. Southern Pacific Transportation Company*\(^{28}\) in California which may be a key decision on drug testing in the private sector. Finally, this Comment will examine and critique the few existing pieces of legislation - enacted and proposed - aimed directly at regulating the use of drug screens in the workplace.

**II. ISSUES OF ACCURACY**

Apart from the privacy issue, the strongest objections to the employers' use of urinalysis screening center on the issue of accuracy. The accuracy debate is divisible into two distinct but interrelated areas of contention. The first group of issues really has nothing to do with the accuracy of the test *per se*, but rather deals with what the test results actually demonstrate.\(^{28}\) Included within the first set of issues is the charge that the drug screens are an impermissibly over-broad response to drugs in the workplace.\(^{30}\) The second group - pure accuracy issues - focuses on the problem of testing integrity: i.e., the high incidence of "false positives", the lack of quality control in administering the test and analyzing the test results, and the lack of appropriate chain-of-custody procedures.\(^{31}\) Subsumed within this second category of issues is the demand for confirmatory testing.\(^{32}\)

**A. Test Results Only Demonstrate Exposure, Not Impairment**

One of the most contested aspects of testing involves what, precisely, urinalysis results demonstrate about drug use. Drug screening critics charge that employers are erroneously treating "positive" test results as indicative of employee impairment as of the time that the specimen was taken, and are identifying substance

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29. See generally, BNA Special Report, supra note 8 at 29-30. See infra notes 33-91 and accompanying text.
30. See infra notes 76-91 and accompanying text.
31. See infra notes 97-218 and accompanying text.
32. See infra notes 112-189 and accompanying text.
abusers and precipitously administering discipline on the basis of an initial urine screen.\textsuperscript{33}

One stark example of an employer's misinterpretation and misuse of urine screen results is demonstrated in \textit{Pettigrew v. Southern Pacific Transportation Company}\textsuperscript{34}. In a case filed last November, Southern Pacific Transportation Company office manager Raymond A. Pettigrew charged the company with invasion of privacy and false imprisonment following what he alleges was a false positive drug test.\textsuperscript{35} Pettigrew voluntarily submitted to the test, only to be informed four days later that he had tested positive for cocaine.\textsuperscript{36} Pettigrew denied having ever used any drugs except non-prescription allergy medicine.\textsuperscript{37} He was permitted to retake the urinalysis examination, but was required to undergo a four day hospital evaluation program before being allowed to return to work despite the negative results of the second test.\textsuperscript{38}

Pettigrew states that he then complied with a series of demands that included confinement for twenty eight days in a drug rehabilitation clinic followed by total abstention from alcohol and drugs, attendance at two Alcoholics Anonymous or Narcotics Anonymous meetings per week, and consent to nine or ten follow-up tests which were all negative.\textsuperscript{39} Despite these negative results and the professional opinion of the clinic doctors that Pettigrew did not need rehabilitation, the employer's demands continued.\textsuperscript{40} Eventually, Pettigrew filed suit, seeking an end to the testing. A superior Court Judge in San Francisco issued a preliminary injunction against Southern Pacific, enjoining the company from further testing and compelling attendance at the AA or NA meetings pending final resolution of the case.\textsuperscript{41} Pettigrew has since filed an amended complaint, alleging that after the preliminary injunction was issued, Southern Pacific retaliated by demoting him to a non-mana-

\textsuperscript{33} ABA Journal, Drug Testing, supra note 12, at 52 ("Based on the literature, employers have for years been falsely accusing employees on the basis of the inaccurate screening test. The literature is loaded with that sort of situation") (quoting Dr. David Greenblatt, chief of the division of clinical pharmacology at Tufts New England Medical Center).


\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id.

\textsuperscript{41} Id.
Another example of an employer blindly relying on urine screen results and hastily acting on the basis of such results can be seen in *Houston Belt & Terminal Railway Company v. Wherry*. Wherry, a switchman, fainted while working, receiving cuts on his face. He was examined by the company's designated chief surgeon, who ordered two sets of tests to be run by the hospital laboratory to ascertain why Wherry had fainted: one for diabetes and the other, a drug screen, to see if the fainting was drug related. The laboratory report for the second test indicated that a trace of methadone was detected in Wherry's urine. The physician notified the company's safety superintendent, advising him of the lab results and the fact that methadone was a synthetic drug used to treat heroin addicts. The physician emphasized that the positive test result only indicated that Wherry might be a methadone user and indicated that further investigation might be appropriate. Subsequently, the physician testified that methadone traces in urine can be detected for only twenty-four hours.

Two weeks after the test results were determined, Wherry was called by management into an investigative hearing where he was advised for the first time that methadone was present in his urine on the day he fainted. Contesting the results, Wherry consulted an outside physician for another urinalysis. The physician's report on the second screen stated that while Wherry's urine sample revealed the presence of a compound the characteristics of which resembled methadone, further analysis demonstrated that the compound was not methadone or any of the commonly abused drugs. Despite this report, Wherry was dismissed for being an unsafe employee; however, no mention was made at the time of his dismissal of any violation of Rule G, which prohibits the use of intoxicants or narcotics in the railroad industry.

Wherry sought assistance from the Veteran's Administration as

42. Id.
44. Id. at 746.
45. Id.
46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id. at 746-47.
a result of which the Department of Labor contacted the company's labor relations director. The labor relations director wrote a letter to the Department of Labor stating that, following Wherry's injury, traces of methadone were present in his system, which constituted grounds for discharge under Rule G.\textsuperscript{53} Wherry appealed his discharge under the Railway Labor Act, and a Public Law Board was convened which affirmed his dismissal.\textsuperscript{54} Wherry then sued in district court for defamation and won a jury award of $150,000 in compensatory damages and $50,000 in punitive damages, which was affirmed on appeal with modifications as to the identity of the liable parties.\textsuperscript{55}

The critics also argue that the most widely used tests are fundamentally flawed in that they do not measure an employee's degree of impairment or level of job performance at the time of the test, but rather show only traces of drugs in the urine and reveal nothing meaningful about an employee's work performance.\textsuperscript{56} Urinalyses test urine, a waste material, and as a result, the chemicals which are found present in it may or may not still be circulating in the bloodstream where they can affect an individual's performance.\textsuperscript{57} The tests do not measure the level of drugs in a person's system but only the presence of enzymes into which the drugs metabolize.\textsuperscript{58} Certain drugs metabolize at a much faster rate than others. Alcohol, for example, is flushed out of the body within twelve hours, while cocaine may remain detectable for two or three days, and marijuana can be traced for a couple of months after it has been used.\textsuperscript{59} Thus, a positive test result, including both initial

\begin{itemize}
\item [53.] Id. at 747.
\item [54.] Id.
\item [55.] Id. at 748, 755. The original award was against the company and its safety supervisor and director of labor relations. On appeal, the verdict was reversed as to the two individuals but affirmed as to the company. Id.
\item [56.] See infra notes 60-67 and accompanying text.
\item [57.] BNA Special Report, supra note 8, at 29.
\item [58.] See generally note 12 supra.
\item [59.] NLJ, Drug Testing, supra note 16, at 24. In one instance, marijuana was detected in a urine specimen 81 days after it was used by the individual. Id. (referencing Professor Kurt Dubowski of forensic toxicology at University of Oklahoma). See also McBay, Problems in Testing for Abused Drugs, 255 J.A.M.A. 39, 40 (1986); Allen, Side Effects, supra note 21, at 22 ("[t]he tests measure use, not intoxication. Thus a test given on Monday could single out both the Friday night drug users and the hard core addicts") (quoting David Smith, medical director at Haight-Ashbury Medical Clinic). Likewise, Columbia Uni-
and confirmatory tests, can demonstrate only exposure to the drugs for which the test is sensitive and is not probative of current drug impairment at the time the specimen was taken. As one expert, Dr. Ronald Seigel, explains: 

"[Drug] testing does only one thing. It detects what is being tested. It does not tell us anything about the recency of use, it does not tell us anything about how the person was exposed to the drug, it doesn’t even tell us if it affected performance." Sharing this view, forensic toxicologist Kurt Dubowski comments, "[n]o matter how good the analysis, the test cannot tell you the intensity of the exposure, the size of the dose, [or] the time it was taken[.] [S]o if you’re using the test to measure the effect of the drug on a person, it is essentially useless."

While blood tests can detect the presence of drugs in the blood where they are capable of causing impairment, employers tend to shy away from their use because blood tests are more expensive than urine screens and the taking of blood is perceived as much more invasive. However, even if blood samples are taken and a specific drug is detected, the quantity of a particular drug necessary to constitute impairment is still much a matter of scientific debate and conjecture. Indeed, for some drugs there may be little, if any, correlation between a positive blood test, not to mention a positive urinalysis, and present impairment. As noted by Dr. Seigel, one extreme example is PCP, a hallucinogen. An individual

versity Professor Alan Westin, who believes that drug tests, if they are to be given any importance should measure the level of impairment of an individual, as breathalyzers do, not merely look for evidence of drugs, comments, "[m]any generations of American workers would get roaring drunk on Saturday night, then show up for work a little hung over on Monday morning, and we led the world in production." TIME, Putting Them All to the Test, supra note 12, at 61; also, Dakis, Pottash, Annetto & Gold, Persistence of Urinary Marijuana Levels After Supervised Abstinence, 139 Amer. J. Psychiatry 1196 (1982); Urine Testing for Detection of Marijuana: An Advisory, 32 Morbidity & Mortality Weekly Rep. 467, 470 (1983).

60. BNA Special Report, supra note 8, at 29 ("Urine testing alone serves only to tell us an agent is present - not whether it is impairing") (quoting Dr. Frederic Reiders, president and director of National Medical Services, one of the foremost testing laboratories).

61. Id. (quoting Dr. Ronald Seigel, a psychopharmacologist at the U.C.L.A School of Medicine).


63. BNA Special Report, supra note 8, at 31, 32.

64. Id. at 34, see also id. at 17 ("The impairment caused by marijuana and other drugs is different than that of alcohol, and to this day, scientists are grappling with how to describe and quantify their effects). See NATIONAL INSTITUTE ON DRUG ABUSE, Q & A, DETECTION OF DRUG USE BY URINALYSIS, at 13 (1986) (The effects of drug use have not been correlated with specific drug metabolites in urine specimens).

65. Id. at 29 (referencing Dr. Ronald Seigel); see also id. at 17 ("data currently available indicates that wide ranges of drug concentrations may be present at equal levels of im-
can be in a virtual "catatonic state" from the use of the drug and yet test negative for the drug in blood and urine samples. On the other hand, an individual can test positive for PCP in the blood and urine and demonstrate no signs of impairment.

The inability of drug screens to detect present impairment has had an impact on litigation over disciplinary decisions based on drug test results. For example, in *Boone Energy* one issue before the arbitrator was whether the employees whose urine samples tested positive for marijuana and/or amphetamines were properly discharged for "entering the mine and/or work area of the mine while under the influence of intoxicants." The arbitrator determined that the dismissals based on this plant rule were without just cause.

Reviewing the testimony proffered by both the company and the union experts, the arbitrator concluded:

Given the state of testing technology, it is just as possible that the grievants ingested a substance containing phentermines or smoked a marijuana cigarette several weeks prior to June 4, 1985, as it is that they did so immediately before reporting to work. It is the uncertainty, . . . which renders the test results, by themselves, as an unreliable indicator of whether or not an individual is under the influence of any intoxicant, other than alcohol, when the samples are drawn . . . .

Along with the inability of the laboratory tests to determine when a particular substance has been ingested or smoked, there is also no quantitative

See infra text accompanying notes 955-958 for comments on this issue by the district court in *AFGE*, 651 F.Supp. 726; and infra text accompanying note 1220 for the court's comments in *Capua*, 643 F.Supp. 1507.

66. Id.

67. Id.


See infra text accompanying notes 955-958 for comments on this issue by the district court in *AFGE*, 651 F.Supp. 726; and infra text accompanying note 1220 for the court's comments in *Capua*, 643 F.Supp. 1507.


70. Id.

71. Id. at 237.
scale in existence to determine, from the amount detected, whether or not a particular individual is under the influence . . . . The laboratory tests, simply stated, do not support the claim made by the Company, and the requisite just cause is therefore lacking.\(^7\)

The same problem was implicitly recognized by District Judge Harold Greene in *Local Union 1900 v. Potomac Electric Power Company*\(^7\) when he granted a temporary restraining order against the employer's unilateral implementation of a modified drug testing program.\(^7\) The text of Judge Green's bench ruling states: "He is discharged on the first offense if he is found to have any detectable quantity of drugs in his system, even if they were acquired during his private time such as his weekend or vacations."\(^7\)

Included in the impairment-exposure issue is the argument by drug screening critics that urinalysis casts its net too broadly, penalizing employees for off-the-job indulgences that have no bearing on their job performance and are therefore outside the scope of the employer's legitimate interests.\(^7\) According to the critics, this is the result of a combination of two inherent flaws in urine testing. First, contend the critics, the drug testing works too well: urinalysis reveals all recent drug consumption; urine retains a trace of drugs for days, sometimes even weeks, long after the drug has ceased to impair mental or physical capacity.\(^7\) For example, marijuana can be detected in urine samples for two weeks after use; other studies suggest that marijuana presence can be detected for as long as eight weeks after use; cocaine is traceable in urine for seventy-two hours after use; and amphetamines are still present in

\(^72\) Id.
\(^73\) C.A. 86-717 (D.D.C. Mar. 18, 1986), reported in Daily Lab. Rep. (BNA), Mar. 21, 1986, at D-1. The union's subsequent request for a preliminary injunction against the employer's enforcing of the new testing rules was denied in *International Brotherhood of Electrical Workers v. Potomac Edison Power Co.*, 634 F.Supp. 642 (1986) (denied on the basis that such extraordinary relief was not necessary to preserve the integrity of the arbitration process).

\(^74\) Id.
\(^75\) C.A. 86-717 (D.D.C. Mar. 18, 1986) (emphasis added). The District Court for the District of Columbia also implicitly recognized the impairment-exposure issue in *Jones v. McKenzie*, 628 F.Supp. 1500 (D.D.C. 1986). The *Jones* court, however, never reached the issue of whether a positive urinalysis result for THC demonstrated that a school employee on school premises violated a school directive prohibiting school employees from using or being under the influence of drugs while on school premises. Rather, the court disposed of the case by ruling that the termination was arbitrary and capricious since it was based on a single, unconfirmed EMIT test. Id.

\(^76\) See infra notes 81-84.

the system up to two days after ingestion. Second, argue drug screening opponents, urine screens are also incapable of demonstrating present impairment. Thus, conclude the critics, urinalysis is incapable of distinguishing between the worker who smoked marijuana at a Friday night party and the other worker who just finished a marijuana cigarette in the company bathroom and, therefore, potentially subject an employee to discipline or discharge for off duty conduct away from company premises.

Implicit in this argument is the notion that what an employee does during his off-duty hours is a private matter and should not be subject to employer scrutiny. Sarah Ann Determan, chairperson of the American Bar Association Section of Individual Rights and Responsibilities, contends, "[u]nless the employer can justify a per se rule that any illegal conduct renders you unfit for your job, it's hard to see how off-duty drug use is anyone's business." Morton Halperin of the American Civil Liberties Union, ACLU, agrees: "[W]hat someone does outside the job isn't a concern for the employer unless it affects what they do on the job." Likewise, Erwin Chemersky, professor of constitutional law at the University of California, states: "[W]hat someone does outside the job isn't a concern for the employer unless it affects what they do on the job." This line of reasoning reflects a widely accepted principal of arbitral law that what employees do on their own time is their own business and is not an appropriate subject of discipli-
nary action unless the conduct could be reasonably said to affect the company's business, reputation, or product; render the employee unable to perform properly the duties of his job; or affect other employees' morale or willingness to work with the employee.84

This notwithstanding, there has been a change in the philosophical mindset of employers from an attitude that so long as employees give an honest day's work, what they do during off-duty hours is of no importance, to the concept that employees are the employers' ambassadors to the public, representing the employers twenty-four hours a day, each day, and, therefore, should be held account-

84. Geidt, Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights, 11 EMP. REL. L. J. 181, 195 (1985). See Pacific Bell, 87 Lab. Arb. (BNA) 313 (1986) (Schubert, Arb.), where the arbitrator held that discharge of an employee for use or possession of illegal drugs on company property, based on his criminal conviction for possession of cocaine off company premises, was unjustified, since right to discharge for off-duty misconduct is not automatic, and employer appeared to rely on conviction to corroborate charges that employee used drugs on the job rather than as furnishing independent basis for dismissal. The arbitrator in Pacific Bell pointed out that:

The right to discharge for such a conviction is not automatic, but depends upon the effect of the grievant's misconduct upon plant operations. [Citation omitted]. To sustain a discharge in such cases the Company must prove that (1) the employee's behavior harms the Company's reputation or product, (2) the employee's behavior renders the employee unable to perform his duties or appear at work, in which case the discharge would be based upon inefficiency or excessive absenteeism or (3) the employee's behavior leads to refusal, reluctance or inability of other employees to work with him.

Id. at 317. See Texas Utilities Generating Co., 82 Lab. Arb. (BNA) 6 (1983) (Edes, Arb.), where the arbitrator held that requesting a drug screen after a marijuana cigarette was observed in a grievant's car after work was improper because it was outside working hours, and therefore, the incident was unrelated to employment. See also Nugent Sand Co., 81 Lab. Arb. (BNA) 988, 999 (Daniel, 1983)("Generally speaking, arbitrators view misconduct outside the plant as beyond the purview of disciplinary considerations unless it can be clearly shown to relate either adversely to the employer's interests or potentially to the ability of the particular employee to satisfactorily perform his work."). But see Potomac Electric Power Co., No. 16-30-0110-8411 (June 30, 1986) (Zumas, Arb.) ("This arbitrator is aware of considerable authority holding that what employees do on their own time and off the employer's premises is none of the employer's business") ("However, when such activities, under the circumstances, pose a potential threat to the safety of other workers, the public, and the legitimate interests of the employer, such employer may, consistent with the collective bargaining agreement and reasonable rules and practices, take steps to reduce such threat") ("It follows, of course, that such steps must be reasonable, are based on a legitimate need, and take into account the procedural and substantive workplace safeguards to which employees are entitled"); when an employer has reasonable belief that an employee, who operates dangerous and complicated machinery, has used drugs, the employer may require that employee to submit to a drug test and may discipline an employee who tests positive; "an employee, such as PEPCO, operating potentially dangerous and complicated equipment and machinery, has the right and obligation to ensure that employees, who are required to perform complex duties, are drug-free"; random testing, or any employee, however, is not permissible").
able for their off-duty conduct. The increased publication of drug abuse related costs and losses in the workplace has also convinced employers that they should be concerned with what the employees are doing once they leave company property. Robert W. Taggart, spokesman for Southern Pacific Transportation Company, which has implemented a random drug screening program, reflects this growing conviction among employers:

The employment relationship is voluntary. No one has a right to a job. We make one of the conditions of having a job here that a person be clean of drugs. When you come to work with drops of marijuana used on the weekend in your system, statistically, I know that you will cost me more in productivity, in health-care costs and in absenteeism.

The private employer's prerogative to promulgate plant rules and codes of conduct, proscribing the off-duty use of drugs, and to administer discipline, including discharge, has not yet been challenged in the courts. But in the public sector, where the use of drugs by employees would pose situations fraught with imminent grave consequences to public safety, a growing body of case law recognizes the employer's paramount interest in safeguarding the public health and welfare as sufficient justification for the institution and implementation of such workplace rules. Representative occupations, where the courts have sanctioned public employment policies that prohibit off-duty use of drugs and authorize discipline or dismissal for violation of the policy, include police officers, fire

85. Lehr, Work-Place Privacy Issues, supra note 10, at 408; see infra notes 1001, 1036 and accompanying text, where the employer made a similar argument as one justification for using random drug screens, and the court accepted it.

While some courts have been willing to accept the employer's argument that an employer is justified in testing for and disciplining for off-duty drug use where the employer's business or service is largely dependent upon public perception of integrity and reliability, other courts have scrutinized the theory and have decided that it was a meritless justification. See infra notes 801-05 (Capua) and accompanying text.

86. NLJ, Drug Testing, supra note 22, at 24 (quoting Robert W. Taggart).

87. City of Palm Bay v. Bauman, 475 So.2d 1322, (D.Fla. 1985) ("The City has the right to adopt a policy which prohibits police officers and fire fighters from using controlled substances at any time while they are so employed, whether such use is on or off the job. The nature of the police officer's or fire fighter's duties involves so much potential danger to both the employee and to the general public as to give the City legitimate concern that these employees not be abusers of controlled substances") (An additional justification offered by the City for the rule as applied to the police officers was that police officers are sworn to enforce laws and will lose credibility and public confidence if they violate the very laws they are sworn to enforce). See infra text accompanying notes 753-806, 1203-27 for a discussion of the Capua case.

See also Shawgo v. Spradlin, 701 F.2d 470 (5th Cir.), cert. denied, 464 U.S. 965 (1983) (the state's interest in regulating the off-duty conduct of its employees is perhaps at its greatest where paramilitary organizations such as a police force, are involved; police depart-
fighters, bus drivers, and train engineers. The appropriate role of drug screens, as perceived by the courts and arbitrators, in enforcing these rules as well as those proscribing on-duty drug use are discussed in subsequent sections.

B. Inaccuracy In The Testing Process

Current drug screening is not a paragon of accuracy. The most
widely used tests boast a ninety-five to ninety-nine percent accuracy record. Syva Company of Palo Alto, California, manufacturer of EMIT, the leading test in the industry, claims a ninety-seven to ninety-nine percent level of accuracy. Such track records are ostensibly impressive; however, in companies conducting blanket testing these figures mean that "on the average, one to five out of every one hundred employees tested will be falsely accused." Kevin B. Zeese, director of the National Organization for the Reform of Marijuana Laws (NORMAL), speaks in more alarming terms: "With four to five million [employees] being tested a year, a one percent rate of inaccuracy means 40,000 to 50,000 [of those tested] would be falsely accused." A recent study by Northwestern University suggests that the accuracy level of the test is much lower than the manufacturers willingly admit: twenty-five percent of all EMIT tests that came up positive were really false positives. Dr. Frederic Reiders, president and laboratory director of National Medical Services, one of the foremost testing laboratories, acknowledges that the urine screens can produce, in certain cases, thirty percent false positive rates.

93. NEWSWEEK, Can You Pass?, supra note 12, at 50.
94. TIME, Putting Them All to the Test, supra note 12, at 61 (Though the Emit manufacturer claims a 97% to 99% accuracy rate, critics are quick to point out that this level of accuracy is only achieved under optimal conditions and in practice, the tests are far less reliable due to improper storage of specimens, or improper handling by lab personnel); NLJ, Drug Testing, supra note 16, at 23. For a discussion of poor quality control that leads to a higher incidence of testing inaccuracy, see infra notes 190-218 and accompanying text.
95. NEWSWEEK, Can You Pass?, supra note 12, at 50.
97. NEWSWEEK, Can You Pass?, supra note 12, at 50.
98. BNA Special Report, supra note 8, at 30. A high rate of false positives means that the specimens are incorrectly identified as containing the tested-for drug. For employees this often translates into unfair disciplinary action ranging from leniency - compelled attendance to a company run or sponsored employee assistance program (EAP) - to severity - dismissal. The ramifications of dismissal are obvious: not only is the individual without a job, deprived of his means of livelihood, but also his future employment prospect may be simultaneously lessened, if not foreclosed, if his positive drug test result is made part of his personnel file, which may be viewed by potential employers. See Jones v. McKenzie, 628 F.Supp. 1500, (1986), see infra text accompanying notes 160-99; also Hester v. Milledgeville, 598 F.Supp. 1456, 1473 (M.D. Ga. 1984). The potential consequences of compulsory attendance in a drug rehabilitation program are less apparent, but no less real. The fact that the employee has been placed in the drug program, as a practical matter, is no secret - the EAP is informed of the positive result and the employee's supervisor is aware that he is being counselled. In the future, the employee may be subjected to undue supervisory scrutiny with any error raising heightened suspicions of drug impairment, and may be denied future promotions based on the improper use of unexpunged past test results, despite successful completion of the EAP. The falsely accused employee may also be ostracized by co-employees either out of contempt or fear of having to work beside or with someone who uses
Inaccuracy can creep into the drug screening process at several levels. The first potential source of incorrect results is in the imprecision of the urinalysis technology itself. The initial urine screen, for example, is unable to distinguish between the presence of some over-the-counter drugs and illegal drugs at which the tests are aimed, producing, for example, a positive finding for marijuana when the urine contains ibuprofen - the basic anti-inflammatory ingredient contained in the popularly used over-the-counter pain relievers like Advil and Nuprin. Similarly, false positives for amphetamine use can be triggered by synthetic compounds such as phenylpropanolamine, which is contained in 151 drugs currently sold over the counter, including the therapeutic cold medicines such as Contac and Sudafed, and dieting aids such as Dexatrim and Dietac. Meanwhile, cough syrup or cough drops containing dextromethorphan can create false positives for morphine, and tonic water, containing quinine, in a gin and tonic cocktail can produce a false positive for heroin, because quinine is commonly used

<table>
<thead>
<tr>
<th>Brand Name</th>
<th>False Illicit Drug</th>
</tr>
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<tbody>
<tr>
<td>Advil (ibuprofen)</td>
<td>Marijuana</td>
</tr>
<tr>
<td>Datril (ibuprofen)</td>
<td>Marijuana</td>
</tr>
<tr>
<td>Motrin (ibuprofen)</td>
<td>Marijuana</td>
</tr>
<tr>
<td>Nalfon (fenoprofen)</td>
<td>Marijuana</td>
</tr>
<tr>
<td>Nyquil (ephedrin)</td>
<td>Amphetamines</td>
</tr>
<tr>
<td>Anaprox (naproxen)</td>
<td>Amphetamines</td>
</tr>
<tr>
<td>Alka-Seltzer-Plus (phenylopropanolamine)</td>
<td>Amphetamines</td>
</tr>
<tr>
<td>Empirin (codeine)</td>
<td>Heroin</td>
</tr>
<tr>
<td>Formula 44-d (dextromethorphan)</td>
<td>Heroin</td>
</tr>
<tr>
<td>Robitussin-DM (dextromethorphan)</td>
<td>Opiates</td>
</tr>
<tr>
<td>Vick's Cough Syrup (dextromethorphan)</td>
<td>Morphine</td>
</tr>
</tbody>
</table>

99. NEWSWEEK, A Question of Privacy, supra note 7, at 18.
100. Id.; ABA Journal, The Legal Dilemma, supra note 12, at 51; brand name medications which have been identified as potential mimick illegal drugs and produce false positives include:

101. Id.
as a trace element by toxicologists to identify heroin use.¹⁰²

A related problem concerns test over-sensitivity, leading to positive results for unintentional exposure to substances. Marijuana is the most frequently mentioned drug in this area because of the rise of "passive inhalation" of smoke.¹⁰³ The problem arises because the cutoff point for substance levels is set too low and the minutest presence of THC, the active ingredient in marijuana, in the urine triggers a positive result for marijuana.¹⁰⁴ Leading urine screen

¹⁰². NEWSWEEK, A Question of Privacy, supra note 7, at 18-20.


Alfred Klein, a Los Angeles-based management attorney, explains: "Small amounts of unlawful substances does not indicate the employee has a problem at all . . . In Southern California, where I live, it is not uncommon for marijuana smoke to blow into your face in public places, [such as at] concerts. And I'm not talking about rock concerts. The Los Angeles Philharmonic at the Hollywood Bowl." BNA Special Report, supra note 8, at 29.

One source suggests that, as a practical matter, the passive inhalation defense has met with limited success when raised. See EMPLOYEE TESTING & the Law, Nov., 1986, Passive Inhalation Defense Difficult to Demonstrate, at 5.

¹⁰⁴. Zeidenberg, Marijuana Intoxication by Passive Inhalation, supra note 60, at 76. The Zeidenberg study placed one non-user in a locked hospital ward with five heavy marijuana smokers for over a month. The non-user's urine showed negligible amounts of THC in the first week, 100 ng/ml by the second week, and 260 ng/ml by the third week. For the next three weeks the urinalysis results steadily decreased, as the subject learned to avoid the marijuana smokers in the ward. Id.
manufacturers, Syva Corporation and Hoffman-LaRoche, acknowledge the potential for positive tests due to passive inhalation of marijuana smoke, but state that they have taken precautions against this by recommending that laboratories refuse to label “positive” those specimens with minute quantities of marijuana residues.\textsuperscript{105}

Marijuana, while the most common example, is not the only drug capable of unintentional exposure which may produce a false positive test result if threshold identification levels are set too low.\textsuperscript{106} For instance, the drinking of certain herbal teas will produce a positive result for cocaine.\textsuperscript{107} These teas, although not labeled as containing cocaine, actually have small quantities of the drug that can trigger a positive reading.\textsuperscript{108} Otherwise illicit, phenobarbital in small dosages in non-prescription drugs is perfectly legal.\textsuperscript{109} Thus, several over-the-counter drugs on the market containing legal portions of phenobarbital can produce a positive result as easily as consumption of amounts beyond the legalized dosage.\textsuperscript{110} In the case of all unintentional exposures, if the unwary employee tests positive for an illegal drug and cannot identify the source, he may lose his job.\textsuperscript{111}
Manufacturers of the urine screens acknowledge some of their deficiencies, counseling that every positive urine screen should be confirmed by another, more elaborate and expensive testing method. For example, the Syva Corporation, manufacturer of EMIT, the most commonly used urine screen, while claiming a ninety-seven to ninety-nine percent accuracy rate, instructs its clients that a positive reading should not by itself be a ground for termination, and counsels that, before any decision affecting the career of the employee is made, a confirmatory test should be conducted.\(^{112}\) The larger testing laboratories take these admonitions seriously. For example, CompuChem Laboratories, which has been under contract with the military for several years and has recently expanded into the private employer drug screening market, submits all initial positive results to an independent and different confirmatory test.\(^{113}\) Likewise, PharmChem Laboratories, of Menlo Park, California, claims that it simply refuses to report a positive

the results and recognizing the potential dangers of legal drugs mimicking illicit ones and unintentional exposure. Since testing laboratory certification is non-existent and no standards of skill or education are required of the technicians, not all labs may employ technicians competent in these areas. See infra text accompanying notes 199-211.

Finally, inasmuch as the medical profession and scientists are still unable to reach a consensus as to what levels of different drugs constitute impairment, it would seem equally unlikely that they can draw a bright line, defining significant and non-significant presence levels, in order to protect the victims of unintentional exposure to illicit drugs. See supra notes 64-5 and accompanying text.

This can be resolved by disclosure on a medical survey conducted prior to the test—but in the case of drugs containing legal amounts of an otherwise illicit drug—disclosure may require disclosure of a condition which one does not wish to be known. The question becomes, whether the employer is entitled to such information? Under threat of discharge an employee has to divulge confidential personal information. Is this a violation of privacy? See infra text accompanying notes 1313-75 for a public-sector decision on this issue.

112. Susan Niesloss of Syntex Laboratories, of which Syva Corporation is a subsidiary, says: "We always recommend that a urine test be followed with a confirmation test to establish the positive use of a drug." ABA Journal, *The Legal Dilemma*, supra note 12, at 52.


Roche Diagnostics, a division of Hoffman-La Roche, manufacturer of the Abuscreen test, a close second in popularity to the EMIT test, also counsels employers to confirm every positive test result with a more precise back-up test. BNA Special Report, supra note 8, at 30.

result without conducting a confirmatory test.\textsuperscript{114}

The confirmatory tests include thin layer chromatography, gas chromatography, and gas chromatography/mass spectrometry (GC/MS).\textsuperscript{116} Of these, the most common and most accurate is the GC/MS technique.\textsuperscript{118} Toxicologists claim that confirmatory accuracy of the GC/MS test has been greatly refined to a point where the error rate approaches zero.\textsuperscript{117} The GC/MS method reduces the constituent chemicals of the urine sample to their molecular levels and identifies a particular drug by its unique molecular configuration.\textsuperscript{118} According to Peter Bensinger, formerly director of the United States Drug Enforcement Agency and currently a senior partner with Bensinger, DuPont & Associates, a Chicago-based drug policy advisory group, while the GC/MS tests are not yet able to detect the use of steroids by athletes, they are “100 times 99.9 percent accurate” in confirming nine of the most commonly abused drugs—amphetamines, barbituates, benzodiazepines (such as librium and valium), cocaine, marijuana, opiates, PCP, methaqualone and methadone.\textsuperscript{119} Some companies use the gas chromatography method alone, omitting the mass spectrometry step, for the confirmatory test, and others use some form of the radioimmunoassay technique (RIA); both procedures have a high reliability factor but do not reach the same level of precision as the GC/MS technique.\textsuperscript{120}

The improved accuracy levels of the confirmatory tests strongly recommend their routine use, but skipping the follow-up test is much cheaper. The GC/MS test is far more expensive than the initial urine screens such as the EMIT test; the initial urinalysis can cost as little as ten dollars per sample, while the more sophisticated confirmation tests can range in cost from eighty dollars to

\begin{itemize}
\item \textsuperscript{114} BNA Special Report, \textit{supra} note 8, at 30 (referencing Chuck Renfroe, PharmChem’s information director). One must wonder whether the same can be said of smaller firms who are testing their employees. \textit{See infra} notes 121-22.
\item \textsuperscript{115} BNA Special Report, \textit{supra} note 8 at 30.
\item \textsuperscript{116} NLJ, \textit{Drug Testing, supra} note 16, at 24; \textit{see also} ABA JOURNAL, \textit{The Legal Dilemma, supra} note 12, at 52. \textit{See infra} note 120.
\item \textsuperscript{117} \textit{Id}.
\item \textsuperscript{118} \textit{See supra} note 12 and accompanying text.
\item \textsuperscript{119} ABA Journal, \textit{The Legal Dilemma, supra} note 12, at 52.
\item \textsuperscript{120} \textit{Id} (referencing Peter Bensinger). Despite what Bensinger refers to as a reduced level of accuracy in the RIA, a federal district judge in \textit{McLeod and Robinson v. City of Detroit}, 83 CV 2163DT (W.D. Mich. 1985), ruled that a positive screen test confirmed by an RIA was accurate enough to permit the Detroit Fire Department to refuse two applicants a job.
\end{itemize}
two hundred dollars per specimen.121 Given the significant cost dif-
ferential between the initial and confirmatory tests, some employ-
ers either eliminate the confirmation process and base disciplinary
decisions on the initial screen result or merely re-run the original
test and call it a confirmation.122

The Chicago Transit Authority, for instance, quietly reinstated
several CTA bus drivers four years ago after they had been sus-
pended for refusing to participate in a drug screen test for which

121. See supra note 12 and accompanying text; NLJ, Drug Testing, supra note 16, at
23 (urine screens costs as little as $5 per sample, while the confirmatory tests can costs up to
$80 a piece); BNA Special Report, supra note 8, at 30 (urine screens costs as little as $10 per
sample and confirmatory tests can costs as much as $80 per sample).

122. The larger corporations such as Southern Pacific and DuPont claim that they
perform confirmatory tests on all positive urine screen results, but as Joan L. Rosenthal,
executive director of the Delaware affiliate of the ACLU, observes, the larger employers can
absorb the high cost of confirmation testing for positive results: "I can see Du Pont spend-
ing the money on that, but other employers may just say the hell with it." NLJ, Drug Test-
ing, supra note 16, at 23; Paper delivered before the National Forum on Drug Abuse by
E. C. Curtis, M.D., M.P.H., Corporate Medical Director for Westinghouse Electric Corpora-
tion, March 6, 1986, at 4 (hereinafter referred to as Curtis, NFDA Paper). See supra note 12
and accompanying text. See also Jones v. McKenzie, 628 F.Supp. 1500 (D.D.C. 1986), supra
notes 150-89.

The Food and Drug Administration, through its Office of Device Evaluation, Center for
Devices and Radiological Health, recently notified manufacturers of urinalysis tests for drug
use of more stringent labeling requirements. Instigated by a petition filed with the FDA by
the National Organization for the Reform of Marijuana Laws, complaining of marketing
abuses in the drug testing industry and urging the FDA for closer regulation. In a letter
intended to notify the drug screen manufacturers of the new labeling requirements, the
FDA set forth the following:

... FDA is requiring the following information to be displayed clearly and promi-
nently on all outside package labels, inserts, and promotional materials for all drugs
of abuse test kits intended for screening purposes for the above referenced drugs.
Such tests would include but not be limited to immunoassay and chromatographic
based test devices.

The (trade name of test) provides preliminary test results only. All positive
test results should be confirmed by an independent and more specific method.
Gas chromatography/mass spectrometry (GC/MS) is the confirmatory method
of choice. Any reliance on positive findings from the (trade name of test) for
employment purposes or any other purpose is not advised without confirma-
tory testing.

Display of the above should include, for example, that the information appear in a
prominent box and/or in bold face type that will clearly highlight the information
from the surrounding text or graphic information.

In addition to the above, the limitations section of each package insert must con-
tain a list of all prescription drugs, OTC medications, foods, and other substances or
clinical conditions known to interfere with the assay which may cause false-positive
reactions.

EMPLOYEE TESTING & the Law, Apr. 1987, New Labeling Requirements for Drug Test
Products, at 5.
the CTA planned no follow-up confirmation of results. Two weeks after the suspension, the workers threatened the CTA with a civil suit seeking an injunction against the testing program and damages for wrongful suspension. The CTA finally relented after learning that urine screening without a confirmatory test could result in false positives.

b. Judicial Recognition of the Need for Confirmation

Several recent court decisions addressing the propriety of employee discipline or dismissal based on the results of a urinalysis have recognized a compelling need for confirmatory testing before an employment decision is rendered. In one instance, Banks v. Federal Aviation Administration, the court held that the employer has a duty to preserve the specimens in order that the accused employee can conduct an independent confirmation test.

In Banks, two air traffic controllers appealed the final order of the Merit Systems Protection Board upholding their dismissals for drug usage. Plaintiffs James Bank and Harold E. Faulkner (controllers) were Air Traffic Control Specialists at the Fort Worth Air Traffic Control Center. Their supervisor suspected them of using drugs and requested the controllers to submit to a drug screening test in March, 1980. Banks and Faulkner voluntarily complied with the supervisor’s request, furnishing urine samples which they knew were to be tested for evidence of drug usage.

In both instances, the test results returned positive for the use of cocaine. A little over a month later, May 16, 1980, the controllers received notices of “proposed separation” from their jobs due to the use of prohibited substances. Despite written challenges to the notices filed by the controllers with the Federal Aviation

123. ABA Journal, The Legal Dilemma, supra note 12, at 52.
124. Id.
125. Id.
126. See infra notes 127-89 and accompanying text; see also notes 1156-68 (Jones case), 1220-22 (Capua case), 1238-48 (NTEU) and accompanying text.
127. 687 F.2d 92 (5th Cir. 1982).
128. Id. at 93.
129. Id.
130. Id.
131. Id.
132. Id. Judge Williams, author of the opinion notes later in the opinion that the supervisor’s suspicion was at best “highly speculative.” Id. at 94.
133. Id. at 93.
134. Id.
Administration (FAA) on June 30, 1980, the FAA determined that the dismissals were proper and ordered the dismissals to become effective as of August 22, 1980. The controllers timely appealed their discharges to the Merit Systems Protection Board and, pursuant to the appeal, requested production of the lab urine samples for independent inspection and testing. The FAA was unable to comply with the request since it had allowed the proprietary lab which had conducted the tests to dispose of the samples. The appeals went forward and, after the requisite hearings, both the regional examiner and the full Board upheld the dismissals. The controllers then filed an appeal before the Fifth Circuit Court of Appeals, claiming that they had been denied due process in the administrative appeal of their dismissals as a result of the FAA's failure to preserve their urine samples and their consequent inability to have the samples independently evaluated.

At the outset of the opinion, the Banks court observed that "[t]here can be no doubt in this case that it was crucial to Banks and Faulkner to have their laboratory samples available for independent testing." Borrowing the analysis from its earlier decision in a criminal case involving the destruction of drug-related laboratory evidence, the court explained the importance of the

135. Id.
136. Id.
137. Id.
138. Id. at 93. Judge Williams observes that the Court was constrained to assume that both decisions of the Board and regional official were controlled by the laboratory reports showing traces of cocaine in the urine samples supplied by Banks and Faulkner, since no other evidence of record indicated drug use by the controllers. Id.
139. Id.
140. Id. at 94. As a practical matter, however, the expense of performing an independent analysis may be prohibitive.
141. In United States v. Gordon, 580 F.2d 827 (5th Cir. 1978), cert. denied, 439 U.S. 1051 (1978), the defendants were charged with criminal conspiracy to manufacture methaqualone, a controlled drug. Pursuant to a legal seizure, government agents seized samples of three chemicals found in the defendants' warehouse, and government chemists were able to manufacture methaqualone from these samples. The synthesized methaqualone was destroyed by the government chemists shortly after its manufacture and confirmation. In preparing for trial, the defendants requested a sample of the drug that was synthesized by the government chemists, however, the government was capable of supplying only samples of the three raw materials originally seized since the manufactured drug had been seized.

First, the Gordon court determined that the manufactured methaqualone was a properly discoverable item for purposes of preparing a defense. Id. at 836 (the synthesized drug was "clearly discoverable"). The Court also determined that it was "equally clear that the destruction of the substance was done in good faith, not for the purposes of inflicting disadvantage upon the defendants." Id. at 837. The Gordon court then observed:

The crucial issue, then, is whether the lack of experimentally produced methaqualone requires reversal because it would have been "likely to have changed the
urine samples to the proper disposition of the administrative case presently before them:

The laboratory tests here were the only meaningful evidence resulting in the discharges. The accuracy of those tests, including the possibility that the samples were mixed up, damaged, or even inaccurately tested, was likely determinant of the entire case. Indeed, challenging the laboratory reports was probably the only way the controllers could succeed on their appeal.142

In an attempt to ameliorate the effects of its failure to preserve the lab samples, the FAA argued that alternative avenues remained open to challenge the accuracy of the laboratory results.143 The FAA contended that since the director of the independent testing laboratory was available for cross-examination, and the general testing methods were described and, therefore, open to challenge, the unavailability of the urine samples for independent testing was not so grave as to constitute a deprivation of the controller's due process rights.144

Refusing to countenance the government's argument, the Banks court determined that the opportunity to cross-examine the laboratory director was an unsatisfactory substitute for the samples themselves.145 As a practical matter, reasoned the Court, the laboratory director would be a highly antagonistic witness in any challenge of the laboratory results and, therefore, cross-examination of the director could only be minimally effective in making that challenge; "[a] laboratory challenge of that test was its only effective counter."146 Reiterating the importance of maintaining the laboratory samples, the Banks court found the Agency's failure to do so unexcusable:

The FAA contends that since it was not in possession of the samples, it was under no duty to preserve or order the control of the samples. This does not excuse the shortcoming. The record shows that such samples can be preserved safely for years, at minimal cost. There is also evidence in the record showing that other laboratories maintain their samples routinely for long

verdict," [citations omitted] . . . An important factor . . . is whether the evidence was "crucial to a determination of the guilt or innocence of the accused" . . . .

Id. In Gordon, the court determined that the government's failure to produce the sample to the defendant would not have changed the verdict, since the defendants were charged and convicted of conspiracy to manufacture methaqualone, not with actual manufacturing of the controlled substance. Id.

142. Id. at 94 (emphasis in original).
143. Id.
144. Id.
145. Id. ("[w]e cannot agree with the casual treatment of the procedural rights of government employees").
146. Id. at 95.
periods of time if there is a possibility of later legal inquiry.\(^\text{147}\)

**The Banks** court concluded:

Because of the importance these samples foreseeably held in the construction of an able defense, the FAA had a duty adequately to insure the preservation of the samples for the defendants' independent examination if the agency intended to rely upon them. The FAA failed in that duty. . . .\(^\text{148}\)

Accordingly, the **Banks** court held that the destruction of the specimens constituted a denial of the controllers' due process rights, insofar as they were denied the opportunity to prepare a credible defense, and, therefore, the results of the urine tests were suppressed as evidence.\(^\text{149}\)

In a more recent case, *Jones v. McKenzie*,\(^\text{150}\) the District Court for the District of Columbia discussed the issue of urinalysis inaccuracy and the necessity of result confirmation before the employer makes a termination decision.\(^\text{151}\) The plaintiff, Juanita M. McKenzie, a school bus attendant, brought suit in federal district court against the District of Columbia and those responsible for the School system's drug-use surveillance program,\(^\text{152}\) challenging their decision to discharge her for an alleged violation of a directive that required school personnel to refrain from using, possessing, or being under the influence of marijuana while on school

\(^{147}\) *Id.* at 95. The **Banks** court does intimate that perhaps the government's failure to preserve and produce such relevant evidence might be excusable upon a showing of good faith and reasonable effort. *Id.* The court, however, reserved this issue for a later date, observing that in the instant case, the FAA's procedures evidenced no attempt to preserve the evidence. *Id.* at 96.


\(^{149}\) The supression of the drug screen results, the only evidence supportive of the controller's discharge for drug usage, was fatal to the government's case. As the court summarized, "Without a properly admissible drug screen, and without the opportunity to challenge that laboratory report, the record is devoid of any credible evidence supporting the dismissals. The decision of the Merit Systems Protection Board must be reversed." *Id.* at 96. For similar cases, ruling that the failure to preserve the samples for independent testing is a violation of due process rights and mandates the suppression of the test results from evidence, accord *People v. Garries*, 645 P.2d 1306 (Col. 1982); *People v. Gomez*, 596 P.2d 1192 (Col. 1979). See Generally Note, *The Right to Independent Testing*, supra note 148.


\(^{151}\) *Id.* Confirmation, as used by the courts, entails the use of a method different from that used for the original urine screen. See infra notes 1156-68 (Jones case); 1220-22 (Capua case); 1238-48 (NTEU case) and accompanying text.

\(^{152}\) Named individually as defendants are Floretta Dukes McKenzie, Superintendent of the District of Columbia Public Schools, and William J. Bedford, Director of Logistical Support, D.C. Public Schools. 628 F.Supp. 1501 n.1.
Among the several counts alleged by the plaintiff in her Complaint, she claimed that the defendants’ actions with respect to her discharge were arbitrary and capricious and in violation of Board of Education Rules governing termination decisions.

In 1977, The Superintendent for the District of Columbia Public Schools issued Directive 662.13, which stated in pertinent part:

[I]t is strictly prohibited for school personnel . . . to possess, use or be under the influence [footnote omitted] of . . . narcotics, [footnote omitted] or other drugs such as LSD, marijuana and the like, while on school premises. Personnel found violating this directive will be subject to suspension and/or termination.

The Directive defined “under the influence” as:

[a]ny abnormal or mental or physical condition resulting from indulging in any degree in intoxicating liquors, narcotic drugs or other drugs which tend to deprive one of the clearness of thought and control of him which he would otherwise possess.

Upon the joint recommendation of William C. French, Transportation Officer, and William J. Bedford, French’s supervisor, the District of Columbia school system initiated in June, 1984 a program of urinalysis testing for the detection of illegal drugs. The program was created pursuant to Directive 205.1, which required “urinalysis testing of all employees who are or will be required to undergo medical examinations to determine physical fitness for licensing and other employment-related reasons.” The Directive also provided: “The confirmed finding of an illicit narcotic sub-

153. 628 F.Supp. at 1501.
154. Id. The Complaint actually contained six counts alleging inter alia that the defendants’ actions were: (I) both arbitrary and capricious, (II) violated her rights under the Fourth and Fifth Amendments of the United States Constitution, (III) constituted violations of applicable Board of Education Rules and Superintendent directives, (IV) violated her constitutional right of privacy, (V) failed to satisfy the requirements of the District of Columbia Procedures Act, and (VI) constituted negligence. Id. The case was before the district court on defendant’s motion to dismiss, or in the alternative for summary judgment, and plaintiff’s motions for partial summary judgment on Counts I, II, III and V of her Complaint. Id. at 1502, 1504.

The Jones court’s disposition of the motion for summary judgment on Count I, alleging arbitrary and capricious termination, is instructive on the issue of confirmation. Therefore, it will be discussed presently, while the remaining issues will be discussed in subsequent appropriate sections. See infra note 557 and accompanying text (fourth amendment), and infra text accompanying notes 1156-68 (due process).
155. Id. at 1502.
156. Id.
157. Id.
158. Id. at 1502.
stance in the urine of an employee . . . shall be grounds for termination of that employee . . .”

The System’s Transportation Division implemented the program by requiring two hundred Transportation Division employees to take physical examinations which included a urinalysis test for drugs.

In August, 1984, the plaintiff submitted to the urinalysis screening for drugs as part of the Transportation Division’s testing program. The first test, effected by computer, returned a positive result for THC, the active ingredient in marijuana, in the plaintiff’s urine. The test was then repeated manually yielding the same result; it was not otherwise confirmed. Immediately upon notification of the positive test result, the plaintiff voluntarily submitted to two additional urine screens which returned negative for THC. On August 16, 1984, the plaintiff’s supervisor informed her that she would be discharged on August 31, 1984 because the National Health Laboratories reported that a urine specimen taken in her annual physical examination “indicated positive use of drugs” in violation of Directive 662.13. Specifically, the defendants concluded from the test results that the plaintiff “had used and was under the influence of marijuana.” The plaintiff was thereafter terminated without a hearing.

The plaintiff appealed her discharge, requesting a hearing at

159. Id. at 1502-03.

160. The Division purportedly initiated the program because of, inter alia, a significant increase in traffic accidents and absenteeism, and the discovery of syringes and bloody needles in restrooms frequented by Transportation Division employees. Id. at 1502.

The program had its genesis from correspondence between French and Bradford, in which French enumerated several instances of drug-impaired employees reporting to work and performing deficiently. French identified drug abuse as “a major problem” in the Transportation Division and emphasized that “[the responsibility inherited [sic] in the mission of this branch in transporting handicapped students and other students in a safe manner is immeasurable . . .,” and concluded that “. . . immediate action must be taken to drastically reduce or eliminate the narcotic problem.” Id.

Bradford corroborated the accounts of employee impairment and passed the recommendation up the supervisory hierarchy which ultimately led to the promulgation of Directive 205.1. Id.

161. Id. at 1503.

162. Id.

163. Id.

164. Id. For the pertinent text of Directive 662.13, see supra text accompanying notes 155-56.

165. Id. (citing Interrogatory Answers 30, 33).

166. Id. The plaintiff was not the only employee terminated after returning a positive result for illegal drugs: During the months of August and September, 27 other Division employees were dismissed - 23 for marijuana, 2 for marijuana and other drugs, and 2 for PCP. Id.
which she could appear with counsel and submit other evidence in her behalf.\textsuperscript{167} The defendants denied the plaintiff’s request and permitted only a written submission.\textsuperscript{168} In November, 1984, a hearing officer employed by the Superintendent of the Schools denied the plaintiff’s appeal, whereupon she filed an appeal with the District Court for the District of Columbia.\textsuperscript{169}

In addressing the issue of whether the defendant’s termination of the plaintiff was arbitrary and capricious under governing Board of Education Rules,\textsuperscript{170} the Jones court first observed that the plaintiff had established that the EMIT urinalysis was the sole basis for the defendant’s decision to terminate her employment.\textsuperscript{171} The Court then noted that the defendants did not dispute that they failed to confirm the positive EMIT test result, despite the manufacturer’s clear label warning that all positive results should be confirmed by an alternative method,\textsuperscript{172} and despite the Superintendent’s express directive that a “confirmed finding of an illicit narcotic substance” is the approved basis for a just cause termination for drug abuse.\textsuperscript{173}

The Jones court refused to accept the defendant’s argument characterizing the manual re-run of the test, after the automated test returned positive, as a confirmation, holding that this was not

\begin{itemize}
  \item \textsuperscript{167} Id. at 1503.
  \item \textsuperscript{168} Id.
  \item \textsuperscript{169} Id. at 1504.
  \item \textsuperscript{170} The defendants conceded that the plaintiff’s employment was governed by Board of Education Rules 1401.1 and 1401.2, which permitted the termination of an employee only for “cause.” Id. Specifically, Rule 1401.1 provided that:
    \begin{quote}
      Adverse action shall be taken for grounds that will promote the efficiency and discipline of the service and shall not be arbitrary or capricious.
    \end{quote}
    Id. (emphasis added by the court). Rule 1401.2 provided that:
    \begin{itemize}
      \item Just cause for adverse action may include:
      \begin{itemize}
        \item (f) Intoxication while on duty;
      \end{itemize}
      \item (h) Violation of the rules, regulations, or lawful orders of the Board of Education
    \end{itemize}
    Id. at 1504.
  \item \textsuperscript{171} Id. at 1505. To test the urine samples, the defendants used the EMIT Cannabinoid Urine Assay, manufactured by the Syva Company. For a discription of how the test operates, see id., at 1503; and also supra note 12 and accompanying text.
  \item \textsuperscript{172} The manufacturer’s label, inserted in each test package, bears this legend:
    \begin{quote}
      Any positive should be confirmed by an alternative method. Other methods in use for detection of [delta 9] THC metabolites include raioimmunoassay and gas chromatography-mass spectometry.
    \end{quote}
    628 F.Supp. at 1503.
  \item \textsuperscript{173} Id. at 1505 (referring to Directive 205.1). Directive 205.1 is set forth in pertinent part in the text accompanying notes 158-59
\end{itemize}
Drug Testing

confirmation as the term was used in either the Superintendent's Directive or the manufacturer's label, which specifically called for alternative testing techniques and suggested such tests as gas chromatography. In support of its construction of “confirmed,” the Jones court pointed to several documents, made part of the record, in which various experts emphasized the need for initial urine screens such as EMIT to be confirmed by an alternative method. According to the Jones court, the need for confirmation testing has received recognition from state and federal courts around the nation as well as a local arbitrator. The court also pointed out that numerous other courts have established, as a matter of court usage, that manual re-runs of an automated EMIT test are ineffective confirmations.

In an attempt to cure their failure to confirm the positive EMIT result, the defendants argued in the alternative that, even if the test failed to show actual use or effect on school premises, “it did show that the plaintiff was using an illegal substance which was certainly detrimental to the school system.” The Jones court, however, was not persuaded, noting that even if the School System’s rules regulating off-duty conduct proscribed with sufficient clarity the use of drugs, this was not the authority invoked by the defendants when they terminated the plaintiff and, therefore, could not be relied on after the fact.

In reaching its conclusion, the Jones court held:

On the basis of the undisputed facts and these persuasive authorities,

174. Id. at 1505.
175. Id. at 1506 (citing a 1983 report by the Food and Drug Administration to several government agencies reviewing the EMIT test; a February 1983 letter published by three toxicologists in the Journal of the American Medical Association; a scientific advisory prepared by the United States Center for Disease Control; and a scientific study by the United States Air Force School of Aerospace Medicine).
178. 628 F.Supp. at 1506.
179. Id. at 1506.
plaintiff is entitled to a summary judgment that her termination on the basis of a single unconfirmed EMIT test was arbitrary and capricious. Her termination thus violated the requirements of the Board of Education and the Superintendent that precluded arbitrary and capricious termination.

The Banks and Jones decisions, although early jurisprudential developments in the area of employment drug screening, have set the tenor for subsequent discussion regarding the need for confirmation of initial urine screens. The Banks court would impose upon every employer who conducts drug screens and intends to use adverse results in subsequent employment decisions the duty to preserve and safeguard the urine specimens from which those results were obtained. According to the Banks court, rights of due process necessitate this duty of preservation so that the accused employee has access to his specimen and may subject it to independent analysis in order to defend against any adverse employer actions. Implicitly, if not expressly, the court recognized the potential for error and inaccuracy in the procedure and the consequent danger of false accusation. If the employer fails in this duty to preserve the specimens, then the evidence is simply inadmissible, and where, as in the Banks case, the urinalysis results form the sole basis for dismissal for violation of the employer's drug policy, the termination decision will be reversed.

The Jones ruling added a different dimension to the need for confirmatory testing. Relying on a host of expert opinion and judicial precedent, the Jones Court ruled that, because the initial urine screening process is subject to inaccuracy, all positive results thereby obtained must be confirmed by an alternative testing procedure before an employment decision is made. The Court also

180. Id. The Jones court, however, expressly carved out of its holding the issue of whether it would be arbitrary and capricious for defendants to conclude from the confirmed presence of THC in the urine of an employee on the school premises that the employee was in violation of Directive 662.13. Id. at 1505 n.2. The Court does entertain some doubts, however, noting that the EMIT test does not demonstrate either use or impairment ("under the influence") while on school premises as required for a Directive 662.13 violation. Id.

181. 687 F.2d at 95 ("... the FAA had a duty adequately to insure the preservation of the samples for the defendant's independent analysis if the agency intended to rely on them").

182. Id. at 96 ("We hold that due process required an opportunity by the controllers to test on their own behalf to evaluate the accuracy of the government-sponsored tests").

183. Id. at 94 (where the court intimates the possibility of samples being mixed up, damaged, or inaccurately tested). See also text accompanying notes 190-218.

184. 687 F.2d at 96.

185. 628 F.Supp. at 1506.
emphasized that simply repeating the initial test after a positive result has been obtained is not a proper confirmation; rather, confirmation requires the use of an alternative method. On this basis, the Jones court concluded that the defendant-employer’s termination decision based solely upon an unconfirmed urinalysis result was arbitrary and capricious. The upshot of the Jones ruling is that employers may not rely upon urinalysis results which have not been confirmed by an alternative method in making their termination decisions without risking some adverse legal consequences. The Jones court declined, however, to address the more difficult issue—whether the confirmed presence of a drug could properly support an employer’s conclusion that the employee had violated work rules proscribing being “under the influence” of drugs while on work premises—saving it for some later case.

2. The Lack of Quality Control

A second potential of inaccuracy in the testing process is the lack of quality control in the testing laboratories. Drug testing is a booming business these days— one estimate indicates that it has become a three hundred million dollar annual business for the makers of the test kits and the operators of the testing laboratories. The rapidly escalating drug screening market is fraught with two grave dangers which are not easily dismissed. First, in the absence of mandatory and uniform certification and accreditation

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186. Id.
187. Id.
188. The Jones case can be argued to be a special case, insofar as the Directive under which the employer’s termination decision was made, and ultimately challenged, required a confirmed finding of an illicit drug to support a termination of the employee. For the pertinent text of Directive 205.1, see supra text accompanying notes 158-59. However, in reading the opinion, it is apparent that the court, in reaching its conclusion, placed as much weight, if not more, on the various expert testimony and the advice of the test manufacturer, all of which called for a confirmation of a positive EMIT result by an alternative method. 628 F.Supp. at 1505-06. See supra notes 171-77 and accompanying text. Thus, even in the absence of the confirmation requirement under Directive 205.1, the Court may still have found the employer’s termination decision based on an unconfirmed EMIT test to be arbitrary and capricious.

For those employers who may not, statutorily or contractually, discharge employees without “just cause,” it takes no stretch of the imagination to envision courts equating the “arbitrary and capricious” analysis to a lack of “just cause” and thereby invalidating employer termination decisions based on unconfirmed urine screen results.

189. 628 F.Supp. at 1505 n.2. For a general discussion of the impairment-exposure debate, see supra text accompanying notes 33-111.

190. NEWSWEEK, A Question of Privacy, supra note 7, at 18.
procedures, unskilled laboratories are entering the business, offering shotty and unreliable services to cash in on the boom in drug testing. Secondly, as testing volume increases and the competition becomes fiercer, some labs will inevitably succumb to the pressure and compromise the quality of their operations in order to remain price-competitive. Likewise, the urge to save a few dollars will inevitably prove too irresistible to some employers, who will opt for the cheaper testing package at the expense of reliable and accurate results.

191. See infra notes 199-207.

192. BNA Special Report, supra note 8 at 31 (referencing comments by Dr. Willette, advisor for the Navy's drug program). See also, Hansen Coudill & Boone, Crisis in Drug Testing, 253 J.A.M.A. 2382 (1985).

193. Dr. Harold M. Bates, a chemist with MetPath Laboratories of Teterboro, New Jersey, a drug screening firm, posits the following scenario:

A company will decide to start a drug-testing program and they'll come to Metpath and say, "We are going to screen 12,000 employees a year. How much can you do it for?" We tell them we can do it for $700,000 a year. They go to another lab that tells them that they can do it for $500,000 at the same level of quality. And maybe they can.

But the company will take it a step further and go to a third lab. Finally they find a lab that in order to get the business tells them they can do it for $250,000. Now when you reach a certain rock-bottom price they simply have to cut corners and compromise results. When you start going for price that way, you're going to get a lot of false positives.

NLJ, Drug Testing, supra note 22, at 24. Ultimately, those who stand to lose the most from the cutthroat competition are the employees, who may lose their job as a result of being falsely accused for drug use, based on the results of a slipshod drug screen.

The absence of governmental and industry standards, regulating drug screening labs makes it difficult to monitor, let alone prevent, the sacrifice of quality control in the testing procedures for a less efficient and less reliable but cheaper operating procedures. See infra notes 190-207 and accompanying text. Likewise, there is presently nothing to prevent the niggardly employer from selecting the cheaper, less reliable, and less accurate testing program, except perhaps the potential risk of litigation.

Keystone Diagnostics, Inc. recently introduced a new urinalysis test marketed as a rapid, economical, on-the-premises drug screen. The KD1 QUIK TEST screens for cocaine, crack, morphine/heroin, PCP, and amphetamines, simultaneously and for only $6.50 per test! Keystone Diagnostics, a Columbia, Maryland firm, lists the following as benefits of the QUIK TEST: (1) Each screen takes no more than five minutes to perform from start to finish; (2) An experienced person can perform 175 tests per 7-hour workday; (3) Since results are nearly immediate and employees can be informed soon after submitting a urine specimen, work disruptions are minimized; (4) The only urine samples which need to be packed and shipped to testing laboratories are the positive results. These would probably amount to only 5 to 10 percent of the total specimens collected; (5) The overall cost to an organization to screen personnel through urinalysis and confirm the positive results will be less than half the cost of using other methods.

The company emphasizes that the QUIK TEST is only relatively accurate and that all positive results need to be confirmed by suitable laboratory analysis prior to disciplinary action being taken. EMPLOYEE TESTING & the Law, Apr. 1987, KD1 Offers Employers a Quik Drug Screen, at 5. Employers will most likely herald the QUIK TEST as another drug
Even accurate tests are only as reliable as the people who are performing the tests and interpreting their results; results can vary widely with the skills of the individuals administering the test or the laboratory personnel analyzing the results.\textsuperscript{194} One expert warns, "The real room for error is not with the technology but with administrative error . . . . A human being has to pick up the sample and put it in the machine. It may sound trivial but it is not . . . ."\textsuperscript{196} False results can be produced by contaminated equipment, tainted specimens, or a technician's error in judgment when interpreting the results.\textsuperscript{196}

There are potentially grave problems in this area, as demonstrated in a 1981 survey conducted by the United States Center for Disease Control (CDC), an agency of the Department of Health and Human Services, in which spiked urine samples were sent to thirteen laboratories without informing the labs of the nature of the test in order to determine their precision in detecting samples containing amphetamines, barbituates, cocaine, codeine, methadone, and morphine.\textsuperscript{197} At best, the results were disconcerting. For example, some labs reported false negatives (the sample contained the drug but tested negative) as high as 100 percent for cocaine and amphetamines, while reporting false positives (samples were drug-free but tested positive) as high as 37 percent for amphetamines and 67 percent for methadone.\textsuperscript{198}

\textsuperscript{194} ABA JOURNAL, The Legal Dilemma, supra note 12 at 52; Rothstein, Screening Workers, supra note 12 at 426 ("Even accurate tests are only as good as the people doing the testing").

\textsuperscript{195} NLJ, Drug Screening, supra note 16, at 24 (quoting Dr. Bates of Metpath Laboratories).

\textsuperscript{196} NEWSWEEK, A Question of Privacy, supra note 7, at 2; ABA Journal, The Legal Dilemma, supra note 12, at 52. Educated technician judgment is especially essential when a minute trace of a drug appears in the sample and a decision must be made as to whether to classify it as a positive in light of the risks of unintentional exposure. See supra text accompanying notes 106-110.

\textsuperscript{197} See infra note 198 and accompanying text. See also Rothstein, Screening Workers, supra note 12, at 426; BNA Special Report, supra note 8, at 30.

\textsuperscript{198} The results of the CDC survey were as follows:

\begin{tabular}{|l|c|c|}
\hline
Substance & False Positives & False Negatives \\
\hline
1. Amphetamines & 0-37 & 19-100 \\
2. Barbituates & 0-6 & 11-94 \\
3. Cocaine & 0-6 & 0-100 \\
4. Codeine & 0-7 & 0-100 \\
\hline
\end{tabular}
Unfortunately, there are presently no uniform federal or state statutory or regulatory standards for professional competence of the technicians and no accreditation programs to regulate the quality of services rendered by the drug testing labs. The unanimous agreement among experts that such standards are sorely needed spawned two projects aimed at developing voluntary guidelines to regulate the growing drug testing industry. One project is affiliated with the federal government, being conducted by the NIDA, a division of the Department of Health and Human

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<tr>
<th>False Positives</th>
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<tr>
<td>(%)</td>
<td>(%)</td>
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<tr>
<td>5. Methadone</td>
<td>0-66</td>
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<tr>
<td>6. Morphine</td>
<td>0-10</td>
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Rothstein, Screening Workers, supra note 12, at 426-27 (citing Hansen, Coudill, and Boone, Crisis in Drug Testing, 253 J.A.M.A. 2382 (1985)).

Charles Renfroe, information director for PharmChem Laboratories, in Menlo Park, California, points out that the CDC study is over five years old and is not relevant to the testing laboratories today, but does concede that there may be problems in the smaller, less experienced facilities. BNA Special Report, supra note 8, at 30. Dr. Robert Willette, an Annapolis, Maryland based testing specialist and a consultant to the Navy testing program, opines that "[t]here are laboratories currently offering services to employers that probably would do as badly on those tests [CDC]... There are some good labs - there are some excellent labs - and then there are some poor labs, and a lot of it has to do with trying to get too big too fast." Id. at 30-31. Rothstein points out that the CDC survey is consistent with several similar surveys conducted recently. Rothstein, Screening Workers, supra note 12, at 426-27. based testing specialist and a consultant to the navy testing program, opines that "[t]here are laboratories currently offering services to employers that probably would do as badly on those tests [CDC]... There are some good labs - there are some excellent labs - and then there are some poor labs, and a lot of it has to do with trying to get too big too fast." Id. at 30-31. Rothstein points out that the CDC survey is consistent with several similar surveys conducted recently. Rothstein, Screening Workers, supra note 12 at 426-27.

199. BNA Special Report, supra note 8, at 31; NEWSWEEK, A Question of Privacy, supra note 2, at 20. However, a maverick California Bill, AB-4242, which would have mandated an employer's use of only state licensed testing laboratories in implementing its drug testing program, aimed at ensuring minimal laboratory proficiency in employment drug screening, passed the California Legislature, but nevertheless was vetoed by the Governor of California. The sponsor of the bill has indicated that he will re-introduce the bill when the legislature convenes for its next session. See infra notes 202-23.

200. In an interview with BNA reporters, Dr. Richard Hawks, chief of the NIDA's research and technical branch, stated that development of a certification and accreditation program is an urgent need. BNA Special Report, supra note 8, at 31. As he told NEWSWEEK reporters, "I am very concerned that there should be such controls. ... [Drug screening] is a powerful technological device for drug prevention, but it has to be used correctly. If it is not - if a lot of error creeps in - then the [urinalysis] method will get a bad name very quickly." NEWSWEEK, A Question of Privacy, supra note 7, at 20 (quoting Dr. Hawks). Hawks continued, opining that if a certification program does not develop voluntarily soon, the likelihood of lawsuits challenging the veracity of test results will increase and the pressure for some kind of certification will also increase markedly. BNA Special Report, supra note 8, at 31. Other experts, including Renfroe from PharmChem agree that a certification program is essential. Id. See infra notes 201, 207.
Services. while the other project is a consortium of business concerns which manufacture, service, or use drug-testing technology, calling themselves the American Drug Use Testing Association (ADUTA). ADUTA formed last year for the purpose of developing industry standards that will promote the use of scientifically and legally supportable test programs for detecting drug use. Meanwhile the NIDA has budgeted nearly four million dollars to develop standards and an accreditation program for urinalysis labs and to conduct research into the dependability and efficacy of drug testing methodologies. The NIDA-developed standards will be purely advisory since NIDA lacks federal regulatory authority as an independent agency; however, NIDA officials believe that the standards eventually established will meet with widespread acceptance from those concerned with establishing a legally defensible drug testing program.

Recently the NIDA publicly released a draft of proposed standards for the accreditation of urinalysis laboratories, inviting critical comments and suggestions on how the proposed standards might be improved. The NIDA has not indicated how long the

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201. EMPLOYEE TESTING & the Law, Jan., 1987, NIDA and ADUTA Developing Drug Test Standards, at 8. See infra note 207.
202. Id.
203. Id.
204. Id.
205. Id. The possibility exists, however, that the Department of Health and Human Services, perceiving a compelling need and/or a strong national demand, might incorporate the voluntary guidelines suggested by the NIDA into some form of mandatory federal regulation of the urinalysis industry. For the potential ramifications of such a move by the Department see infra notes 269-282 and accompanying text.
206. EMPLOYEE TESTING & the Law, Jan., 1987, NIDA and ADUTA Developing Drug Test Standards, at 8.
207. EMPLOYEE TESTING & the Law, Feb., 1987, Laboratory Accreditation Standards for Drug Testing, at 5, 8. The following are pertinent excerpts taken directly from the draft standards and reproduced in the February edition of EMPLOYEE TESTING & the Law, supra, at 5, 8.

Laboratory Facilities
In general, laboratories will conform to the requirements concerning environment, space, utilities, safety, and storage outlined in Appendix A.

Quality control procedures will be designed, implemented and reviewed to monitor the conduct of each step of the process. Application and documentation of the process shall be conducted as described in Appendix A.

Control urine specimens containing no drug and specimens fortified with known standards, are analyzed with each batch of specimens screened. A minimum of 10% of all test samples must be quality control specimens. Some controls with added drug or metabolite at or near the threshold (cut off) will be included. In addition, internal controls blind to the analyst shall be tested periodically. Similar controls will be analyzed in parallel with confirmation tests. Implementation of procedures to ensure that
carry-over does not contaminate the testing of a subject’s specimen must be documented.

Participation in proficiency testing surveys by which the laboratory performance is compared with peers at reference laboratories is encouraged. Participation in the NIDA recognized proficiency testing program for drugs of abuse is mandatory (See Appendix B). Acceptable performance in two cycles of this proficiency test program is one of the criteria which must be met before a laboratory becomes eligible for accreditation.

**Documentation**

Documentation of all aspects of the testing process must be available. This documentation will be maintained for at least two years, and will include: personnel files on analysts, supervisors, directors and all individuals authorized to have access to specimens; chain of custody documents; quality assurance/quality control records; all test data; reports; performance records on proficiency testing; performance on accreditation inspections and hard copies of computer-generated data. The laboratory should be prepared to maintain documents for any specimen under legal challenge for an indefinite period.

Accredited laboratories must have the capability, at the same laboratory site, of performing screening and confirmation tests for each drug or metabolite for which service is offered. Screening tests are presumptive tests of acceptable sensitivity, designed to eliminate negative specimens from further consideration. Confirmatory tests are procedures conducted independently of the screening test that utilize appropriate methodology based on different chemical and physical principles from those used in screening procedures. It is essential to confirm all positive screening test results prior to reporting them.

The laboratory must be secure not only in the traditional sense of resisting breaking and entering, but also in the sense of limiting access to areas where specimens are being processed and records are stored. Access to these secure areas is limited to specifically authorized individuals whose authorization is documented. Visitors and maintenance and service personnel must be escorted at all times. Documentation of individuals accessing these areas, dates and time of entry, and purpose of entry must be maintained.

**Personnel**

The scientific director of the drug testing laboratory will be qualified to assume professional, organizational, educational, and administrative responsibility for the laboratory. This director is an individual with documented scientific qualifications equivalent to that of a person certified by the American Board of Forensic Toxicology or the American Board of Clinical Chemistry in Toxicological Chemistry.

**Quality Assurance and Quality Control**

Urine drug testing laboratories shall have a quality assurance program which encompasses all aspects of the testing process: specimen acquisition, chain of custody, security, and reporting of results, in addition to the screening and confirmation of specimens.

**Reports**

All test results, including screening, confirmation and quality control data must be reviewed by a qualified, responsible scientist before being certified as accurate. The report shall identify the drugs/metabolites tested for, whether positive or negative, and the threshold (or cut-off) concentration for each.

**Appendix A: Proposed Laboratory Inspection Program**

The following areas will be the focus of inspections for purposes of laboratory accreditation. Scores based on check sheets covering these particular areas will be used in conjunction with performance scores from proficiency testing to confer accredita-
date for a final draft of the standards.

One tool potentially available to the employer until a uniform regulatory scheme is developed by some authority is the pre-contract award assessment. The pre-contract award assessment program is a study similar to that conducted by the CDC: the employer goes to the lab with samples, observes the testing procedure and all intermediate storage and handling procedures, as well as checks the credentials of the testing personnel and internal quality records for the lab. This type of procedure presumes that the

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tion. Details of inspection within each area will be based on principles in standards for accreditation. Inspections will generally be required every six months with the exception of the initial accreditation period when an additional inspection will be required after 3 months (for a total of 3 inspections in a 6-month period initially. A. Extent of Services; B. Proficiency Testing; C. Quality Control; D. Procedural Manual; E. Specimen Receiving, Accessioning, and Storage; F. Reporting; G. Reagents, Controls, and Standards; H. Instruments and Equipment; I. Personnel; J. Records.

Appendix B: Proposed Proficiency Test Program
The proficiency testing (PT) program is designed to provide part of the basis (in conjunction with laboratory inspection) for initial evaluation of a laboratory seeking accreditation and for ongoing assessment of that laboratory's performance to maintain its accreditation. Initial participation in 3 cycles of testing will be required as part of accreditation process. These initial 3 cycles (and those required for reaccreditation) can be compressed into a 3-month period (one per month). After accreditation, laboratories will be challenged with two sets of 10 specimens each in each quarter—a total of 6 cycles per year. Any accredited laboratory may also be subjected to blind proficiency testing. Performance on blind testing specimens at the same level as for the open (non-blind) PT will be required.

PT Evaluation
1. For all drugs for which the laboratory offers service, no false drug identifications are acceptable. A false positive result will result in loss of accreditation.
2. At least 90% of all drugs for which service is claimed must be detected.
3. Participant performance will be evaluated for all samples for which drugs were spiked at concentrations above the level for reporting unless the overall participant response indicates that less than 80% of the participants were able to detect a drug.
4. A laboratory must participate satisfactorily in 3 monthly cycles of open surveys before they can be considered for accreditation.
5. Failure to participate in a survey (except in instances where testing of client specimens was suspended) or to participate satisfactorily will result in loss of accreditation.
6. Failure to participate satisfactorily during a blind proficiency testing survey may result in loss of accreditation.
7. Once accreditation is lost, a laboratory must participate in 2 additional consecutive surveys before reinstatement as an accredited laboratory can be considered.
8. Quantitative results reported on confirmation tests must fall within plus or minus two standard deviations of the calculated mean resulting from all participating laboratories testing a given kit.
9. Performance criteria noted in items 2, 6, and 8 above will be the basis of a scoring system which, taken together with the inspection scoring system, will generate an aggregate score which must be met to achieve or maintain accreditation.

208. BNA Special Report, supra note 8, at 31.
employer knows what he is looking for, when in reality he may not. Thus, those employers who lack the internal expertise to implement such an appraisal program will have to look to professional sources for assistance. However, not only are these services presently rare, but they are also expensive. Perhaps the Fortune 500 employers can afford the costs of locating a proficient testing laboratory, but the assessment program is probably not financially feasible for the smaller employer.

3. The Lack of Appropriate Chain of Custody Procedures

Another area of contention closely related to the quality control issue is the lack of appropriate “chain of custody” procedures within the drug testing process. “Chain of custody” is a legal evidentiary term referring to the requirement that the proponent of evidence must be able to account for the location and possession of an item of evidence from the moment it is taken into custody until

209. Unless the laboratory program is so deplorable as to qualify as a “Three Stooges” operation, the employer is probably incompetent to properly scrutinize the integrity of the testing and analysis process. For example, the employer most likely could not identify an acceptable quality assurance level or necessary educational credentials to qualify a technician beyond the unacceptability of no quality assurance and no credentials. Moreover, the employer will be in no position question a judgement call when the trace substance appears in a minute quantity and the result is identified as positive. Indeed, the medical and science professions have not furnished a definitive answer to this issue. See supra notes 64-67 and accompanying text.

210. According to Hawks of the NIDA, the only commercially available pre-contract award assessment program available is the service offered by Dr. Willette, Navy advisor, and his firm, DUO Research, Inc. of Annapolis, Maryland. BNA Special Report, supra note 8, at 31. The basic program entails sending spiked samples to a lab on a blind basis over a twelve month period and documenting the false positive and false negative levels. The charges start at $5,000 per assessment package, and presumably increase with the degree of scrutiny to which the laboratory is subjected. Id.

211. This entire discussion presumes that the employer will be willing to conduct such an assessment program before contracting out the testing service. However, the reasonableness of indulging such a presumption is at best questionable. For as indicated by Rothstein, much of industry is not even aware that the urine tests suffer from inaccuracy. See supra note 92. The employers may not even be aware of the incumbent need to select a reputable testing service. Moreover, some employers may not be willing to postpone the actual testing program, while waiting for a protracted assessment of several laboratories to identify a qualified laboratory. Likewise, as in the case of confirmatory testing, some employers may not be willing, even if the resources are available, to incur such an expense. See supra note 76 and accompanying text (quoting ACLU’s Joan Rosenthal).

212. See ABA JOURNAL, The Legal Dilemma, supra note 12 at 52; BNA Special Report, supra note 8 at 31; NEWSWEEK, A Question of Privacy, supra note 7 at 20; E. C. Curtis, Workplace Drug Abuse: Obstacles to Progress, A Paper Delivered before the National Forum on Drug Abuse, Bethesda, Maryland at 4 (March 6, 1986).
the moment in which it is offered into evidence. In the context of urine screens, a complete chain of custody requires that each and every specimen taken be properly labelled as belonging to the correct individual, that the specimens are delivered to the testing laboratory within the appropriate time constraints and under appropriate storage conditions so as not to contaminate the specimen, that a qualified technician conducts the test on the specimen and cross references the test to the specimen label, with the goal that the ultimate results attributed to a particular person are indeed based on that individual’s urine specimen. The inability to meet a challenge to proper chain of custody procedures - one unexplained gap - may render the test results utterly useless in


214. Urinalysis tests must always be administered as though the results will become part of a legal proceeding. Since test results are of no value unless they can be admitted as evidence in the event that an employment disciplinary decision is challenged, care must be taken in collecting, identifying and preserving samples and results. Someone offering a test result as evidence must be able to show an unbroken chain of custody linking the result to the person who gave the specimen. Such a chain of custody includes the following factors:

- Everyone who physically handles the sample is a “link.” IMWINKELRIED, THE METHODS OF AttACKING SCIENTIFIC EVIDENCE, 407 (1982). Therefore, documentation should show who has handled the sample. Id. at 413. This can be accomplished using a chain of custody receipt that every person signs upon receiving the sample and again upon relinquishing possession. Id. at 427. The receipt itself can usually be admitted itself as proof without the necessity of every person testifying. Id. at 89. At minimum, it should list the subject’s and test operator’s names, the date, and the type of sample. Id. at 90. If the sample is mailed to the laboratory after collection, there may be no need to establish all postal links; proof of mailing and receipt should suffice. Id. at 100, 103. See Jensen v. Lick, 589 F.Supp. 35, 39 (D.N. Dakota, 1984); Peranzo v. Coughlin, 608 F.Supp. 1504, 1514 (S.D.N.Y., 1985); Johnson v. Walton, No. 561-84 Rm (Vt. Super. Ct. Feb. 14, 1985); United States v. Duhart, 496 F.2d 941 (4th Cir. 1974); State v. Rose, 428 S.W.2d 737 (Mo. 1968); Gothard v. State, 452 So.2d 889 (Ala. Ct. App. 1984); State v. Dotson, 256 So.2d 594 (La., 1972); State v. Henderson, 337 So.2d 204 (La., 1976).

- Samples must be properly stored and safeguarded from adulteration, contamination or substitution. 29 Am. Jur.2d, Evidence, § 830 (1964).

- Each sample must be properly labeled so that laboratory personnel will not confuse it with others. See IMWINKELRIED, supra at 90.

- Samples should be labeled immediately after collection so that the chain is not established too late - i.e. old samples tend to render inaccurate results. Id.; State v. McKinney, 605 S.W.2d 842 (Tenn. Ct. App. 1980).

- A sample must be in the same condition when offered as evidence as it was upon being taken unless the change is for a justifiable purpose such as alteration required for the testing procedure. 29 Am. Jur.2d, Evidence, § 774 (1964).

Experts also emphasize the need for appropriate chain of custody procedures within the testing process. This issue, along with lab certification, has yet to receive comprehensive industry or legislative regulatory attention.

Employers can seek to protect themselves from a chain of custody attack in drug-related termination challenges by obtaining contractual commitments with respect to the handling of specimens from the laboratory, if a contract laboratory is used, and also by obtaining assurances that the laboratory will supply a qualified representative to testify as to the chain of custody of specimens. Within the union context, the employee union may try to bargain for specified procedures for the handling of the urine specimens which would satisfy the chain of custody requirements.

215. The improper handling of specimens proved fatal to the employer’s termination decision in *Banks v. Federal Aviation Administration*, 687 F.2d 92,95 (5th Cir. 1982) inasmuch as the government’s failure to preserve the samples prevented the independent verification of test results by the discharged employees. For a discussion of the *Banks* case, see supra text at 127-149, 181-84 and accompanying notes. See also Curtis, NFDA Paper, supra note 122, at 4.

In *National Treasury Employees Union v. Raab*, 649 F.Supp. 380 (E.D. La. 1986) (appeal pending before Fifth Circuit Court of Appeals), denying stay pending appeal, 808 F.2d 1057 (5th Cir. 1987), testimony implicating the integrity of chain of custody procedures of the government’s testing program served as one basis for the district judge invalidating the United States Customs Service’s drug testing plan. For a discussion of this aspect of the *National Treasury Employees Union* case, see infra text at 888-932 and accompanying notes.

216. See, e.g., BNA Special Report, supra note 8, at 31. Dr. Willett identified the lack of chain of custody in the drug-screening process as a particularly troublesome area. Id.; see NEWSWEEK, *Putting Them All to the Test*, supra note 12, at 61; Rothstein, *Screening Workers*, supra note 12 at 427; Brochure prepared by CompuChem Laboratories, a leading drug screen manufacturer and support service, see supra note 113, Check/Double Check Drugs of Abuse Testing, “Chain of Custody” (advertising the Company’s Chain of Custody Procedures and the absolute need for testing integrity).

217. Id. See supra notes 199-207 and accompanying text. See also infra note 252.

218. Procedures for establishing a proper chain-of-custody for drug screens are contained within the National Master Freight Agreement between the International Brotherhood of Teamsters’ Union and the trucking industry. In May 1984, industry representatives and representatives for the Teamsters Union attempted to negotiate a drug testing protocol, one of the aims of which was to reduce the potential for errors or fraud in the testing process. In the area of chain of custody, the protocol requires each sample taken to be signed by the tested employee in the presence of management, to be sealed in a special container, sent only to selected and approved labs for expert analysis. BNA Special Report, supra note 8, at 36. In March of 1986, the protocol was revised to improve the specimen packaging and labeling procedures. Id. For a picture of the chain of custody container used by some drug testing labs to seal the specimen, see NEWSWEEK, *A Question of Privacy*, supra note 12, at 20.
III. THE "STATE ACTION" DOCTRINE: A FORMIDABLE OBSTACLE FACING PRIVATE EMPLOYEES SEEKING CONSTITUTIONAL PROTECTION AGAINST DRUG SCREENING IN EMPLOYMENT

Virtually all of the self-executing and thus judicially enforceable protections for individual rights and liberties provided by the United States Constitution shield individuals from the actions of governmental entities. The Bill of Rights, the first eight amendments to the Constitution, on their face restrict only the conduct of the federal government, and to the extent of their incorporation into the fourteenth amendment due process clause, also limit state governments. Similarly, the fourteenth amendment due process

219. The first ten amendments to the Constitution constitute the Bill of Rights; however, the ninth and tenth amendments by their terms do not provide specific guarantees of individual liberties. The ninth amendment provides: "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The tenth amendment provides: "Powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.


The primary focus of litigation of these amendments in the drug screening context has been the fourth amendment dealing with unreasonable searches and seizures by the government. See infra notes 489-1095 and accompanying text.

220. In an early decision, the Supreme Court held that the Bill of Rights was not applicable to the states. Barron v. The Mayor & City Council of Baltimore, 32 U.S. 243 (1833). However, after the passage of the fourteenth amendment, the argument was advanced that the fourteenth amendment, through its privileges and immunities clause and its due process clause made the guarantees of the Bill of Rights applicable to the states. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 11-2, at 567 (hereinafter referred to as TRIBE). The Supreme Court continually rejected this theory of total incorporation of the Bill of Rights into the fourteenth amendment and, instead, adopted a theory of selective incorporation. Id. Under this concept, only those provisions of the Bill of Rights that the Court considers fundamental to the American legal system are applied to the states through the due process clause of the fourteenth amendment. See Duncan v. Louisiana, 391 U.S. 145 (1968). Therefore, the states cannot violate the first ten amendments directly but are only capable of violating those amendments insofar as those provisions are incorporated into the fourteenth amendment and applied to the states.

The Supreme Court proceeded over the years to selectively incorporate the Bill of Rights into the fourteenth amendment, making the particular provisions applicable to the states, in a piecemeal approach: See Cantwell v. Connecticut, 310 U.S. 296 (1940) (First Amendment, free exercise clause); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (first amendment, establishment clause); Gitlow v. New York, 268 U.S. 652, 666 (1925) (first amendment, free speech); Near v. Minnesota, 283 U.S. 697 (1937) (first amendment, free press); DeJonge v. Oregon, 299 U.S. 353 (1937) (first amendment, free assembly and petition); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment); Benton v. Maryland, 395 U.S. 784 (1969) (fifth amend-
and equal protection clauses,\textsuperscript{221} along with the fifteenth amendment,\textsuperscript{222} limit only state government activities. Only the thirteenth amendment,\textsuperscript{223} which abolishes the institution of slavery, is also directed at controlling the actions of private individuals.

A pristine formulation of the requirement of state action was an-

ment, double jeopardy clause); 

\textit{Griffin v. California}, 380 U.S. 609 (1965) (fifth amendment, self-incrimination); 

\textit{Klopfer v. North}, 386 U.S. 213 (1967) (sixth amendment, speedy trial); 

\textit{In re Oliver}, 333 U.S. 257 (1948) (sixth amendment, public trial and notice); 

\textit{Duncan v. Louisiana}, 391 U.S. 717 (1961) (sixth amendment, impartial jury); 

\textit{Pointer v. Texas}, 380 U.S. 400 (1965) (sixth amendment, confrontation clause); 

\textit{Washington v. Texas}, 388 U.S. 14 (1967) (sixth amendment, compulsory process); 

\textit{Gideon v. Wainwright}, 372 U.S. 335 (1963) (sixth amendment, right to counsel); 

\textit{Louisiana ex rel. Francis v. Resweber}, 329 U.S. 459 (1947) (eight amendment, cruel and unusual punishment clause); 

\textit{Schlib v. Kuebel}, 404 U.S. 357, 365 (1971) (eighth amendment, excess bail provision) (by implication); 


Other amendments and parts thereof, specifically denied application to the states by the Supreme Court include: second amendment, 

\textit{Presser v. Illinois}, 116 U.S. 252 (1886); fifth amendment (grand jury clause) 

\textit{Hurtado v. California}, 110 U.S. 516 (1884); seventh amendment (right to trial by jury in civil cases) 

\textit{Minneapolis & St. Louis R.R. Co. v. Bambolis}, 241 U.S. 211 (1916). This author has found no Supreme Court ruling pertaining to the incorporation of the third amendment and the eighth amendment excessive fine provision.

221. The fourteenth amendment, section one states:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, sec. 1.

222. The fifteenth amendment provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XV.

223. The thirteenth amendment provides:

Section 1. Neither slavery nor involuntary servitude, except for punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII.

Although the Supreme Court has held that the Thirteenth Amendment grants Congress potentially broad power to regulate private conduct, see \textit{Jones v. Alfred H. Mayer Co.}, 392 U.S. 409 (1968), the Court has directly invoked the amendment only to strike down peonage laws, imprisoning individuals for breaching contracts, see \textit{Pollock v. Williams}, 322 U.S. 4 (1944), and \textit{Bailey v. Alabama}, 219 U.S. 219 (1911), and has indicated that, for purposes of judicial enforcement, the Court will define "slavery" quite narrowly. See \textit{Palmer v. Thompson}, 403 U.S. 217, 226-27 (1971).
nounced by the Supreme Court over one-hundred years ago in *United States v. Cruikshank*,224 where the Court stated: "The fourteenth amendment prohibits a state from depriving any person of life, liberty or property without due process of law; but this adds nothing to the rights of one citizen against the other."228 The requirement of "state action" for purposes of maintaining a suit under the fourteenth amendment was first fully articulated by the Supreme Court eight years later in the Civil Rights Cases226 of 1883, wherein the Court invalidated congressional legislation which imposed penalties on anyone who interfered with the "full and equal enjoyment" of both public and private facilities.227 The cases involved several black plaintiffs who were denied access to hotel accommodations, theatres, and railroad cars owned by certain private individuals.228 Refusing to enforce the legislation sought to be applied by the plaintiff, the Supreme Court held that "until some state law has been passed, or some state action, through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States . . . can be called into activity."229 Justice Bradley's opinion in the Civil Rights Cases decision spawned the dichotomy between public and private conduct and the concept of "state action" in fourteenth amendment jurisprudence.230

Despite the antiquity of the state action doctrine, it still operates as a viable limitation on suits brought under the fourteenth

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224. 92 U.S. 542 (1875).
225. Id. at 554.
226. 109 U.S. 3 (1883).
227. Id. at 9.
228. Id. at 3.
229. Id. at 13. The Civil Rights Cases also involved statutes passed under the auspices of the thirteenth amendment. Id. at 20-25.
230. Writing for the majority in the Civil Rights Cases, Justice Bradley declared: .... [C]ivil rights, such as are guaranteed [sic] by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual. . . . An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the rights in a particular case; [but] unless protected in these acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the state where the wrongful acts are committed. [The] abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied.
amendment.\textsuperscript{231} Thus, the threshold obstacle facing private sector employees seeking to invoke constitutional protections against an employer's workplace drug testing program is whether the employer's activities can be characterized as "state action" and thereby held to the constitutional responsibilities of the state under the due process clause of the fourteenth amendment. The requirement of state action is mechanically satisfied when the state itself allegedly infringes a constitutional right through any official act of the state such as legislation enacted by the legislature, regulations promulgated by a governmental agency, executive orders, or court decrees.\textsuperscript{232} For example, if litigants challenge a federal or state statute which mandates racial segregation in public schools, state action is obvious and the courts will not make a formal inquiry into the matter.\textsuperscript{233} However, when a plaintiff complains about the actions of a seemingly private individual, an issue will arise as to the presence of state action, for the defendant will undoubtedly argue that he is incapable of violating the Constitution because he is not part of the government, thereby giving rise to the state action issue. The court must then determine whether the alleged wrongdoer has sufficient connection to the state to subject his activities to constitutional restrictions.\textsuperscript{234} If the court deter-

\textsuperscript{231} NOWAK, CONSTITUTIONAL LAW, Ch. 14 § 1 at 499-502 (hereinafter referred to as NOWAK).

As recently as 1982, the Supreme Court was called upon to determine whether a public school teacher’s discharge allegedly in violation of the teacher’s constitutional rights to freedom of speech and due process constituted state action in order to afford the teacher the claimed constitutional protection. See Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

\textsuperscript{232} See NOWAK, supra note 12 at 498 (“It should be noted that actions of any governmental entity give rise to state action for the purposes of constitutional limitations. Any subdivision of any state, be it an administrative agency or an independent political subdivision, such as a city, represents government or state authority to a sufficient degree to invoke constitutional restrictions on its actions”); LOCKHART, CONSTITUTIONAL LAW, casebook edition, Ch. 12 § 1 at 1514.

\textsuperscript{233} See, e.g., Brown v. Bd. of Educ., 347 U.S. 483 (1954). See also Peterson v. City of Greenville, 373 U.S. 244 (1963) (if a state legislature commands that restaurants serve food on a racially segregated basis, then the action of restaurant owners who discriminate between their patrons on the basis of race will constitute state action).

\textsuperscript{234} See NOWAK, supra note 12 at 497 (“[W]henever a suit is brought against private individuals on the basis that they have taken actions which have violated the civil or political rights of another, there is a question as to how the actions of the private individuals could be limited by these constitutional provisions. There must be a determination of whether defendant’s actions constitute governmental or ‘state’ action of a type regulated by the appropriate constitutional provision”).

The Supreme Court has had considerable difficulty establishing coherent guidelines for evaluating the state action issue where the government’s nexus to the challenged activity is more attenuated. Professor Charles Black characterized modern judicial analysis of the state
mines that sufficient state action exists, it will order a remedy for the aggrieved party and discontinuance of the practice of the alleged wrongdoer. If the court finds that the alleged wrongdoer is not involved with state action, it will afford no remedy to the aggrieved party, who must continue to suffer whatever deprivation of individual rights complained of. The remainder of this section will discuss the bases upon which the court may find state action in the "private activities" of the alleged wrongdoer and whether these bases present viable arguments for the private-sector employee in the drug screening context.

Traditional state action analysis of private activities can be divided into two basic inquiries: the extent of government involvement or encouragement of private activities and whether private persons have assumed governmental/public powers or functions.

A. Government Involvement in or Encouragement of Private Activity as a Potential Exception to State Action

Formal government involvement in or encouragement of private activities can arise in a variety of ways including the grant of governmental power to private individuals or groups, the allocation of government aid to private activities, and the regulation of private action problem as a "conceptual disaster area." See Black, "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 95 (1967). Lawrence Tribe, echoing the conclusion nearly three decades earlier of William Van Alstyne and Kenneth Karst, found contemporary state action doctrine to be in a "condition of bankruptcy." TRIBE, § 18-2, at 1149; see Van Alstyne & Karst, State Action, 14 STAN. L. REV. 3, 58 (1961). Indeed, the Supreme Court itself has acknowledged that "formulating an infallible test" for state action "is an impossible task." Reitman v. Mulkey, 387 U.S. 369, 378 (1967). "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

The ad hoc approach to the state action issue followed by the Supreme Court has produced a panoply of decisions resolved on specific factual nuances. An in-depth discussion of these intricacies is beyond the scope of this comment; however, a detailed treatment of the state action concept can be found in Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 COLUM. L. REV. 656 (1974) (hereinafter referred to as Note, State Action).

For purposes of this comment the author adopts the more general broad categories of government involvement or encouragement of private activity and the government/public function concept. See LOCKART, supra note 15, at 1515. See also Note, State Action, supra at 662.

236. See discussion infra at notes 238-389 and accompanying text.
237. See infra notes 390-465 and accompanying text for a discussion of the governmental/public function analysis.
238. See infra notes 243-252.
239. See infra notes 253-268.
activity, the encouragement of private parties to act as "agents" in accomplishing government objectives, and the judicial enforcement of private rights.

1. Grants of Power

Generally speaking the cases dealing with governmental grants of power to private parties focus on whether the government has increased through legislation or constitutional provision the powers or status of a private party thereby enabling it to conduct activities in which it could not otherwise engage. The analysis employed in these cases is illustrated by the Supreme Court's decision in Nixon v. Condon. In Nixon, the Supreme Court held that a statute shifting power to determine membership in political parties from the party as a whole to its executive committee members invested the individual decision makers with governmental power thereby rendering their decisions state action. In reaching its conclusion in Nixon, the Court observed that:

Whatever power of exclusion has been exercised by the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the state . . . . If the state had not conferred it, there would be hardly color of right to give a basis for its exercise.

Under the power grant analysis, the courts have found the requisite state action in cases involving state statutes or custom which granted private groups the authority to dictate government policies; state statutes which facilitated the enforcement of privately promulgated rules; state constitutional provisions which con-
ferred protected status to common law rights;\textsuperscript{249} and state statutes which allocated monopoly power to private entities.\textsuperscript{250}

The upshot of the courts' rationale in all of these cases appears to be that by giving through statutory enactment or constitutional provision to the private party power or authority that it would have not otherwise possessed, the government has, in effect, loaned its power to the private party, and, therefore, any challenged activity arising out of the exercise of the peculiarly government-conferred power is subject to constitutional scrutiny.\textsuperscript{251} Thus, it seems unlikely that a private employer's unilateral decision to implement a drug screening program for its employees can be characterized under a power grant theory absent a showing that the employer's decision was somehow related to the exercise of rights which have

\begin{itemize}
  \item enforce a concededly discriminatory private rule. State action, for purposes of the Equal Protection Clause, may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action. . . . [T]he application of state sanctions to enforce such a rule would violate the Fourteenth Amendment; also \textit{Bowman v. Birmingham Trust Co.}, 280 F.2d 531 (5th Cir. 1960) (invalidating criminal sanctions imposed for noncompliance with a bus company's racially segregative seating rules).
  \item 249. In \textit{Reitman v. Mulkey}, 387 U.S. 369 (1967), for example, the Supreme Court determined that the amendment to the California Constitution that recognized the absolute freedom of real property owners to refuse to sell, lease, or rent residential properties to anyone for any reason and thereby effectively repealing fair housing laws, under which the plaintiff's allegations of discrimination were raised, conferred constitutional protection to a landlord's right to discriminate. \textit{Id.} at 377. Therefore, the landlord's discrimination on the basis of race in making rental decisions constituted state action subject to the due process clause of the Fourteenth Amendment. \textit{Id.} See also, \textit{Railway Employes' Dept. v. Hanson}, 351 U.S. 225 (1956) and \textit{International Ass'n of Machinists v. Street}, 367 U.S. 740 (1961) (in both \textit{Hanson} and \textit{Street}, the Court's government power grant analysis was based not upon the creation of a new substantive right, but the protected status afforded a pre-existing right).
  \item 250. The First, Sixth and Eighth Circuits have expressly held that the grant of complete monopoly power to an otherwise private entity renders the activities of the entity as state action. See, e.g., \textit{Lavoie v. Bigwood}, 457 F.2d 7 (1st Cir. 1972); \textit{Ihrke v. N. States Power Co.}, 459 F.2d 566 (8th Cir.), vacated as moot 409 U.S. 815 (1972); \textit{Palmer v. Columbia Gas of Ohio, Inc.}, 479 F.2d 153 (6th Cir. 1973); contra, \textit{Lucas v. Wisc. Elec. Power Co.}, 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973). See also \textit{Jackson v. Metropolitan Edison Co.}, 483 F.2d 754 (3rd Cir. 1973), aff'd., 419 U.S. 345 (1974) (discussed \textit{infra} at notes 257-59, 417-27 and accompanying text).
  \item 251. See generally, Note, \textit{State Action}, supra note 235, at 663-672.
\end{itemize}

A potential state action issue exists under Oregon's Unemployment Compensation System under a government-power-grant theory. Unemployment benefits can be denied to job applicants who refuse to take a drug test required by a prospective employer, according to a new policy adopted by the State of Oregon's Employment Division. Another part of the policy that went into effect earlier this month denies benefits to current employees fired for refusing to take a drug test if the employer had reasonable cause to order the test, said Libby Leonard, deputy administrator at the division. However, benefits are not denied for a worker who refuses to take a random drug test and is fired as a result. INDIVIDUAL EMPLOYMENT RIGHTS, Sept. 30, 1986, "Drug Test Tied to Benefits," at 10.
been enhanced by the government.\textsuperscript{252}

\section*{2. Government Aid}

When the government allocates aid through grants of money, contributions of materials, awards of governmental contracts, or provisions for tax exemptions or deductions, it may be considered by the courts to be sufficiently involved with the activity being assisted as to make the activity state action.\textsuperscript{253} The Sixth Circuit explained the rationale behind the government aid analysis in \textit{Smith v. Holiday Inns of America, Incorporated}:\textsuperscript{254} "We believe that the right not to have state finances, state agencies, and state laws employed to such a [discriminatory] purpose and such a [discriminatory] result is a right encompassed in . . . the fourteenth amendment."\textsuperscript{255}

The Supreme Court has not developed a quantitative test by which it can be determined how much aid warrants a finding of state action, but rather has approached the issue on a case-by-case basis, trying to determine whether the aid amounts to something more than generalized service, such as police and fire protection, to which any person or association is entitled, by looking at the specific nature of the recipient and by considering the worth of the subsidized activity and the harm to constitutionally recognized

\textsuperscript{252} To the extent, however, that the legislature of a state would pass a law authorizing a private employer to conduct drug screens it appears that a persuasive argument could be made that the state has either created a new right not available to the private employer under the common law - see supra notes 244-246 - and/or that the legislature has conferred protected status upon the employer's decision - see supra note 249.

A 1985 San Francisco municipal ordinance, SAN FRANCISCO, CAL., POLICE CODE, Part II Ch. VIII art. 33A (1985), prohibits all random or company-wide testing of employees by all private employers. The California legislature passed a bill, A.B.4242 (Klehs) which would preempt the San Francisco ordinance banning private sector drug screening and would authorize private employers to administer drug tests. For a discussion of the statute, see infra notes and accompanying text. The Governor of California subsequently vetoed the bill, see infra notes and accompanying text; however Assemblyman John Klehs, sponsor of the bill, has vowed to reintroduce the legislation. \textit{Id.} If the bill were to pass the second time around and receive the governor's signature, then the private sector employee might be able to argue that his employer's implementation and operation of a drug screening program pursuant to the California statute constitutes state action under governmental power grant analysis. See supra notes 243-246, 249 and accompanying text.

\textsuperscript{253} See Note, State Action, supra note 235 at 672-73.

\textsuperscript{254} 336 F.2d 630 (6th Cir. 1964); see also Cooper v. Aaron, 358 U.S. 1, 19 (1958) where the Supreme Court stated in dictum: "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that 'no State shall deny . . . equal protection of the laws.'"

\textsuperscript{255} 336 F.2d at 635.
Recently, the Supreme Court has indicated that financial aid which is not given as a direct subsidy to the challenged practice will not subject the private activity to constitutional restraint. In *Jackson v. Metropolitan Edison Company*, the public utility company certainly received financial benefit from its license as the only supplier of electricity in the area. However, the Court refused to subject the utility's termination policies to constitutional scrutiny because the financial benefits conferred by the state were not sufficiently connected to the challenged practices. Similarly, the Supreme Court held in *Moose Lodge No. 107 v. Irvis* that while the granting of a liquor license to the club resulted in some financial assistance to the club, this aid was not sufficiently connected with the racially restrictive membership policies and, therefore, could not serve as a basis for constitutional review of such policies. Both *Moose Lodge* and *Jackson* did, however, make it clear that if the government had authorized the challenged practices by granting subsidies for their continuance, then those activities would be subject to constitutional restraint.

The Supreme Court further clarified this point in *Rendell-Baker v. Kohn* where the discharge of certain employees of a privately owned school was alleged to be state action, when it held that the relationship between the private school and its teachers was not changed merely because the state paid the tuition of most students. The Court concluded in *Rendell-Baker* that because the

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256. NOWAK, Ch. 14 § IV, *supra* note 231 at 519. Government aid analysis seemingly presupposes a recognized right which is alleged to have been infringed by the recipient of the aid. This presents no problem in the drug screening context, for several decisions pertaining to drug screening in the public sector have recognized that such testing may implicate a public employee's freedom from illegal search and seizure under the fourth amendment and may be a denial of due process rights under the fourteenth amendment. See *infra* text accompanying notes 489-1095 (fourth amendment analysis); 1120-1290 (due process analysis).

258. *Id.* at 346.
259. *Id.* at 352.
261. *Id.* at 174-176.
262. *Id.* at 176-177; *id.* at 176 n.3.
263. 419 U.S. at 353-357; *id.* at 355 n.15, 357 n.17.
265. *Id.* at 841. The *Rendell-Baker* Court declared:

The school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.
school’s employment practices were not influenced by the government funding program, state action based upon a government-aid analysis was not available to the plaintiff.266

These recent decisions by the Supreme Court indicate that the majority of the current justices do not believe that constitutional restrictions should be imposed on private activity merely because the activity receives some form of general aid or financial benefit from the state.267 Thus, a mere showing that a private employer which has implemented a drug screening program for its employee receives governmental contracts or general aid will be insufficient to demonstrate state action under a government aid analysis.268

3. Government Regulation

Perhaps the most pervasive form of government involvement in private activities is through government regulation of those activities. Unlike the government power grant and government aid cases, which focus on governmental support of private activities,269 governmental regulation analysis concentrates on government restriction of private activities. The conceptual basis of this approach appears to be that the more a government regulates the activities of the private actor the greater involved the state becomes and the

Id. Compare Moose Lodge, 407 U.S. at 173, where the Court stated:
The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases . . . and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have “significantly involved itself with invidious discriminations . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition. (Citation omitted.)

266. Id.
267. See supra notes 257-266 and accompanying text.
268. However, to the extent that either the federal government attempts to tie government aid or government contracts to the private employer’s implementation of an acceptable drug screening program, the government aid analysis becomes meaningful. In such cases, the government’s awarding of benefits (money or jobs) on the explicit condition that the recipient must implement and operate a drug screening program for its private sector employees, although not compelling such programs, nonetheless would be encouraging it through an articulated collective policy choice that plainly manifests the state’s motivation. See supra note 9, where the President’s Commission on Organized Crime recommended such an arrangement.
269. See supra notes 243-267 and accompanying text.
more the private action begins to resemble state action.270

The government regulation approach to state action has a confused history partly due to the ambiguity of the Supreme Court’s ruling in *Public Utilities Commission v. Pollak,*271 which is generally considered to be the first time that the Court appeared to follow a regulation analysis.272 Judicial rulings subsequent to *Pollak* both recognized and rejected the force of a regulation argument for state action.273 The Supreme Court finally laid the controversy to rest in *Jackson v. Metropolitan Edison Company,*274 where it held that extensive regulation of a business would not, standing alone, subject all of its activities to constitutional restraints.275 In *Jackson,* an electric utility terminated service to a customer without affording the customer a final hearing to determine the status of her account or her willingness to pay.276 Finding that the government licensing and regulation of the utility neither commanded, encouraged, nor sanctioned the termination practices of the company, the *Jackson* majority concluded that the termination of ser-

270. NOWAK, Ch. 14 § IV, supra note 231, at 514.
272. NOWAK, Ch. 14 § IV, supra note 231 at 514; Note, State Action, supra note 235 at 687-88.

The *Pollak* case involved first and fifth amendment challenges to the broadcast of radio programs by a transit company in its buses and street cars. The company was licensed to operate the buses in Washington, D.C. *Id.* at 462. In finding government involvement the Court expressly disclaimed reliance upon the company’s exclusive franchise from Congress and instead emphasized the regulation exercised by the Public Utilities Commission and the Commission’s specific approval of the challenged activity. *Id.* The actual holding in *Pollak* is unclear, for the Court indicated that the challenged activity was compatible with the Constitution, even if it constituted government action. *Id.* The majority in *Pollak* may have been merely assuming, *arguendo,* the presence of state action in a regulated industry. *See Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 356 n.16 (1974) (raising this point about *Pollak*).

Twenty years later, in *Moose Lodge Number 107 v. Irvis,* 407 U.S. 163 (1972), the Supreme Court narrowed the precedential support for the regulation theory in *Pollak,* by holding that a private club, which refused to serve the plaintiff on account of his race, was not subject to constitutional restraint merely because it received its liquor license from the state and was subject to extensive regulation by the state. In reversing the district court’s holding that such regulation amounted to state action, the Supreme Court recognized the extensive nature of the state’s regulatory scheme but rejected its significance: “However detailed this type of regulation may be in some particular, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the state in any realistic sense a partner or even a joint venturer in the club’s enterprise.” *Moose Lodge,* 407 U.S. at 176-177. Moreover, the Court explicitly distinguished *Pollak* as a case turning upon specific approval by a government agency of the challenged activity. *Id.* at 175-176 n.3.

275. *Id.* at 354.
276. *Id.* at 358.
vices by the utility did not constitute state action.\textsuperscript{277} The Supreme Court reinforced this approach in the subsequent cases of \textit{Blum v. Yaretsky}\textsuperscript{278} and \textit{Rendell-Baker v. Kohn}.\textsuperscript{279}

Given the present dearth of any sort of governmental regulation of drug screening in employment,\textsuperscript{280} the government regulation argument is not readily available to the private sector employee to demonstrate state action. Even if there was government regulation of drug screening procedures in private employment, the most recent discussion by the Supreme Court on the government regulation approach to state action clearly indicates that regulation alone, no matter how extensive, will not be conclusive of a finding of state action.\textsuperscript{281} It may, however, serve as one factor among many which in the aggregate may lead the Court to find state action in private activity.\textsuperscript{282}

4. Government "Agency"

When the government uses private persons to achieve its own purposes without providing them with special powers, aid, or other support, the government merely influences or encourages private parties to exercise rights available to everyone, toward government

\textsuperscript{277} Id. at 358 (quoting \textit{Moose Lodge}, 407 U.S. at 176-177).

\textsuperscript{278} 457 U.S. 991 (1982). In \textit{Blum}, the Supreme Court rejected the argument that regulations imposing a range of penalties on nursing homes that fail to discharge or transfer patients whose continued stay is medically inappropriate dictate the decisions to discharge or transfer patients. \textit{Id.} at 1006-07. The Court observed that physicians make the decisions as to if a patient's care is medically necessary and those decisions ultimately turn on medical judgment made by private parties according to professional standards that are not established by the State. \textit{Id.} Moreover, added the Court, adjustment in Medicaid benefit levels by the State in response to the discharge or transfer of a patient does not constitute approval or enforcement of that decision. \textit{Id.} at 1010.

The \textit{Blum} decision is discussed further under the "public function" section. \textit{See infra} notes 428-434, 444 and accompanying text.

\textsuperscript{279} 457 U.S. 830 (1982). In \textit{Rendell-Baker}, the Court held that although the state extensively regulated a private school for maladjusted students, the school's decision to discharge several teachers were not compelled or even influenced by state regulations. \textit{Id.} at 841. The government regulation of the school's educational practices and funding of students attending the school were held to be unrelated to the private school's employment practices. \textit{Id.} Thus, the Court refused to find that the school's teachers had any due process right to a fair process regarding their discharge. \textit{Id.} at 841-42.

The \textit{Rendell-Baker} holding is discussed further under the "public function" section. \textit{See infra} notes 435-443, 447-465 and accompanying text.

\textsuperscript{280} \textit{See supra} notes 199-207 and accompanying text.

\textsuperscript{281} \textit{See supra} notes 274-279 and accompanying text.

\textsuperscript{282} To the extent that the Department of Health and Human Services may undertake in the future to regulate the drug screening area, the government regulation theory may become relevant to the state action discussion. \textit{See infra} notes 360-89 and accompanying text.
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objectives. Although the government cannot be said to support the private activities, it nevertheless is promoting them. There is a line of cases holding that in certain instances the government's encouragement of private persons to carry out its objectives gives rise to state action. The underlying rationale running through these cases is that the government should not be able to do indirectly what it cannot do directly; that is, the government should not be allowed to circumvent constitutional limitations on its own action by enlisting private persons to perform the activities for it.

An "agency" analysis has been employed in defining the reach of the fourth amendment search and seizure proscriptions in the context of airline searches conducted by private employees. Where government officials have influenced private persons to conduct searches or seizures and the private individuals have acted for the purpose of aiding the government, the courts have regarded the individuals as "agents" of the government and accordingly have found the presence of state action. But, in at least two cases, the circuit courts of appeal have refused to find an "agency" relationship where the private person has acted for his own purposes, albeit influenced by government officials to make the search. The Ninth Circuit, in United States v. Davis, ignored the underlying purpose behind the airline's actions in resolving the issue of state action, holding that where the government required airlines to

283. See Note, State Action, supra note 235, at 680.
284. See infra notes 285-87 and accompanying text.
286. Id. at 681.
287. See, e.g., Gambino v. United States, 275 U.S. 310 (1927) (the Court applied the fourth amendment to searches and seizures by state police officers who, before Wolf v. Colorado, 338 U.S. 25 (1949), were not bound by constitutional search and seizure limitations, where a long-standing cooperation existed between federal and state officers in the enforcement of federal prohibition laws); Corngold v. United States, 367 F.2d 1 (9th Cir. 1966). But where the federal official has not influenced the private person to make the illegal search, the latter does not act as his "agent." See, e.g., Burdeau v. McDowell, 256 U.S. 465 (1921); United States v. Ashby, 245 F.2d 684 (5th Cir. 1957); United States v. Goldberg, 330 F.2d 30 (3d Cir. 1964).


288. See Gold v. United States, 378 F.2d 588 (9th Cir. 1967); United States v. Cangiano, 464 F.2d 320 (2d Cir. 1972). In these cases, federal officers, suspecting the use of private freight services to transport illegal materials, advised the freight agents they had reason to believe the contents, names and addresses represented on the way bills were inaccurate, whereupon private airline employees undertook to open the packages to preserve their own interests.

289. 482 F.2d 893 (9th Cir. 1973).
maintain anti-hijacking screening procedures, developed a profile to be used by airlines in identifying potential hijackers, and indirectly assisted in implementing the search procedures used by the private airlines, such searches constituted state action and were thereby subject to constitutional scrutiny.280

In a different context, the Supreme Court in Lombard v. Louisiana291 reversed the trespass convictions of sit-in demonstrators because the city officials, prior to the demonstration, had condemned sit-ins and stated that the city was prepared to enforce the law.292 The Court construed these statements as official encouragement of store owners to use the trespass laws in a discriminatory manner, and by doing so, the store owners were furthering city policies.293

280. Id. The Ninth Circuit declared in Davis:

The government's role in the airport search program is and has been a dominant one. But even if governmental involvement at some point in the period could be characterized accurately as mere "encouragement," or as "peripheral, or . . . one of several cooperative forces leading to the [alleged] constitutional violation," see United States v. Guest, 383 U.S. 745, 755-756, 86 S.Ct. 1170, 1177, 16 L.Ed.2d 239 (1966), that involvement would nevertheless be "significant" for purposes of the Fourth Amendment. Constitutional limitations on governmental action would be severely undercut if the government were allowed to actively encourage conduct by "private" persons or entities that is prohibited to the government itself.

Id. at 904 (footnote omitted).


292. The Court, per Warren, C.J., relied on the fact that "prior to this occurrence New Orleans city officials" had issued statements that such attempts [sit-ins at a local restaurant that refused to serve black college students] to secure desegregated service, though orderly and possibly inoffensive to local merchants, would not be permitted." 373 U.S. at 269.

The statements made by the city officials were reported by the Court as follows:

. . . ([O]n September 10, 1960, a like occurrence had taken place in a Woolworth store in the same city. In immediate reaction thereto the Superintendent of Police issued a highly publicized statement which discussed the incident and state that "We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest . . . [W]e want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana." On September 13, four days before petitioners' arrest, the Mayor of New Orleans issued an unequivocal statement condemning such conduct and demanding its cessation. This statement was also widely publicized; it read in part:

I have today directed the superintendent of police that no additional sit-in demonstrations . . . will be permitted . . . regardless of the avowed purpose or intent of the participants. . . .

* * *

It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department.

Id. at 270-71 (footnotes omitted).

293. In reaching its decision the Court declared:
As Professor Nowak points out, it was not at all clear in Lombard whether the store owners had refused to serve the demonstrators or call the police for their own reasons or because of the actions of the officials.294

The agency analysis has not been frequently used by the courts as such; often times such an analysis is only intimated in government-aid cases.295 With little more than an underlying principle as a guide, the bare bones analysis under the "agency" approach leaves many issues unresolved. For example, it is uncertain whether "encouragement" alone will convince the court to find state action. While Lombard v. Louisiana suggests that it might,296 the holding of that case should be used with some caution for it may be merely a reflection of the times and may be limited to its facts.297 Likewise, the airline cases298 fail to offer any guidance in

As we interpret the New Orleans city officials' statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct. We have just held in Peterson v. Greenville, . . . that where an ordinance makes it unlawful for owners or managers of restaurants to seat whites and Negroes together, a conviction under the State's criminal processes employed in a way which enforces the discrimination mandated by that ordinance cannot stand. Equally the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance. The official command here was to direct continuance of segregated service in restaurants, and to prohibit any conduct directed toward its discontinuance; it was not restricted solely to preserve the public peace in a nondiscriminatory fashion in a situation where violence was present or imminent by reason of public demonstrations.

Id. at 273-74. Accordingly, the Court reversed the student's convictions. Id. at 274.

294. NOWAK, Ch. 14 § III, supra note 231 at 509.

295. See Note, State Action, supra note 235 at 682 (discussing the implicit use of an agency analysis in "aid" cases).

296. See supra notes 291-94 and accompanying text.

297. Lombard, like so many of the cases in the state action area, dealt with racial discrimination. The case was decided in 1963 when the Civil Rights Movement was well under way. As noted by one author, "In this area [racial discrimination] courts have been particularly inclined to find 'state action.'" See Note, State Action, supra note 235, at 657. Indeed the courts' willingness to find state action in these cases alarmed some legal scholars, causing several commentators, during this period, to lament what they perceived as the ultimate demise of the state action requirement - at least in the area of racial discrimination. See, e.g., HENKIN, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U.P.A.L.R. 473 (1962); Williams, The Twilight of State Action, 41 TEXAS L. REV. 347 (1963); Lewis, The Meaning of State Action, 60 COL. L. REV. 1083 (1960); Karst and Horowitz, Reitman v. Mulkey: A Telophasel of Substantive Equal Protection, 1967 SUP. CT. REV. 39 (1967); Silard, A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee, 66 COLUM. L. REV. 855 (1966).

The Court's willingness to find state action by reading between the lines of the statements made by the city officials in Lombard may simply be a product of the times and the, seemingly prevalent, judicial attitude against racial discrimination. At least some caution should be exercised in reading the Lombard decision more broadly. Moreover, while freedom from
terms of how much encouragement by the government will suffice to support a finding of state action.

Will the President's national television campaign preaching the evils of drug abuse and urging the private-sector employer to play its part in creating a "drug free America" by helping rid drugs from the workplace be enough governmental encouragement to support a finding of agency? Will these subtle innuendoes implicitly, but not expressly, calling for the use of drug screens in the private-sector workplace be enough? One would hardly think so, but little more was present in the statements of the city officials condemning sit-ins in *Lombard v. Louisiana.* Suppose the government, state or federal, mass mails a policy statement and booklet - similar to the one mailed to the public schools by the Secretary of Education in the fall of 1986 - outlining the evils of drug abuse, with special emphasis on the high economic losses in business associated with drug abuse. Suppose further that these materials, strongly suggesting the implementation of a hardline anti-drug plan for the shop, set forth detailed guidelines for such a program which include provisions and recommendations for a drug screening program. Would this be enough encouragement to make any private action taken on the recommendations state action subject to constitutional review? Or will the courts require even more extensive government involvement along the line of the facts in *United States v. Davis*? The cases offer little insight into these issues.

A different, but equally troubling, question left unresolved by

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racial discrimination is clearly a fundamental right expressly set forth in the Bill of Rights, the right of privacy in one's urine from being taken for drug-screening is not. The courts may be less willing to find governmental encouragement giving rise to state action in the latter context. See GLENNON and NOWAK, A Functional Analysis of the Fourteenth Amendment "State Action" Requirement", 1967 SUP. CT. REV. 221, 222 (1967) (where the authors suggest that the finding of state action by the Supreme Court may be largely dependent upon how the Justices weigh the merits of the competing rights being asserted).

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298. See supra notes 286-87, 289-90 and accompanying text.

299. See supra note 9 for a brief outline of the President's campaign activities against drug abuse and the tenor of his message.

300. See supra note 293.

301. See supra note 9 for a brief description of the contents of the booklet mailed out to the nation's schools by the Secretary of Education.

302. See supra notes 289-90 and accompanying text. See also Corngold v. United States, supra note 287, where the court notes that the customs official joined actively in the search, holding of the flaps of the box, removing, opening and inspecting the small contents of the smaller boxes, and marking the boxes for future identification. 367 F.2d at 6 (“[A]t the very least, the search of the appellant's package was a joint operation of the customs agents and the TWA employee”).
the cases is whether the private party's motives are a determinative factor in the analysis. To find state action in a private employer's decision to implement a drug program must the employer be acting for the purely altruistic purpose of creating a "drug free America?" If so, as at least two circuits have suggested in the airline cases,303 an "agency" discussion is most likely a dead-end inquiry.304 If not, and the motives can be mixed, must the purpose to aid the government outweigh personal motives? If so, the agency analysis would be only slightly more helpful than under a pure motive standard.305 The burden of proof in either instance would be

303. See supra note 288 and accompanying text.
304. Given the various justifications offered by employers for using drug-screens, see supra notes 18-22 and accompanying text, it seems unlikely that a purely altruistic case could be demonstrated. Findings of a recent survey conducted by Noel Dunivant & Associates, of the Fortune 500 firms, indicate that creating a "drug free America" rates relatively low among the reasons given by private employers for instituting a drug testing program:

Reasons for initiating a drug testing program were varied, but two were mentioned more often than others. These were a) reactions to specific drug-related incidents or increases in drug use at the company, and b) concerns about the safety of employees. The full range of reasons given for starting a program is presented in the Table below:

<table>
<thead>
<tr>
<th>REASONS FOR INITIATING A DRUG TESTING PROGRAM</th>
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<tbody>
<tr>
<td>Reason for Testing</td>
</tr>
<tr>
<td>Incidents and/or drug use at the company</td>
</tr>
<tr>
<td>General concern for safety of employees</td>
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<tr>
<td>Response to government regulations</td>
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<tr>
<td>National rise in drug use</td>
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<td>Following the lead of other companies</td>
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<tr>
<td>Sign of the times</td>
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<tr>
<td>Trying to keep down health care costs</td>
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<tr>
<td>To allow enforcement of drug policy</td>
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<tr>
<td>Public image</td>
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Note - Table frequencies are based on weighted counts. Results may be subject to rounding differences.

305. The Chart of results obtained from the Fortune 500 Survey - see supra note 304 - demonstrate that the predominate motive for implementing a drug testing program was "incidents and/or drug use at the company"; calling into play all the economic concerns listed supra in notes 18-22.

While the Ninth Circuit in *Corngold*, supra note 287, indicated that there would have been a finding of state action and an exclusion of the seized evidence even if the TWA employee had not acted solely to satisfy the government's interests in viewing the package, it goes on to detail the extensive involvement of the government official in the actual search. 367 F.2d at 6-7; see note 303 supra. Can *Corngold* be read as suggesting that as government involvement in the actual search increases, the motives of the private party to aid the government become less relevant? If so, is it also true that, as the private party's personal motives are stronger in conducting the search then governmental involvement in the actual search must be greater? If these are the teachings of *Corngold*, then the private sector em-
difficult, to say the least.

In the final analysis it appears that the agency argument for state action, standing alone, would not enable private-sector employees to subject their employers' drug screening practices to constitutional scrutiny.\(^{306}\)

5. Judicial Enforcement

In *Shelley v. Kraemer*,\(^{307}\) the Supreme Court introduced a line of cases standing for the proposition that judicial enforcement of private rights may, at least in some instances, involve "state action."\(^{308}\) In *Shelley*, white property owners attempted to sell their property to members of a racial minority in violation of a racially restrictive covenant forbidding sale of the property to a racial minority.\(^{309}\) Co-covenantors of the properties in question brought suit in a state court, seeking an injunction which would enforce the racially restrictive covenant and prevent the current owners from selling the property to members of a racial minority.\(^{310}\) The Supreme Courts of Missouri and Michigan ultimately affirmed the lower courts' grants of relief to the plaintiffs by enforcing the restrictive covenants.\(^{311}\) On appeal, the Supreme Court held that the restrictive covenants were not illegal, so long as the private parties

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306. The "agency" argument may, however, become important as demonstrating one factor among many, which taken together warrant a finding of state action. See infra notes 360-89 and accompanying text.

307. 334 U.S. 1 (1947). The *Shelley* decision actually involved two separate cases on writ of *certiorari* to the Supreme Court, one from Missouri and the other from Michigan, which the Court decided together.

For an excellent commentary on the *Shelley* line of cases, see Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Weschler*, 108 U. PA. L. Rev. 1 (1959).


309. 334 U.S. at 4-5. The restrictive covenant provided in pertinent part:

\[ 	ext{[T]he said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as (sic) not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.} \]

*Id.*

310. *Id.* at 6.

311. *Id.* at 6-7.
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voluntarily adhered to them. However, the Court went on to hold that the state courts could not be called upon to enforce the covenant's terms, for in so doing, the courts would lend state sanction to the discriminatory practice. Stating that it had "no doubt that there [had] been state action in these cases in the full and complete sense of the phrase," the Supreme Court explained in Shelley:

The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

The Supreme Court concluded that the State, by granting judicial enforcement of the restrictive agreements, denied the plaintiffs equal protection of the law in violation of the fourteenth amendment and, therefore, the state court's judgment could not stand.

Five years later in Barrows v. Jackson, the Supreme Court reaffirmed its holding in Shelley when it held that a white property owner who sold land to a member of a racial minority in violation of a racially restrictive covenant could not be subject to monetary damages for breach of the covenant. In ruling that the state court's award of damages against the defendant would constitute state action subject to constitutional scrutiny, the Barrows Court reasoned:

To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. . . . The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in Shelley.

312. Id. at 13.
313. Id. at 19-20.
314. Id. at 19.
315. Id.
316. Id. at 20.
318. Id. at 254.
319. Id. at 254. The Court in Barrows ultimately sustained the state court's refusal to enforce the covenant against the defendant property owner by entering judgment in favor of the defendant's demurrer. Id. at 260.
The *Shelley* decision received considerable scholarly criticism as being overbroad and rendering meaningless the state action doctrine.\(^2\) Subsequent decisions of the Supreme Court would demonstrate, however, that *Shelley* and *Barrows* did not hold that every judicial order enforcing private decisions imbue those decisions with sufficient state action to subject them to constitutional scrutiny.\(^3\)

In *Evans v. Abney*,\(^3\) the Court explicitly refused to apply its holding in *Shelley* to force the defendants to keep open a park which was to revert to its donor upon the occurrence of its desegregation.\(^3\) In affirming the lower court's decision to permit the land to revert to the donor's heirs, the Supreme Court found that "the Georgia court had no alternative under its relevant trust laws, which [were] long standing and neutral with regard to race, but to end the Baconsfield trust."\(^3\) In allowing the land to revert to the heirs of Senator Bacon, the Court reasoned that while the city and the trustees were not permitted to conduct an on-going racially restrictive admissions policy for the park, the reverter of the land to

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321. See *infra* notes 322-49 and accompanying text.


The Supreme Court's decision in *Evans v. Abney* followed an earlier decision, *Evans v. Newton*, 382 U.S. 296 (1966) concerning the same piece of property devised by Senator Bacon to the town of Macon, Georgia, to be used as a segregated park. *Id.* at 297. For a time, the City of Macon did not honor the restrictive covenant and permitted Negroes to use the park, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis. *Id.* at 297. Bacon's heirs and others sued to remove the city as trustee, for breach of the restrictive covenant black citizens intervened in opposition. The city resigned as trustee and the Georgia courts accepted the city's resignation and appointed private individuals as trustees so that the trust's purpose would not fail. *Id.* at 297-98. On appeal, the Supreme Court held that, even in private hands, the park could not be operated as a segregated facility, emphasizing that the operation of the park was a government function, and pointing out the continued city involvement and upkeep of the park. *Id.* at 301. The Court wrote: "[I]f the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment." *Id.* at 301. "This conclusion is buttressed by the" fact that "the service rendered even by a private park of this character is municipal in nature," "more like a fire department or police department" than like "golf clubs, social centers, luncheon clubs, ... and other like organizations in the private sector." *Id.* at 301-02.

323. *Id.* at 444-48.

324. *Id.* at 444.
the heirs of Senator Bacon, unlike the restrictive covenant in *Shelley*, did not involve continuing discrimination against blacks because "the termination of the park was a loss shared equally by the white and Negro citizens of Macon."^{325}

*Abney* is viewed by the commentators as supporting the argument that judicial involvement with a private practice will not necessarily result in the finding of state action.^{326}

The Supreme Court’s ruling in *Black v. Cutter Laboratories*^{327} also demonstrates that the *Shelley* ruling did not render the state action issue a meaningless inquiry.^{328} *Black* involved an action in which a discharged employee sought enforcement of an arbitration award for reinstatement.^{329} The collective bargaining agreement under which she worked permitted her employer to discharge its employees for just cause.^{330} The California Supreme Court held that Communist Party Membership, the basis for the plaintiff’s discharge, constituted “just cause” as agreed upon by her employer and her union, and, alternatively, found that requiring specific performance of the arbitrator’s award would violate the state’s public policy favoring employer-union cooperation.^{331} On appeal to the Supreme Court, the plaintiff argued that the court’s permitting the defendant-employer to justify her dismissal for communist activity violated her first amendment rights and further contended that the communist activities could not be used as a defense without the court becoming constitutionally involved.^{332}

Justice Clark, speaking for the Majority in *Black*, ignored the

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325. *Id.* at 445. The Supreme Court reasoned in *Abney* that

"[T]he situation presented in this case is also easily distinguishable from that presented in *Shelley v. Kraemer* [citation omitted] where we held unconstitutio- tional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes. Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon, since both races would have enjoyed a constitutional right of equal access to the park’s facilities had it continued."

*But see id.* at 456-457 (Brennan, J., dissenting) (arguing that *Shelley v. Kraemer* required a finding of state action in the *Abney* case).

326. See GLENNON & NOWAK, supra note 297, at 246; NOWAK, supra note 231, at 510; Pollak, supra note 331.


328. *See infra* notes 328-34; *see also* Lewis, The Meaning of State Action, supra note 320, at 1110; Note, State Action, supra note 235 at 678 n.149.

329. 351 U.S. at 294.

330. *Id.* at 294-296.


332. 351 U.S. at 292-94.
plaintiff's "Shelly" arguments and held instead that the state decision involved only the construction of a local contract under local law, presenting no substantial federal question, and affirmed the California Supreme Court's ruling. In a vociferous dissent, concurred in by Chief Justice Warren and Justice Black, Justice Douglas stated that the principle of Shelley v. Kraemer should apply, chiding the majority for "sanction[ing] a flagrant violation of the First Amendment...[by] allow[ing] California acting through her highest court to sustain [the plaintiff's] discharge because of her belief."

In subsequent cases the Supreme Court has also declined to apply the Shelley rationale, although applicable, where an alternative means existed for reaching the same result. This disinclination to use the Shelley decision is demonstrated by the famous "sit-in" cases of the 1960s, Peterson v. Greenville; Lombard v. Louisiana.

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333. Id. at 297-98.
334. Id. at 304 (Brennan, J., dissenting) (joined by Douglas, Jr. and Warren, C.J. concurring). Arguing that the majority's treatment of the problem as one of private contract under local law was wrong when government, through its judicial branch, gives effect to the contract, Justice Brennan wrote:

The Court says that the parties to a collective-bargaining agreement may make Communist Party membership "just cause" for discharge of an employee, that discharge for that reason is merely a matter of contract between the union on the one hand and the employer on the other, and that when the contract is enforced no federal right is infringed. I disagree with that doctrine. It is a dangerous innovation to meet the exigencies of the present case. It violates First Amendment guarantees of citizens who are workers in our industrial plants.

Id. at 301. Justice Brennan explained his difficulty with the majority's position, offering the following hypothetical case:

A union enters into a collective-bargaining agreement with an employer that allows any employee who is a Republican to be discharged for "just cause." Employers can, of course, hire whom they choose, arranging for an all-Democratic labor force if they desire. But the courts may not be implicated in such a discriminatory scheme. Once the courts put their imprimatur on such a contract, government, speaking through the judicial branch, acts. Shelley v. Kraemer, [citation]; Barrows v. Jackson, [citation]. And it is governmental action that the Constitution controls. Certainly neither a State nor the Federal Government could adopt a political test for workers in defense plants or other factories. It is elementary that freedom of political thought is protected by the fourteenth amendment against interference by the States [citation omitted] and against federal regimentation by the first amendment.

Government may not favor one political group over another. Government may not disqualify one political group from employment. And if the courts lend their support to any such discriminatory program, Shelley v. Kraemer teaches that the Government has thrown its weight behind an unconstitutional scheme to discriminate against citizens by reason of their political ideology. That cannot be done in America, unless we forsake our Bill of Rights.

Id. at 301-02 (footnote omitted).

335. 373 U.S. 244 (1963).
ana;336 and Robinson v. Florida.337 Typically the "sit-in" cases involved peaceful protesters who, seeking access to goods and services in privately owned and operated business which segregated its customers based on race and denied complete accommodation to racial minorities, protested by refusing to leave the discriminatory establishment.338 The protesters were subsequently arrested, charged, and tried under the state's trespass laws.339 In each of these cases, the applicability of the Shelley analysis—judicial enforcement of segregation through use of the trespass laws constitutes state action340—was clear;341 however, the Court avoided any holding based on Shelley and instead reversed the convictions by relying on evidence of state compelled segregation342 or upon the position that the trespass laws were void for vagueness under the due process clause.343

Commentators view the Court's unwillingness to use the Shelley holding in the sit-in cases as the rule of decision and the Court's willingness to distinguish the Shelley holding in other cases as indicating that the Shelley decision does not hold that the challenged activity automatically becomes state action for constitutional purposes when the court's authority is used to enforce it.344 However, the commentators are unable to agree on when judicial resolution of private rights gives rise to state action.345 A wealth of

336. 373 U.S. 267 (1963); see supra notes 291-93 and accompanying text discussing the Lombard holding.
337. 378 U.S. 153 (1964); see also Bouie v. City of Columbia, 378 U.S. 347 (1964); and cases cited in Silard, supra note 297, at 861 n.27.
338. Peterson, 373 U.S. at 245; Lombard, 373 U.S. at 289; and Robinson, 378 U.S. at 154-55.
339. Id.
340. See supra notes 312-19 and accompanying text.
341. This is noted by Silard, supra note 297, at 859-67; and Note, State Action, supra note 235 at 679.
342. Peterson, 373 U.S. at 247-48; Lombard, 373 U.S. 273-74; Robinson, 378 U.S. at 156; and cases cited by Silard, supra note 297, at 861 n.27.
344. See supra notes 322-43 and accompanying text. See infra note 345.
345. Compare Van Alstyne & Karst, State Action, 14 STAN. L. REV. 3, 44-45 (1961) (State action analysis which distinguishes between state coercion and active encouragement is untenable); Williams, Mulkey v. Reitman and State Action, 14 U.C.L.A. L. REV. 26 (1966); Henkin, Notes for a Revised Opinion, supra note 320, at 496 ("Generally, the equal protection clause precludes state enforcement of private discrimination. There is, however, a small area of liberty favored by the Constitution even over claims to equality. Rights of liberty and property, of privacy and voluntary association, must be balanced, in close cases, against the right not to have the state enforce discrimination against the victim"); Gilbert, Theories of State Action as Applied to the "Sit-In" Cases, 17 ARK. L. REV. 147, 161 (disagreeing with Henkin, supra); Horwitz, Fourteenth Amendment Aspects of Racial Dis-
commentary on the Shelley decision exists, but there is no consensus on the scope of or application of the holding. The Supreme Court has offered no concrete guidance in the area either, failing to seize opportunities to reconsider or clarify its holding. Thus the "highly problematic" decision in Shelley v. Kraemer remains as "portentous" as ever.

In the drug screening context, one commentator suggests that the Supreme Court's decision in Shelley offers some hope of access to constitutional protection to the private employee, for "the decision and its logical implications . . . demonstrate that when private conduct flagrantly abuses the constitutional rights of individuals, the Court can and will find ways to circumvent the state action requirement."

A review of the Shelley decision and subsequent decisions proves that this observation is perhaps overly optimistic for several reasons. First, it has been at least three decades since the Supreme Court has expressly used the Shelley ruling to find state action under a judicial enforcement analysis. During this period, the

346. See supra note 345; Note, State Action, supra note 235 at 679-80.

347. See Note, State Action, supra note 235 at 680; Lewis, supra note 320, at 1109 (Shelley v. Kraemer, and its companion cases may represent the greatest expansion of the state action concept yet to occur, or they may make no more than a crack capable at most of spreading slowly as pressure increases); Henkin, Notes for a Revised Opinion, supra note 320, at 474 ("Today, fourteen years later, Shelley v. Kraemer still weighs on critical spirits. The Court has not seized opportunities to reconsider or qualify). To professional critics of the Court's work, the case has become a citation for inadequacy in the exercise of judicial function in constitutional cases. See, e.g., Wechsler, supra note 320 at 29.

348. Note, State Action, supra note 235 at 680 ("But [limitations on the Shelley rationale] have not yet been articulated adequately, and until they are, the doctrine known as judicial enforcement will remain highly problematic").

349. See Henkins, Notes for a Revised Opinion, supra note 320, at 473 (stating that at the time it was rendered, Shelley v. Kraemer was a "portentous decision" for the constitutional lawyer).

350. BNA Special Report, supra note 8, at 50 (adopting an article by Alfred Klein, a Los Angeles-based management attorney and former senior attorney for Atlantic Richfield Company).

351. This author has been unable to locate a United States Supreme Court decision
Court has expressly refused to apply the *Shelley* decision\(^{352}\) or has evaded the *Shelley* ruling and achieved the desired result under a more conventional analysis.\(^{353}\) It is uncertain, at best, that the Court will blow the dust off of *Shelley v. Kraemer* to find state action in drug screening programs conducted by private-sector employers, when it refused to apply a *Shelley* analysis in 1970 when first amendment rights were arguably at stake.\(^{354}\)

Second, in the single case in which the Supreme Court was urged to apply the *Shelley* rationale in an employment context to find state action where the state court upheld the plaintiff's discharge based upon her communist affiliations, the Court, in *Black v. Cutter Laboratories*, flatly refused.\(^{355}\) The Court characterized the plaintiff's entire claim as based solely on local contract law with no constitutional implications.\(^{356}\) Although Justice Brennan's dissent in *Black* is persuasive,\(^{357}\) in order for the private-sector employee to convince the Court to reject the majority's holding in *Black* in favor of a *Shelley* analysis, he will have to contend with the hoary principle of *stare decisis*\(^{358}\) first.

Third, if the private-sector employee wishes to enjoin his employer from implementing a drug screening program, *Shelley* may be of little use. Since the rationale behind the *Shelley* decision is that judicial enforcement of private activity lends state sanction to the activity, encouraging similar conduct in the future,\(^{359}\) it appears that the employer could not invoke the *Shelley* rationale to prevent implementation of a drug screening program. Rather, the

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\(^{352}\) See supra notes 322-26 and accompanying text.

\(^{353}\) See supra notes 327-43 and accompanying text.

\(^{354}\) See *Black v. Cutter Labs*, 351 U.S. 292 (1956); see supra notes 327-34 and accompanying text.

\(^{355}\) Id.

\(^{356}\) Id.

\(^{357}\) 351 U.S. at 304 (Brennan, J., dissenting) (joined by Douglas, Jr. and Warren, C.J. concurring), see supra note 338 and accompanying text.

\(^{358}\) The doctrine of *stare decisis* refers to the policy that when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same, regardless of whether the parties or property is the same. It is grounded on the theory that security and certainty require that an accepted and established legal principle, under which rights may accrue be recognized and followed. Black's Law Dictionary 1261 (5th ed. 1979).

\(^{359}\) See notes 312-19 and accompanying text. It is uncertain whether the Courts would be willing to extend the judicial enforcement concept to encompass actions for declaratory judgment.
employee would have to wait until after the program has been implemented, the employer has taken some adverse action based on test results or a refusal to take the test, and this adverse action has been contested and resolved in the state court system.

6. Joint Contact—“Symbiotic Relationships”

There is a body of case law under state action analysis in which otherwise private actors, who have multiple or joint physical and economic contacts to the government, have been found to have sufficient state action to subject them to constitutional restraints even though no single factor, standing alone, warranted a finding of government responsibility for their activities. In the “symbiotic relationship” cases, the court endeavors to ascertain the true significance of state involvement in private activity by taking into account the variety of connections between the private actor under all the facts and circumstances of the individual case. When the private actor becomes so entwined with the government that his actions appear to have the authorization of the state, the Supreme Court has found state action in the private activities and subjected them to constitutional review.

The classic “joint contact-symbiotic relationship” case is Burton v. Wilmington Parking Authority. In Burton, the Supreme Court held that a privately owned restaurant which leased space in a government parking facility was subject to the restrictions of the fourteenth amendment and, therefore, could not refuse service to racial minorities. The Supreme Court began its analysis with the recognition that fashioning and applying a precise formula for state action is an “impossible task.” Then in an oft-quoted passage, Justice Clark, writing for the majority, stated: “Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true


361. Professor Nowak borrows this terminology from the Burton opinion, 365 U.S. at 725. NOWAK, supra note 231, at 516.

362. Id.


364. Id. at 725.

365. Id. at 722.
significance." 367

Justice Clark then enumerated a list of facts which the majority considered relevant in reaching its decision in Burton: The Wilmington Parking Authority constructed the public parking facility, which included lease spaces for suitable business enterprises.368 The rental income from these spaces was to make the facility self-supporting since it was not expected that the parking revenues would be adequate for this purpose.369 The land and the facility were publicly owned, and as an entity, the building was dedicated to "public uses." 370 The cost of the land, acquisition, construction and maintenance of the building was subsidized entirely by the City of Wilmington from public funds as well as the parking service revenues and the space rental fees.371

Justice Clark pointed out that the defendant, Eagle Coffee Shop, Inc., leased, for twenty years, one of the business spaces for use as a restaurant372 under a lease with the Parking Authority which contained no provision requiring the nondiscriminatory provision of services to the general public,373 although, noted the Court, the Parking Authority certainly had the authority to adopt such rules.374 The Burton Court considered important the tax exempt benefits conferred upon the restaurant owner as the result of the lease with the Parking Authority, and the convenient parking facilities available to the restaurant's customers.375 The Court also found important the restaurant's allegation that serving Negroes would injure its business, concluding that the restaurant's profits earned by discrimination enured to the benefit of the Parking Authority, becoming an "indispensable element in . . . the financial success of [the] governmental agency." 376

Reviewing its list of relevant contacts, the Supreme Court ruled that, although there was no single factor which indicated the presence of state action in the discriminatory operation of the restaurant, the totality of the circumstances indicated the " . . . State [had] so far insinuated iself into a position of interdependence

367. Id.
368. Id. at 723-724.
369. Id.
370. Id. at 723.
371. Id. at 724.
372. Id.
373. Id. at 719.
374. Id. at 720.
375. Id. at 724.
376. Id.
with the restaurant that it must be recognized as a joint participant in the challenged activity." 377 According to the Burton Court, this joint participation in the challenged activity brought the otherwise private activity squarely within the constitutional restrictions of the fourth amendment. 378

The joint contact-symbiotic relationship analysis may prove useful to the private-sector employee seeking to qualify his employer's drug screening practices as state action, in as much as it provides authority for the court to consider the totality of the circumstances when addressing the state action issue. 379 Burton teaches that while no one factor may be sufficient to justify a finding of state action, the sum of all of the factors may establish a sufficient degree of governmental entanglement with the private actor to constitute state action, thereby subjecting the private conduct to constitutional restrictions. 380 As indicated in earlier sections, making out a persuasive case for state action in the private employment drug screening context will most likely be very difficult under a straight power grant, 381 government aid, 382 government regulation 383 or government agency theory. 384 After Burton, however, the court may weigh all of these factors together and possibly tip the judicial balance in favor of a finding of state action. 385

Despite the advantages under the joint contact-symbiotic relationship analysis, the private employee should not be misled by Professor Nowak's characterization of this approach as a "catch all" 386 category. The Supreme Court never suggested in Burton that the "sifting and weighing" process was a pot luck analysis, merely counting contacts without considering the relevance of each contact to the ultimate issue of government entanglement in private activity. The list of factors in Burton which the Court considered crucial in resolving the state action 387 clearly indicates that only facts which are material and relevant to the issue of govern-

377. Id. at 725.
378. Id.
380. See NOWAK, supra note 231, Ch. 14 § IV, at 517.
381. See supra text accompanying notes 251-52.
382. See supra text accompanying notes 267-68.
383. See supra text accompanying notes 280-82.
384. See supra text accompanying notes 295-306.
385. See supra text accompanying notes 366-78.
386. See NOWAK, supra note 231, at 516 ("This category is, in reality, a "catch all ...").
387. See supra notes 368-76 and accompanying text.
ment entanglement are considered; inconsequential and insignificant facts are ignored. Thus, while the private employee is afforded some analytical flexibility under the joint contact-symbiotic relationship analysis, he must still demonstrate that his employer has multiple or joint contacts to the government that so entwine the government and the employer that they can be said to be in a "symbiotic relationship," or that the employer's actions "appear to have the authorization of the state."

B. **Private Performance of Public Duties—The Public Function Exception to State Action**

Even absent formal government involvement, when private persons perform functions that are usually conducted by the state, their actions may be subjected to constitutional limitations under the public function test. Before the Burger Court era, the Supreme Court found state action in public function cases involving primary elections conducted by private individuals, a company

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388. *Id.*

389. See supra notes 377-78; NOWAK, supra note 231, Ch. 14 § IV, at 516-17.

390. *Evans v. Newton*, 382 U.S. 296 (1966): "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Id.* at 299.

See TRIBE, supra note 324, § 18-5 at 1163-71; NOWAK, supra note 231, Ch. 14 § II at 502-508. When a private actor assumes the role of the state, the public function doctrine subjects the individual to the constitutional limitations imposed on the state. *Id.* Professor Tribe stated that actions of seemingly private actors may be "inherently governmental, and thus subject to constitutional limitation," even if the state is not directly responsible for the actions challenged. TRIBE, supra note 234, at 1163 (footnote omitted).

391. See *Terry v. Adams*, 345 U.S. 461, 473 (1953). In *Terry*, the Court reviewed a practice of the "Jay Bird Democratic Association" which was composed of supposedly voluntary clubs of white democrats in Texas. *Id.* at 463. These clubs held their own private elections of nominees who then ran in the democratic primaries in Texas—usually unopposed. *Id.* In this case the Supreme Court held that these pre-primary elections were subject to the restrictions of the Fifteenth Amendment even though there had been a "complete absence" of formal state connection to any of the activities of the political clubs. *Id.* at 469. There was no majority opinion in this case but the justices seemed to agree that the relationship between the club practices and electoral system constituted the delegation of a public function to this group so as to subject it to the fifteenth amendment. *Id.* at 469. See generally, Chambers & Rotunda, *Reform of the Presidential Nominating Conventions*, 56 VA. L. REV. 179, 194-96 (1970). Black, speaking with two other Justices, Douglas and Burton, emphasized that "[t]he Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern the county," *id.* at 469, and concluded that "[t]he Jaybird Party thus brings into being and holds precisely the kind of election that the Fifteenth Amendment seeks to prevent." *Id.* Justice Clark's opinion, concurred in by three other members of the Court, Chief Justice Vinson and Justices Reed and Jackson, found the Jaybirds "part and parcel" of the Democratic
owned town, \textsuperscript{392} privately owned shopping centers, \textsuperscript{393} and a privately owned park. \textsuperscript{394} In recent years, the public function doctrine has been said to be a "slender analytical reed" \textsuperscript{395} for plaintiffs to lean upon. The Burger Court has rejected public function arguments in cases involving shopping centers, \textsuperscript{396} a television station, \textsuperscript{397} the Jaybird Democratic Association is the decisive power in the county's recognized electoral process . . . . Consonant with the broad and lofty aims of its Framers, the Fifteenth Amendment, as the Fourteenth, "refers to exertions of state power in all forms." \textit{Id.} at 484. Justice Frankfurter noted that while the state had taken no positive action it had abdicated its responsibility of insuring a racially neutral election system and that this abdication was the basis for subjecting the club to the restrictions of the fifteenth amendment. \textit{Id.} at 477 (Frankfurter, J. concurring).

\textit{See also Smith v. Allwright}, 321 U.S. 649, 663 (1944) (exclusion of blacks from convention unconstitutional); \textit{Nixon v. Condon}, 286 U.S. 73, 88-89 (1932) (exclusion of blacks from primary unconstitutional). These decisions are traditionally called the "white primary" cases and arose from attempts by white political groups to exclude blacks from voting in primary elections in Texas.


394. \textit{See Evans v. Newton}, 382 U.S. 296, 299 (1966). Evans involved a scheme by private individuals who attempted to prohibit blacks from using a park. \textit{Id.} at 297. The decision of the Court seemed to center on the entanglement between the city government and the operation of the park. \textit{Id.} at 301-02. However, the opinion indicated that the park could not be operated on a racially restricted basis even if the city managed to sever all of its ties to the operation of the facilities. \textit{Id.} at 301. The majority opinion by Justice Douglas implied that the operation of the park was an essential municipal function which could not be delegated to private persons so as to avoid the restrictions of the Fourteenth Amendment. \textit{Id.} at 301-02. Justice Douglas stated that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." \textit{Id.} at 299.

Having concluded that schools could not consistently be excluded if properties used as "parks" were included, Justice Harlan expressed in his \textit{Evans} dissent fear that "this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies and a host of other functions commonly regarded as non-governmental though paralleling fields of government activity . . . ." \textit{Id.} at 321 (Harlan, J., dissenting).


396. \textit{See Hudgens v. NLRB}, 424 U.S. 507, 521 (1976) (warehouse employees had no first amendment right to strike employer at retail shopping center); \textit{Lloyd Corp. v. Tanner}, 407 U.S. 551, 570 (1972) (anti-war demonstrators had no right to protest at shopping
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a public utility,\textsuperscript{398} private dispute resolution,\textsuperscript{399} and, most recently, a private hospital\textsuperscript{400} and a private school.\textsuperscript{401}

One of the early cases where state action was found, \textit{Marsh v. Alabama},\textsuperscript{402} has been called the strongest statement of the public function doctrine.\textsuperscript{403} This case involved a "company town" which was a privately owned area encompassing both residential and commercial districts.\textsuperscript{404} The Gulf Shipbuilding Corporation owned and governed this area but it had no formal ties to any state agency or authority.\textsuperscript{405} Agents of the corporation had ordered a Jehovah Witness to leave the privately owned business district and to refrain from distributing religious leaflets within the boundaries of the company town.\textsuperscript{406} If the order were valid it would have subjected the leafletter to conviction under state trespass laws for her refusal to leave the area or stop distributing the literature.\textsuperscript{407} The issue before the Court was whether the first and fourteenth amendment restrictions safeguarding free speech were applicable to the corporation making its order invalid.\textsuperscript{408} A majority of the justices, in an opinion by Justice Black, held that the company town was subjected to the limitations of the first and fourteenth amendments and that the individual had a right to distribute her leaflets within the town.\textsuperscript{409}

The Court's decision in \textit{Marsh} focused on the fact that the state allowed private ownership of land and property to a degree which

\begin{thebibliography}{409}
\bibitem{397} C.B.S. \textit{v. Democratic Nat'l Comm.}, 412 U.S. 94, 119 (1973) (no state action where licensed television network refused to accept political advertisement).
\bibitem{400} \textit{Blum v. Yaretsy}, 102 S.Ct. 2777, 2790 (1982) (no state action where private hospital transferred Medicaid patients without notice or hearing). See infra text accompanying notes 428-34.
\bibitem{402} 326 U.S. 496 (1946).
\bibitem{403} NOWAK, \textit{supra} note 231, Ch. 14 § II, at 503.
\bibitem{404} 326 U.S. at 502.
\bibitem{405} \textit{Id.} at 505-506.
\bibitem{406} \textit{Id.} at 503.
\bibitem{407} \textit{Id.} at 503-504.
\bibitem{408} \textit{Id.} at 505.
\bibitem{409} \textit{Id.} at 508-09.
\end{thebibliography}
allowed this corporation to replace all of the functions and activities which would normally belong to a city: “the town of Chickasaw does not function differently from any other town.” Because the privately owned business area served as the equivalent of a community shopping district in a normal city, the Court concluded that the first amendment applied with equal force to the corporation’s activities.

The Supreme Court’s decision in *Amalgamated Food Employees v. Logan Valley Plaza* conferred an even broader scope of application to the public function analysis. In *Logan Valley*, the Court held that a large shopping center could not prohibit picketing by non-employee union organizers addressed to the employees and patrons of a store in the center, that hired non-union personnel and paid non-union wages. The central issue in the case was whether the operation of a privately owned shopping center was a public function for purposes of the fourth amendment. In resolving this issue, the Court relied on *Marsh* and concluded that the shopping center was the “functional equivalent” of a company town, and required no further contact between the state and the shopping center to establish the applicability of the fourth amendment.

The Court withdrew from an expansive public function test in *Jackson v. Metropolitan Edison Company*, a case which some commentators contend severely weakened, if not eliminated, the

410. *Id.* at 508.
411. *Id.* In reaching this decision, the Court declared in *Marsh*: “[t]he managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees . . . ” *Id.*
413. *Id.* at 319-20. “The state may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner . . . consonant with the use to which the property is actually put.” *Id.*
415. 391 U.S. at 318. But see *id.* at 330-33 (Black, J. dissenting) (questioning the logic of the majority’s analogy to the company town in *Marsh*).
416. *Id.* In the final analysis the Court concluded that the first amendment protected the peaceful picketing in the *Logan Valley* case reasoning that

[B]ecause the shopping center serves as the community business block” and is freely accessible and open to the people in the area and those passing through” the State may not delegate the power, through the use of its trespass laws, wholly to exclude these members of the public wishing to exercise their First Amendment rights on the premises in a manner for a purpose generally consonant with the use to which the property is actually put.

*Id.* at 319-20.
public function test. In Jackson, the Court found no state action where a privately owned monopolistic utility company terminated electrical service to one of its customers without a hearing. In claiming that the utility company performed a public function, the petitioner argued that the Commonwealth of Pennsylvania approved of the company’s termination procedures by issuing the company a certificate of public convenience empowering it to deliver electricity. As a condition of this grant of power, Metropolitan Edison Company was subject to heavy regulation by the state. The petitioner also argued that the company’s monopoly status was indicative of its role as a public functionary.

Justice Rehnquist, writing for the majority, conceded that these factors could be indicative of state action, but nevertheless rejected petitioner’s arguments stating that there was not “a sufficiently close nexus between the state and the challenged action of the regulated entity so that the latter may be fairly treated as the state itself.” In addition, the Court distinguished the utility company from entities discussed in prior public function cases by noting that the company was not exercising a function “traditionally associated with sovereignty.” The Court declined to expand the public function test, insisting that it only applies to “private action which is traditionally the exclusive prerogative of the state.”

418. See, e.g., NOWAK, supra note 231, at 506 (after Jackson, few public functions will be found beyond essential governmental services without counterpart in private sector); Comment, Public Utilities—State Action and Informal Due Process After Jackson, 53 N.C.L. REV. 817, 824 (1975) (Jackson formulates new public function doctrine).

419. Jackson, 419 U.S. at 358-59. The facts of this case arose from a series of unresolved allegations stemming from the non-payment of utility bills which were allegedly not received by the delinquent consumer. Id. at 347.

420. Id. at 347-48. Pursuant to Pennsylvania law, Metropolitan Edison Company was required to file a general tariff with the state before receiving a certificate of public convenience. Id. at 346. Metropolitan’s tariff which did not have a hearing provision, stated in pertinent part: “Cause for discontinuance of service—Company reserves right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill. . . .” Id. at 346 n.1.

421. Id. at 346.

422. Id. at 351.

423. Id. at 350-51. “It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be ‘state’ acts than will the acts of an entity lacking these characteristics.” Id.

424. Id. at 351.

425. Id. at 353.

426. Id. The Court stated: “Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all
After *Jackson*, "it would appear that few public functions will be found beyond those most essential services which are provided by governments and which have no direct counterpart in the private sector."\footnote{427}

Subsequent decisions in this area would reinforce this prediction. In *Blum v. Yaretsky*,\footnote{428} the Court found no state action when Medicaid patients in private nursing homes were transferred or discharged without notice or an opportunity for a hearing.\footnote{429} The patients argued that since the Medicaid statute\footnote{430} and the New York Constitution\footnote{431} made the state responsible for providing every Medicaid patient with nursing home services and the State delegated this duty to the hospital, then the hospital was performing a public function.\footnote{432} Justice Rehnquist, writing for the majority, summarily rejected this argument,\footnote{433} stating that the nursing homes were not performing a function that was "traditionally the exclusive prerogative of the state."\footnote{434} The fate of the public function doctrine was certain after the Court's decision in *Rendell-Baker v. Kohn*.\footnote{435} The issue in *Rendell-Baker* was whether the state had delegated its statutory duty\footnote{436} to provide free public education for all students, including those with special educational needs.\footnote{437} The majority, in an opin-

\begin{footnotes}
427. NOWAK, *supra* note 231, at 506.
429. *Id.* at 1011.
431. N.Y. Const. art. XVII, §§ 1, 3.
432. *Blum*, 457 U.S. at 1010.
433. *Id.*
434. *Id.* (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 343 (1974)). In a dissenting opinion, Justice Brennan argued that the nursing homes were performing a public function vis-à-vis the patients. *Id.* at 1028 (Brennan, J., dissenting). Justice Brennan stated that "[w]ithin that environment, the nursing home operator is the immediate authority, the provider of food, clothing, shelter, and health care, and in every significant respect, the functional equivalent of a State." *Id.*
435. 457 U.S. 830.
436. Under Chapter 766, Mass. Gen. Laws Ann. ch. 71B §§ 1-14 (West 1982), Massachusetts is obligated to provide free public education to all students, including those with special needs.
437. 457 U.S. at 831. Chief Justice Burger framed the issue to be "whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under color of law when it discharged certain employees." *Id.*
ion by Chief Justice Burger, stated that while "there can be no doubt that the education of maladjusted high school students is a public function," the question is not whether a private group is performing a public function, but whether the function performed was "traditionally the exclusive prerogative of the state."

Focusing on the "exclusivity" language of the public function test enunciated in Jackson, the Court pointed out that, while Chapter 766 of the Massachusetts Acts of 1972 demonstrated the State's intent to provide services for troubled high school students at public expense, the "legislative policy choice in no way makes these services the exclusive province of the state." The Court, therefore, refused to find state action.

Read together, the Supreme Court's decisions in Rendell-Baker, Blum, and Jackson mark a radical curtailment of public function analysis from earlier decisions. The Rendell-Baker and Blum rulings witness the Court's steadfast commitment

438. Justice White concurred in the judgment and filed a separate opinion. Id. at 843. Justice Brennan joined in Justice Marshall's dissent. Id. at 844.

439. Id. at 842.


441. 457 U.S. at 842.

442. Id. In reaching its decision, the Court declared:

[O]ur holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been "traditionally the exclusive prerogative of the State." [Citations to Jackson, supra, and Blum, supra omitted]. There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry.

Id. (emphasis in original).

In a harsh dissent, Justice Marshall insisted that the state should not be permitted to avoid its constitutional obligations simply by delegating its statutory duty to a private entity. Id. at 849. Justice Marshall criticized the majority's opinion as a "return to empty formalism in state action doctrine," id. at 852, and advocated a "more sensitive and flexible interpretation" of state action principles. Id.


446. See supra notes 402-16 and accompanying text.

This probably came as no surprise to the critics of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), including Justice Marshall, who predicted the demise of public function doctrine. Justice Marshall, in a harsh dissent to the Jackson decision, admonished the majority for adopting "a stance that is bound to lead to mischief when applied to problems beyond the narrow sphere of due process objections to utility terminations." 419 U.S. at 366 (Marshall, J., dissenting). See also NOWAK, supra note 231, Ch. 14 § II, at 506; J. CHOPER, Y. KAMISAR & L. TRIBE, The Supreme Court: Trends and Developments, 1978-1979, 270-71 (1979).
to a strict application of the rule announced in Jackson that the public function analysis applies only to "private action which is traditionally the exclusive prerogative of the state." Formerly persuasive arguments by commentators suggesting the extension of the state action doctrine to include large private corporations have been effectively foreclosed by the Court under a public function analysis, at least for the near future. At present,

447. See supra notes 428-34 for Blum and notes 435-42 for Rendell-Baker.

448. Jackson, 419 U.S. at 353; Rendell-Baker, 457 U.S. at 842.

449. Professor Wolfgang Friedmann argues that corporations, by asserting extensive power over individuals and the economic life of American society, perform as governmental institutions. Friedmann, Corporate Power, Government by Private Groups, and the Law, 57 COLUM. L. REV. 155, 176 (1957). The thrust of Friedmann's argument was as follows:

The corporate organizations of business and labor have long ceased to be private phenomena. That they have a direct and decisive impact on the social, economic, and political life of the nation is no longer a matter of argument. It is an undeniable fact of daily experience. The challenge to the contemporary lawyer is to translate the social transformation of these organizations from private associations to public organisms into legal terms.

Id. He continues, stating that in many ways, the large corporation exercises vast power over many people. Id. For example, businesses employ millions of the work force; they control the commercial lives of millions who are not their employees through standardized terms in contracts, prices of goods produced, tempo of production, and conditions of labor; they also control organs of the state through lobbying, through the election and policies of elected representatives, and through the mass media. Id. These factors place many big businesses in the role of government because they serve a public function. Id. at 177.

Another commentator adds that corporations are creatures of state law, which has ultimate responsibility for their existence. Hermann, Privacy, The Prospective Employee, and Employment Testing The Need to Restrict Polygraph & Personality Testing, 47 WASH. L. REV. 73, 141-142 (1971). In the modern economic structure, the state allows the corporation to meet economic needs, which are also a responsibility of government. Id. Because of the public function which they serve, the corporation should be held to the same Constitutional standards applicable to the state. Id.

According to Hermann:

The extensive body of statutory and administrative law dealing with labor, fair trade, consumer protection and licensing clearly shows state involvement in "private" activities. Moreover, governmental assis- tance in the form of contracts, grants and tariff protections, along with the subsidization of transpor- tation systems, postal ser- vices, and developmental research, all directly involve the government in business activities. Finally, state inaction in failing to alleviate the tremendous imbalance of power between corporate employers and prospective employees arguably violates the Fourteenth Amendment just as if affirmative state state intervention had produced the same situation. . . . All of these considerations support the conclusion that the invasion of privacy, self-incrimination, and unreasonable searches incident to pre-em- ployment polygraph and personality testing are prohibited even to private employers by the fourteenth amendment.

Id.

The late Adolf A. Berle argued for constitutional limitations on corporate activity in order to provide protection of personal rights from invasion through economic power. Berle, Constitutional Limitations on Corporate Activities - Protection of Personal Rights from invasion through Economic Power, 100 U. PA. L. REV. 933 (1952). Berle believed the modern
unless the private employee can demonstrate to the Court's satisfaction that the challenged activity is one which has been traditionally reserved to state authority or commonly associated with state sovereignty, he will not succeed in having his employer's conduct held to constitutional scrutiny under a public function analysis. While the operation of an electoral system or a company town will constitute such functions, private enterprise will not.

The state has ultimate responsibility for the national economy and that one of the devices developed for meeting these economic needs was the corporation. American corporations, Berle observed, are theoretically subject to formal (although in effect nominal) control by the law of the state in which they are incorporated, which is generally exercised, along with federal authority, when conditions become unsatisfactory. Noting that a broad area of concern is the relationship between corporations and the individuals with which they deal, Berle viewed this area as a "field of growing law" where there "is the tendency to give specific constitutional or legal protection by individuals in their dealings with private units wielding great economic power." Id. at 942. This translation of constitutional law from the field of political to the field of economic rights rests on two premises: that the state has created the corporation and that the corporation now has economic power. It is the abuse of that power which brings the constitutional protections of the individual into play. Id. at 942-43. Berle argued that a private corporation is performing a "public function," and it should therefore be held to the constitutional standards that apply against the state itself. Id. at 948-49. Berle cites at this stage of his thesis Marsh v. Alabama, 326 U.S. 501 (1946).

The foregoing analyses are persuasive, and a reasonable approach which may have succeeded in the courts. Cf. Wellington, The Constitution, The Labor Union, and "Government Action", 70 YALE L. J. 345 (1961). In his article Wellington asserts:

Undue fascination with the supposed structural and power similarities unions and corporations have with government can be misleading . . . some commentators are motivated by an undisciplined desire to "let the mind be bold." This sort of thinking deserves little sympathy. The Bill of Rights and the fourteenth amendment are the great instruments with which courts protect the people from misused governmental power. The view that because unions and corporations are somehow similar to government they too should be restrained by these same constitutional provisions has perhaps an aesthetic and emotional appeal. Its analytical shortcomings, however, are fatal. The need to regulate unions and corporates is undeniable; but it need not be assumed a priority that the Constitution is the proper regulatory instrument. Other, more appropriate, means may be available to accomplish the same desirable ends. Id. at 348 (emphasis added). Wellington suggests regulatory legislation to cope with employer and union abuses rather than the acceptance of the "state action" notion as applied to corporations and unions. Id.

With the strict formulation of the public function test recently adopted by the Court in

Jackson, 419 U.S. at 353, and affirmed in its progeny, see supra notes 443-472 and accompanying text, it seems highly unlikely that the "corporation as state" argument would be countenanced by the Court.

450. Jackson, 419 U.S. at 353; Blum, 457 U.S. at 1010; Rendell-Baker, 457 U.S. 830. See also supra notes 426, 434, 441 and accompanying text.


The Rendell-Baker ruling presents another potential impediment to a private-sector employee claiming state action, as a result of the Court's disposition of the plaintiff's argument under the symbiotic relationship analysis announced in Burton. Addressing the plaintiff's argument under Burton, the Court began by observing that their decision in Burton hinged upon several crucial facts: that the restaurant was located on public property, the restaurant's rent contributed to the support of the public garage and that the State profited from the restaurant's discriminatory conduct. Finding none of these factors in the present case, the Court found no symbiotic relationship as existed in Burton. The majority in Rendell-Baker ignored the "sifting and weighing of circumstances" analysis set forth in Burton and dismissed the argument solely on the finding that the school's relationship with the State was a purely contractual one, not fundamentally different from a contract between the government and a company which, for example, builds submarines.

457. Id.

The question whether such a relationship exists "can be determined only in the framework of the peculiar facts or circumstances present." [Citation to Burton omitted.] Here, an examination of the facts and circumstances leads inexorably to the conclusion that the actions of the New Perspectives School should be attributed to the State; . . .

The majority argues that the fact that the school receives almost all of its funds from the State is not enough, by itself, to justify a finding of state action. It also contends that the fact that the school is closely supervised and heavily regulated is not enough, by itself, to justify such a finding. Ante, at 840-842, 73 L.Ed.2d, at 427-428. I am in general agreement with both propositions. However, when these two factors are present in the same case, and when other indicia of state action are also present, a finding of state action may very well be justified. By analyzing the various indicia of state action separately, without considering their cumulative impact, the majority commits a fundamental error. See also ante, at 842-843, 73 L.Ed.2d, at 428-429.

457 U.S. at 847-48 and n.1.
459. Id. at 843. The majority in Rendell-Baker declared: "Here the school's fiscal relationship with the State is not different from that of many contractors performing services for the government."

Earlier in the opinion the majority wrote:

The school, like the nursing homes [in Blum v. Yaretsky, supra], is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts
If the ruling in *Rendell-Baker* on the symbiotic relationship is indicative of the Court's perception of how the *Burton* analysis is to be applied in a given case, much of the private employee's analytical freedom under the analysis is lost. The majority's apparent requirement in *Rendell-Baker* that some distinct financial benefit enure to the State as a result of the challenged activity, would present considerable difficulty to the private employee arguing that his employer's drug screening policies amount to state action. While the State may be given the satisfaction of a drug-free workplace, it seems unlikely that the employer's drug screening activities would fill the State's coffers—at least directly. If the *Rendell-Baker* decision signals an emphasis on financial benefit to the State, then the private employee's *Burton* argument in a drug screening context is substantially debilitated, for the most persuasive factors in this context would most likely be government aid, regulation and agency.

C. Current State Action Doctrine Will Prevent the Majority of Private-Sector Employees from Subjecting Their Employers' Drug Screening Practices to Constitutional Scrutiny

As the foregoing examination indicates, the various analytical approaches to finding a sufficient nexus between the government, state or federal, and the private actor have been sharply limited by the Supreme Court.

In the area of government involvement, the power grant theory has been successful only in instances of legislative enactments or constitutional provisions expanding, enhancing, or protecting common law rights of the private actor. Current government-aid analysis requires the aid to be “sufficiently connected” to the chal-

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Id. at 840-41.

460. *See supra* text accompanying notes 379-89.

461. *See supra* note 456 and accompanying text.

462. Arguably an employer's anti-drug abuse efforts in the workplace could indirectly save the state considerable sums of money by reducing the need for massive government subsidy to drug treatment and rehabilitation programs and clinics, by spreading the cost of the anti-drug campaign process among the private sector, and reducing the need for beefed-up police forces to combat drug abuse in the streets— to name a few potential savings.

463. *See supra* notes 243-52 and accompanying text.

464. *See supra* note 282 and accompanying text.

465. *See supra* note 306 and accompanying text.

466. *See infra* notes 467-76 and accompanying text.

467. *See supra* notes 251-52 and accompanying text.
lenged private activity - general grants of aid will not suffice.\textsuperscript{468} Recent decisions of the Court have virtually eliminated government regulation arguments to the extent that the regulation does not command, directly encourage or sanction the challenged private conduct.\textsuperscript{469} Government "agency" analysis, to the extent that it exists as a separate inquiry,\textsuperscript{470} remains uncertain on critical points such as the level of encouragement and the nature of private motives necessary to create state action.\textsuperscript{471} Finally, the judicial enforcement analysis has a dubious existence; commentators cannot agree on its meaning or application;\textsuperscript{472} and the Court has not used it in years.\textsuperscript{473}

In the area of private assumption of public functions, the Court has recently curtailed the earlier expansive application of the test\textsuperscript{474} and has ruled that it will be applied only to situations in which the challenged private activity has been "traditionally the exclusive prerogative of the state,"\textsuperscript{475} with special emphasis on "exclusivity."\textsuperscript{476}

As a result of these restrictions placed on the concept of state action, the vast majority of private-sector employees will be unable to rely on federal constitutional safeguards to protect them from the private-sector employers' drug screening practices.\textsuperscript{477} Instead, private sector employees will have to resort to collective bargaining agreements,\textsuperscript{478} if they are unionized, and if they are not, they will have to look to state constitutional,\textsuperscript{479} statutory\textsuperscript{480} or common law\textsuperscript{481} for protection.

Although technically, federal constitutional restrictions do not apply to private employers, given the novelty and complexity of the drug screening issue,\textsuperscript{482} courts and arbitrators can be expected

\textsuperscript{468.} See supra notes 257-68 and accompanying text.
\textsuperscript{469.} See supra notes 273-282 and accompanying text.
\textsuperscript{470.} See supra note 295 and accompanying text.
\textsuperscript{471.} See supra text accompanying notes 296-306.
\textsuperscript{472.} See supra text accompanying notes 352-58.
\textsuperscript{473.} Id.
\textsuperscript{474.} See infra notes 417-48 and accompanying text.
\textsuperscript{475.} See supra notes 426, 434, 441 and accompanying text.
\textsuperscript{476.} Id.
\textsuperscript{477.} Although there may be some hope under the "symbiotic relationship" test. See supra notes 360-89, 454-65 and accompanying text.
\textsuperscript{478.} See infra text accompanying notes 1440-1871.
\textsuperscript{479.} See infra text accompanying notes 1890-98.
\textsuperscript{480.} Id. See also text accompanying notes 2016-73 for a discussion of state and local legislation specifically directed at regulating employment drug screening.
\textsuperscript{481.} See infra notes 1899-1989 and accompanying text.
\textsuperscript{482.} As Robert W. Taggart, spokesman for Southern Pacific Transportation Company,
to be strongly influenced by the decisional law interpreting these restrictions when evaluating private-sector employer policies and practices. Thus, the discussion of the emerging standards for drug screening in public-sector employment which follows takes on additional significance.

IV. TESTING THE LEGALITY OF DRUG TESTING IN PUBLIC-SECTOR EMPLOYMENT—A SEARCH FOR CONSTITUTIONAL STANDARDS

The conflict between competing interests of employer and employee in the public-sector concerning drug screening has generated legal challenges to the employer’s use of urinalysis in the workplace which have centered in four areas of constitutional law: the fourth amendment right to be free from unreasonable searches and seizures, the fourteenth amendment right to due process of the law, the general constitutional right of privacy, and denial of the fourteenth amendment right to equal protection of the law. The following section will examine the legal bases of, and the judicial response to, these challenges.

aptly described the current struggle in society to find a common ground on drug testing in employment: “We’re all groping in the dark because its so new.” NLJ, Drug Testing, supra note 22 at 24.

483. The public sector cases decided under constitutional principles are relevant to private sector employers for a number of reasons. First, the decisions represent the bulk of the decided cases in the area and are likely to be relied upon as authority in private sector cases. Since the fourth amendment, for example, protects individuals against governmental invasion of their “reasonable expectation of privacy” these cases may be especially relevant to private sector challenges to drug testing programs based on the tort of intrusion. Second, the public sector cases are relevant in arbitration since some arbitrators will provide workers protection similar to that provided by the fourth amendment. See, e.g., Dow Chemical Co., 65 Lab. Arb. (BNA) 1295, 1298 (1976) (Lipson, Arb.) (“rights to privacy and personal dignity are so fundamentally a part of the American tradition that they should at least be given consideration by a labor arbitrator in passing on search problems in plants”).

Similarly, workplace due process issues, such as “fair notice,” often parallel, in arbitration, the requirements of the Due Process Clauses of the fifth and fourteenth amendments. See, e.g., Faygo Beverage, Inc., 86-1 Lab. Arb. Awards (CCH) ¶ 8302 (Feldman, 1986) (company cannot discharge employee for refusing to submit to alcohol test where employer had not notified employees of unilaterally adopted policy).

484. See infra notes 485-1439 and accompanying text.
485. See infra notes 489-1095 and accompanying text.
486. See infra notes 1095-1290 and accompanying text.
487. See infra notes 1291-1415 and accompanying text.
488. See infra notes 1416-39 and accompanying text.
A. Assessing the Constitutionality of Public-Sector Employment Drug Screening under the Fourth Amendment

Although the drug screening in employment issue has not yet been ruled on by the Supreme Court, both federal and state courts have considered and resolved the issue primarily under a fourth amendment analysis.

The essential purpose of the fourth amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials in order to safeguard the privacy and security of individuals against arbitrary invasions by government officials. The fourth amendment was first applied to the states in 1949 in Wolf v. Colorado. While the fourth amendment issue most frequently arises in the context of criminal cases in which preclusion of evidence from admission at trial is sought on the ground that it was illegally obtained in violation of the fourth amendment, the right to be free from unreasonable searches and seizures is also applicable in the non-criminal context.

Until the Supreme Court's landmark decision in Katz v. United States, the fourth amendment protections were thought to apply

489. See infra text accompanying note 516 for beginning of fourth amendment discussion.

490. The Fourth Amendment of the United States Constitution provides:
The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized. U.S. Const. amend. XIV.

491. Delaware v. Prouse, 440 U.S. 648, 653-54 (1979); Camaro v. Municipal Court, 387 U.S. 523, 528 (1967) (the purpose of the Fourth Amendment is to protect people from arbitrary and capricious conduct) ("The Fourth Amendment thus gives concrete expression to the right of the people which 'is basic to a free society' ") (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)).


493. In Camaro, 387 U.S. at 530, the Supreme Court found the contention that Fourth Amendment protections attach only in criminal proceedings untenable: "it is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." See also Wyman v. James, 400 U.S. 309 (1971). For an express holding in the public employment drug screening context that such tests are subject to Fourth Amendment protections, see McDonnell V. Hunter, 612 F.Supp. 1122, 1127 (D.C. Iowa 1985). See also infra notes 534-40 and accompanying text.

only to what were viewed as characteristically "private places." However, the Court in *Katz* rejected this approach, holding that the reach of the fourth amendment “cannot turn upon the presence or absence of a physical intrusion into any given enclosure,” and declared that the fourth amendment “protects people, not places.” Since the *Katz* decision, fourth amendment jurisprudence has emphasized the privacy of the individual as opposed to the privacy of places, in determining the scope of fourth amendment protection.

As a threshold matter, the court must determine whether the particular challenged governmental action constitutes a “search” and “seizure” within the meaning of the fourth amendment. The seminal case dealing with fourth amendment searches and seizures of bodily fluids is the Supreme Court’s decision in *Schmerber v. California*, where it was held that blood testing for the presence of alcohol “plainly involves the broadly conceived reach of a search and seizure under the fourth amendment.” The Supreme Court noted in *Schmerber* that the fourth amendment “expressly provides that ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.’” Given the plain language of the amendment, the Supreme Court concluded that “[i]t could not reasonably be argued . . . that the administration of the blood test in this case was free of the constraints of the fourth amendment. Such testing procedures plainly constitute searches of ‘persons,’ and depend antecedently upon seizures of ‘persons,’ within the meaning of that amendment.”

The first issue before the court considering a challenge to public employment drug screening is whether urinalysis can be brought within the rationale of *Schmerber* and thereby found to be a search and seizure within the purview of the fourth amendment.

496. *Katz*, 389 U.S. at 351.
497. *Id.*
498. *See Note, A Post-Katz Study, supra note 529 at 968.*
500. *Id.* at 767.
501. *Id.* (emphasis added by the Court).
502. *Id. See also United States v. Ramsey, 431 U.S. 606 (1978); United States v. Afanador, 567 F.2d 1325, 1331 (5th Cir. 1978) (“One’s anatomy is draped with constitutional protection”).
503. Several courts have concluded that urinalysis constitutes a search within the pa-
The fourth amendment protects an individual's reasonable expectation of privacy from unreasonable intrusions by the government. The fourth amendment does not proscribe all government intrusions, rather, it only prohibits unreasonable searches and seizures. In making the ultimate determination of the reasonableness of a search, the courts balance the individual's reasonable expectations of privacy against the legitimate government interests to be advanced by the search.

The first step in this balancing process requires a determination as to whether the individual has a reasonable expectation of privacy to be protected. Concurring in Katz, Justice Harlan established a two part "reasonable expectation of privacy" test as a means of identifying protected fourth amendment claims: first, the expectation must be an "actual" one, subjectively held by the person subject to the search; second, the expectation must be "one that society is prepared to recognize as reasonable." Despite its rameters of the Fourth Amendment. The leading case in this respect appears to be McDonell v. Hunter, 612 F.Supp. 1122 (D.C. Iowa 1985). For a discussion of the McDonell court's rationale, along with subsequent rulings of other courts following the McDonell ruling, see infra text accompanying notes 534-540.

504. United States v. Chadwick, 433 U.S. 1, 7 (1977); Terry v. Ohio, 392 U.S. 1, 9 (1968) (The Fourth Amendment is intended to protect the privacy of individuals from unreasonable searches of the person and those places and things wherein the person has a reasonable expectation of privacy).

505. Carroll v. United States, 267 U.S. 132 (1925); New Jersey v. TLO, 469 U.S. 324 (1985) (The fundamental command of the Fourth Amendment is that searches and seizures be reasonable); Chadwick, 433 U.S. at 7.

506. Security and Law Enforcement Employees, District Council 82 v. Carey, 737 F.2d 187, 201-20 (2d Cir. 1984) (court must balance intrusiveness of search on individual's Fourth Amendment interests against legitimate government interests to determine reasonable of search). See also Illinois v. Lafayette, 462 U.S. 640 (1983) (reasonableness of inventory search of purse belonging to suspected shoplifter determined by use of Fourth Amendment balancing test); United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (reasonableness of Border Patrol Customs officers stopping and searching car discerned by use of traditional Fourth Amendment balancing test); Prouse, 440 U.S. 648 (1979) (permissibility of particular law enforcement practice judged by balancing its intrusion on individual's Fourth Amendment interests against legitimate government concerns); cf. Camaro, 387 U.S. at 534-35 (In determining whether an individual has a reasonable expectation of privacy and whether governmental intrusions are reasonable, courts have generally weighed the need to seize against the invasion which the seizure entails).

507. 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan explained his two part test as follows:

Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Id. See also id. at 351 (what a person knowingly exposes to the public, even in his home or
origins in a concurring opinion, the "reasonable expectation of privacy" formula has emerged as the judicial "lodestar" for current fourth amendment analysis.\textsuperscript{508} The courts have recognized as a general matter the reasonable expectation to personal privacy and bodily integrity;\textsuperscript{509} however, the courts have ruled that the reasonableness of the expectation is relative since each person's privacy interest is shaped by the context in which it is asserted\textsuperscript{510} and "[w]hat is reasonable in one context may not be reasonable in another."

office, is not subject to Fourth Amendment protections; but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

508. *Smith v. Maryland*, 442 U.S. 735, 739 (1979), soon after the phrase was suggested by Justice Harlan in his concurrence to *Katz*, 389 U.S. at 361, a majority of the Court adopted the reasonable expectation of privacy test in *Terry v. Ohio*, 392 U.S. 1, 9 (1968) ("Whenever an individual may harbor a 'reasonable expectation of privacy,' he is entitled to be free from unreasonable government intrusion") (citation omitted). The Court has subsequently used "legitimate" or "justifiable" in place of reasonable, but apparently intends all three terms to be synonymous in the expectation of privacy context. See *Smith*, 442 U.S. at 740 (protection under Fourth Amendment "depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable' or a 'legitimate expectation of privacy'"). Despite its current "lodestar" status, the reasonable expectation of privacy test has been the object of strong and continuing academic criticism. See, e.g., Amsterdam, *Perspectives on the Fourth Amendment*, 48 MINN. L. REV. 349, 383-86 (1974); Walinski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV.-U. L. L. REV. 1, 2-4 (1981); Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 157-170 (1977).

509. See, e.g., *Schmerber*, 384 U.S. at 770 (1966) (recognizing the fundamental human interests in human dignity and privacy as being implicated in searches involving bodily intrusions); *Rochen v. California*, 342 U.S. 165 (1952) (forcible extraction of stomach contents) ("This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach contents—this course of proceedings by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation."); *Security & Law Enforcement Employees, District Council 82 v. Carey*, 737 F.2d 187 (2d Cir. 1984) (visual body cavity searches); *United States v. Ramsey*, 431 U.S. 606, 618 n.13 (1977); *United States v. Sandler*, 644 F.2d 1163, 1167 (5th Cir. en banc 1981); *United States v. Dorsey*, 641 F.2d 1213, 1217 (7th Cir. 1981).

See infra text accompanying notes 541-1095 for decisions in the drug screening context discussing the issue of reasonable expectations of privacy in one's urine.

510. *United States v. Thomas*, 729 F.2d 120, 123-124 (2d Cir. 1984) (expectations of privacy vary depending upon circumstances and location; parolee's diminished expectation of privacy further lessened while in parole officer's office); see also *Terry v. Ohio*, 392 U.S. at 9 (specific contents of right to be free from unreasonable governmental intrusion must be shaped by context in which it is asserted).

511. *Committee for GI Rights v. Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975) (one's rights under the fourth amendment must be shaped by the context in which asserted; conditions peculiar to military life dictate affording different treatment to activity arising in military context); *Parker v. Levy*, 417 U.S. 733, 758 (1974) (military personnel do not possess the same degree of Fourth Amendment protection as the ordinary citizen). See also *U.S. v.*
The second step in the fourth amendment balancing process involves the judicious weighing of the degree of affront to, and invasion of legitimate privacy interests inherent in the search against the legitimate governmental interests to be served by the search. In the context of searches of governmental employees, the courts have in the past balanced the individual's expectation of privacy against the government's rights as an employer (as opposed to the government's rights as law enforcer) to investigate employee misconduct which is directly relevant to the employee's performance of his duties and the government's performance of its statutory responsibilities.

The Supreme Court has not formulated a "bright line" test for reasonable searches, rather, the Court explained in Bell v. Wolfish:

The test of reasonableness under the fourth amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

It is against this constitutional backdrop that the courts have been called upon to determine the constitutionality of public-sector employment drug screening programs under the fourth amendment.

Knotts, 460 U.S. 276 (1983) (expectations or privacy vary, depending on circumstances and location); Bell v. Wolfish, 441 U.S. 520, 558 (1979) (given realities of prison confinement, any reasonable expectation of privacy retained by inmates necessarily of diminished scope); Rakas v. Illinois, 439 U.S. 128, 143 (1978) (person can assert legitimate privacy interest in a place other than his own home in order to invoke Fourth Amendment protections).


515. Id. at 559.
1. Employment Drug Screens Constitute a "Search" Within the Meaning of the Fourth Amendment

The threshold issue facing the courts in a fourth amendment challenge to drug screening in public-sector employment is whether the taking of urine samples from employees constitutes a search within the meaning of the fourth amendment's proscription of "unreasonable searches and seizures." The overwhelming majority of the courts which have been presented with the issue have determined that urinalysis constitutes a search subject to fourth amendment restrictions, following the lead established by the District Court for the Northern District of Georgia in Allen v. City of Marietta.

In Allen, six local government employees were suspected, along with ten other employees, of having used marijuana on the job on several occasions prior to the testing. All six plaintiffs worked in the Electrical Division of the Board of Lights and Water, working around extremely hazardous high voltage electrical wires. Based upon information supplied by an undercover agent, the Manager of the Board of Lights and Water determined that he had sufficient evidence to terminate the sixteen employees for use of drugs on the job. The sixteen employees were offered the choice of resigning. When none of the employees volunteered to resign, the Manager indicated that they all would be fired unless they submitted to a urinalysis. The six plaintiffs elected to take the urinalysis test which, in each case, returned positive for the presence of marijuana. All six plaintiffs were subsequently fired, precipitat-

516. See supra note 524 for the text of the fourth amendment.
517. See infra note 575 and accompanying text.
519. Id. at 484.
520. Id.
521. Id. The court noted that the investigation was apparently spurred by the receipt of reports from various sources of drug usage by employees of the Board and the suspicion that perhaps drugs were responsible for what appeared to be a large number of injuries to Board employees. Id. The undercover investigator kept detailed reports of which employees he observed smoking marijuana and the dates on which he observed them which were submitted to the Manager of the Board. Id. Noting the strong correlation between the names on the investigator's log and the employees who had had "unexplained" accidents, the Manager decided to initiate termination proceedings against the named individuals. Id.
522. Id. The sixteen employees were called together for a meeting with the Manager on July 12, 1983, in which the Manager confronted the employees with the evidence and informed them of his termination decision, providing to each the option to resign instead of being fired. Id.
523. Id.
524. Id. The court notes that each of the plaintiffs went into a bathroom stall and
ing a suit in which the plaintiffs alleged that their fourth amendment rights to be free from unreasonable searches and seizures had been violated by the urinalysis test administered by the City.\textsuperscript{525}

In resolving the former employees' fourth amendment challenge to the urinalysis administered in \textit{Allen}, the District Court observed that as a preliminary matter it had to determine whether the urinalysis test was a search or seizure within the meaning of the fourth amendment.\textsuperscript{526} Acknowledging that it entertained some doubt that requiring a person to submit a urine specimen for analysis was a "search" as contemplated by the framers of the fourth amendment, the District Court nevertheless ruled that a urinalysis is a search within the meaning of the amendment,\textsuperscript{527} relying heavily upon the Supreme Court's decision in \textit{Schmerber v. California}.\textsuperscript{528} \textit{Schmerber} held that the extraction of a blood sample from a defendant for purposes of determining his state of intoxication was a search under the fourth amendment.\textsuperscript{529} The court in \textit{Allen} reasoned that "[w]hile the extraction of blood from an unwilling defendant is qualitatively different from a requirement that an individual provide samples of his biological waste products," other courts have applied the \textit{Schmerber} ruling to other human waste products by analogy.\textsuperscript{530} The District Court concluded that the

\begin{quote}
provided a urine specimen in a glass jar which was subsequently labeled and sent away for analysis. \textit{Id.}
\end{quote}

\textsuperscript{525} \textit{Id.} The plaintiffs filed suit under 42 U.S.C. \textsection 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. \textsection 1979; Pub.L. 96-170, \textsection 1, Dec. 29, 1979, 93 Stat. 1284. 601 F.Supp. at 485. The case was presently before the court on plaintiff's motion for partial summary judgment, asking the court to rule as a matter of law \textit{inter alia} that the urinalysis tests violated the plaintiff's constitutional rights as secured by the Fourth and Fourteenth Amendments. \textit{Id.} at 486.

\textsuperscript{526} \textit{Id.} at 488.

\textsuperscript{527} \textit{Id.}

\textsuperscript{528} 384 U.S. 757 (1966). For a discussion of the underlying rationale in \textit{Schmerber} on this issue, see \textit{supra} notes 533-536 and accompanying text.

\textsuperscript{529} \textit{Schmerber}, 348 U.S. at 767; see \textit{supra} note 534 and accompanying text.

\textsuperscript{530} \textit{Allen}, 601 F.Supp. at 488.

\textsuperscript{531} The \textit{Allen} court referred to decisions in which the \textit{Schmerber} rationale was used by the courts to classify breathalyzer tests and detainment of persons suspected of smuggling contraband in their stomachs until the contraband was expelled in a bowel movement as searches. \textit{Id.} at 488-89. The \textit{Allen} court also pointed to two much earlier decisions which have treated urinalysis tests as searches within the meaning of the Fourth Amendment,
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Schmerber decision could properly be extended to encompass urinalysis tests in the instant case.\textsuperscript{532} While, intuitively, the argument advanced by the district court in Allen for considering a urinalysis to be a search within the purview of the fourth amendment is correct, the court failed to adequately address the countervailing argument that blood and urine are inherently different and should not be treated similarly for fourth amendment purposes.\textsuperscript{533}

In McDonell v. Hunter,\textsuperscript{534} the District Court for the Southern District of Iowa improved upon the Allen court’s analysis by demonstrating that the asserted differences between blood testing and urinalysis testing under the fourth amendment are more apparent than real.\textsuperscript{535} McDonell involved a group of Iowa prison guards, employees of the Iowa Department of Corrections, who brought a class action challenging the constitutionality of an Iowa Department of Corrections Policy requiring correctional institution employees to submit to urinalysis tests at the request of Department officials.\textsuperscript{536} Proceeding on the merits of the plaintiffs’ claim, which sought a declaratory judgment that the Department policy was violative of fourth amendment and an injunction prohibiting further urinalysis testing,\textsuperscript{537} the district court concluded, as a preliminary matter, that urinalysis tests constituted a search and seizure within the meaning of the fourth amendment.\textsuperscript{538} In reaching its conclu-

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\textsuperscript{532} Id. at 489.

\textsuperscript{533} The thrust of the opposition’s argument is that blood and urine are fundamentally different on several bases. First, urine, unlike blood is a waste product which is routinely discharged, and it is inherently contradictory to say that an individual retains a privacy interest in his urine. Second, since urine does not involve any physical intrusion into the individual’s body, as taking a blood specimen does, it cannot be said that the individual’s bodily integrity has been violated. See infra text accompanying note 574, where the district court in McDonell v. Hunter, 612 F.Supp. 1122 (S.D. Iowa, C.D. 1985) addresses these specific arguments. See also infra note 575.

\textsuperscript{534} 612 F.Supp. 1122 (S.D. Iowa, C.D. 1985). The McDonell case is discussed more fully beginning at text accompanying note 578.

\textsuperscript{535} See infra text accompanying note 574.

\textsuperscript{536} 612 F.Supp. 1125. The plaintiffs brought their suit pursuant to 42 U.S.C. § 1983. See supra note 559 for text of the statute. The court points out in McDonell that the Department’s policy did not identify who had the authority to require an employee to submit to a search or to provide a blood or urine sample, nor did the policy articulate any standards for its implementation. 612 F.Supp. at 1126.

\textsuperscript{537} Id. at 1125.

\textsuperscript{538} Id. at 1127 (the court prefaced its discussion on the issue by citing Schmerber v. California, 384 U.S. 757, 767 (1966), as standing for the proposition that taking blood from the body is a search and seizure within the meaning of the Fourth Amendment).
sion, the district court in *McDonell* explained:

Urine, unlike blood, is routinely discharged from the body, so no governmental intrusion into the body is required to seize urine. However, urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy. One does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds, except as part of a medical examination. It is significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.  

Thus, according to the district court in *McDonell*, while the government intrusion required to seize urine is certainly different from the intrusion required to seize blood, the difference is one of degree, not kind. Subsequent decisions on this issue have consistently applied this rationale.
2. The Fourth Amendment Protects People, Not Places

... But Not Always Their Urine

Emerging from the fourth amendment litigation flurry is a growing body of federal and state judicial authority that "reasonable suspicion" is necessary for a compulsory urinalysis test of public-sector employees to pass constitutional muster under the fourth amendment. Thus, in most instances, blanket testing and random testing of public employees for illegal drug use have been declared unconstitutional as violative of the fourth amendment. However, the courts have distinguished pervasively-regulated industries and medium and maximum security facilities as exceptions to Fourth Amendment protections (citing McDonell, supra).

Other decisions have implicitly concluded that the urinalysis test in question was a search within the meaning of the Fourth Amendment. See, e.g., Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. App. 1985); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976); and Shoemaker v. Handel, 608 F.Supp. 1151 (D.C. N.J. 1985).

For the contrary view that urinalysis testing is not a search within the meaning of the Fourth Amendment, see Turner, supra, 500 A.2d at 1009-1022 (Nebeker, J., concurring); National Treasury Union v. Von Raab, 808 F.2d 1057, 1062 (5th Cir. 1987) (Higginbotham, J., specially concurring) ("There is a substantial question whether requiring the [urine] samples... is a search or seizure at all"); Hester v. City of Millectedville, 598 F.Supp. 1456, 1457 n.2 (M.D. Ga. 1984), rev'd. on other grounds, 777 F.2d 1496 (11th Cir. 1985) ("The defendants in both actions also have required plaintiffs to submit to urinalysis testing procedures. Although plaintiffs to some extent have challenged the reliability of urinalysis, the court is not persuaded that use of such testing procedures will violate plaintiffs constitutional rights. Accordingly, the court hereby DENIES plaintiffs' request for injunctive relief with respect to the use of urinalysis testing procedures") (the court's decision concerned the legality of polygraphs used to help detect suspected drug use among employees and Fifth Amendment challenges to this type of testing).

541. See infra text accompanying notes 547-995.
542. Blanket drug testing refers to a system of en masse drug testing whereby all employees are required to submit to the test without any indication that any one employee, let alone all employees, has been using drugs in violation of the applicable work rule. A good example of such a program can be found in Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J. 1986); see infra text accompanying notes 753-806.
543. The conceptual distinction between a blanket drug test and a random drug test is that blanket testing describes the breadth of the group to be tested — i.e. department-wide, whereas random testing refers to a program in which the individuals to be tested are selected by no identifiable, objective, consistent criteria. An example of a random drug screening program can be found in Caruso v. Ward, 506 N.Y.S.2d 789 (Sup. Ct. 1986); see infra text accompanying notes 669-709.
545. McDonell v. Hunter, 746 F.2d 785 (3rd Cir. 1984) (affirming trial court's issuance of a preliminary injunction against drug testing program, pending a trial on the merits), 612 F.Supp. 1122 (S.D. Iowa 1985) (trial on merits) (adopts "reasonable suspicion" standard),

Fourth Amendment protections") (citing McDonell, supra).
ceptions to the general rule. In these situations, the courts have condoned random drug screening of employees for illegal drug use. The following two sections examine the current judicial rulings dealing with the reasonable suspicion standard and its exceptions.


Long before drug screening became a household word and the subject of political rhetoric, the Seventh Circuit was called upon to determine the constitutionality of a public transit authority's urine testing policy in Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy. In Division 241, a bus driver's union with approximately 5,500 members brought an action against the Chicago Transit Authority (CTA) challenging the constitutionality of work rules requiring bus drivers to submit to urine tests when they were involved "in any serious accident" or when suspected of being intoxicated or under the influence of narcotics while on duty. Em-
employees who refused to take the test were subject to discipline, including potential discharge.\footnote{549}

On appeal from a dismissal granted the defendant by the lower court, the Union argued that the CTA rules were facially unconstitutional as violative of the fourth and fourteenth amendments.\footnote{550} Passing over the threshold issue of whether urinalysis constitutes a "search" within the meaning of the fourth amendment, the appellate court delved into the heart of the plaintiff's claim, stating the familiar principle that the fourth amendment protects an individual's reasonable expectation of privacy from unreasonable intrusions by the state.\footnote{551} Acknowledging the unquestioned authority of a governmental agency to place reasonable conditions on public employment,\footnote{552} the Seventh Circuit proceeded to balance the bus drivers' privacy interests against the public interests as repre-

the book of rules.

Under Rule 14, the employee could be discharged for violations of Rule 10. \textit{Id.}

\footnote{549} See \textit{supra} note 548 for text of CTA General Bulletin 62-75 provision of discipline for refusal to take test.

\footnote{550} 538 F.2d at 1266. The plaintiffs originally filed a four-count complaint under the Civil Rights Act, 42 U.S.C. § 1981, against eight CTA officials, attacking the constitutionality of Rules 10 and 14 of the General Rule Book and of General Bulletin G2-75 of the CTA insofar as they required CTA bus operations to submit to blood and urine tests when they were involved in "any serious accident," or suspected of being intoxicated or under the influence of narcotics. \textit{Id.}

\textit{See supra} note 548 for text of the contested rules and bulletin.

The trial court upheld the CTA Rules 10 and 14 and General Bulletin 62-75, writing in its memorandum opinion that the rules were both "reasonable and necessary," and "not . . . unreasonable." \textit{McDonell v. Hunter}, 405 F.Supp. 750, 751-52 (N.D. Ill. 1975). The trial court, consistent with its opinion, dismissed Count I of the plaintiffs' complaint challenging the constitutionality of the CTA rules as written, and simultaneously denied Counts II-IV charging that the rules had been applied in a manner violating the constitutional rights of Union members, because the court could not "say with certainty [that] time that plaintiff can prove no set of facts," in support of the allegations. Subsequently, Counts II-IV were dismissed with prejudice by the district court. The union appealed.

On appeal, the union argued that the rules were facially unconstitutional since they violated both the fourth and fourteenth amendments. 538 F.2d at 1266. Seventh Circuit explained that insofar as the fourth amendment required a higher burden for the government to justify its actions than did the fourteenth amendment, it necessarily followed that if the plaintiffs could not demonstrate a fourth amendment violation, neither could they demonstrate a fourteenth amendment violation. \textit{Id.}

\footnote{551} \textit{Id.} Consistent with traditional fourth amendment analysis, the court adopted the balancing of interest test to determine whether CTA's urine screening program was unreasonable. \textit{Id.} at 1267 (citing to \textit{Camara v. Municipal Court}, 387 U.S. 523, 534-35 (1967); and \textit{United States v. Martinez-Fuerte}, 428 U.S. 543 (1976)). However, the court only superficially applied the balancing process to the \textit{Division 241} case. \textit{See infra} note 553.

\footnote{552} \textit{Id.} at 1267 ("It is clear that a governmental agency can place reasonable conditions on public employment").
sented by the CTA. In the final analysis, the Seventh Circuit found that

[i]n this case, the CTA has a paramount interest in protecting the public by insuring that bus and train operators are fit to perform their jobs. In view of this interest, members of plaintiff Union can have no reasonable expectation of privacy with regard to submitting to blood and urine tests.

Deeming the limited circumstances under which the urine tests were required and the manner in which the tests were administered as reasonable, the Seventh Circuit concluded that, all factors considered, "[c]ertainly the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse." There-

553.  Id. The appellate court devoted no discussion to an identification or valuation of the competing interests, but rather summarily concluded that the CTA's interest was superior. See infra note 554 and accompanying text.
554.  Id. (citing United States v. Cogwell, 486 F.2d 823, 835 (7th Cir. 1973), cert. denied, 416 U.S. 959 (1975)
555.  Id. The court found that the conditions under which the urinalysis was conducted were reasonable, emphasizing that the tests were only administered to operating employees directly involved in "any serious accident" or "suspected of being under the influence" of intoxicating liquor or narcotics. Moreover, a urinalysis was not required until and unless two supervisory employees concurred. Id.
556.  Id. Special notice was made that the urinalysis tests were administered in a hospital environment. Id. Citing to Schmerberg, 384 U.S. 757, 771 (1966), the court in Division 241 ascertained that the performance of the tests in the hospital was a reasonable procedure. Id. Given the reasonable conditions and circumstances under which the urinalysis tests were administered along with the CTA's valid public interest involved, the Division 241 court determined that the urinalysis tests were justified because probable cause existed. Id.

A casual reader of the Seventh Circuit's opinion might be misled by the court's puzzling use of the "probable cause" terminology. In a footnote, the appellate court explained that the CTA bus drivers were subject to a higher standard of accountability than the average citizen driver, thereby making the minimal requirements of the breathalyzer laws inapplicable to a determination of when to test a bus driver for intoxication. Moreover, the court indicated that because the state had a more substantial interest in the competence of its bus drivers, the state need not lawfully arrest the bus driver before requiring him to submit to the urinalysis test. Id. at 1267 n.3. It appears from this discussion that the Division 241 court was stating that probable cause, inasmuch as it is the prerequisite of a lawful arrest, was unnecessary and that some less stringent standard for compelling the test was appropriate in the case. When the court spoke of "probable cause" in the text, it apparently was deeming the level of suspicion under the circumstances of the CTA urinalysis program to be the functional equivalent of a "probable cause" requirement in a more intrusive search and seizure situation. A more precise articulation of the lower fourth amendment standard for conducting CTA's drug test, rather than the misuse of a legal term of art such as "probable cause," would have been more useful.
557.  538 F.2d at 1267.

The Division 241 rationale is not unlimited in application. In Jones v. McKenzie, 628 F.Supp. 1500 (see supra text accompanying notes 150-69 for the operative facts in the case) the plaintiff schoolbus attendant, discharged for alleged marijuana use, claimed that the
fore, CTA's drug policy complied with the fourth amendment standards, so that discharging employees who refused to submit to the urine tests when requested was permissible.558

Although one court has suggested that the Division 241 decision stands for the proposition that the overriding public interest in ensuring the safety of public mass transit permits drug screening of public transit employees without cause, such a reading of Division 241 is clearly erroneous.559 Division 241 was not a case of random

School District's mandatory en masse drug screen of 200 Transportation Department employees was an unreasonable search in violation of the fourth amendment. The defendants conceded that they had no particularized reason to believe that the plaintiff, possessed or was under the influence of drugs. In fact, the defendants admitted that the plaintiff was an exemplary employee. Id. at 1507-08.

Pointing to the decision in Division 241, the School District in Jones emphasized the obvious and special public danger if their personnel who operate and assist in the operation of school buses are under the influence of drugs and justified their taking and examining urine specimens of all Transportation Department employees on a significant increase in traffic accidents, an increase in absenteeism, several incidents of erratic and abnormal behavior of some Department employees and the discovery of syringes and bloody needles in Transportation Department restrooms. Id. at 1508. The plaintiff countered by arguing that the Division 241 upheld the testing only for those bus drivers who had been involved in serious accident or "suspected of being under the influence while on duty." Id. Finding the plaintiff's argument more persuasive, the court in Jones concluded:

While the question is not free from doubt, . . . it does not follow that a school bus attendant like plaintiff should have expected to be exposed to such testing or that public safety considerations require testing of a school bus attendant like plaintiff equivalent to that imposed by the military and more stringent than that so far found permissible for the police or for bus drivers in the absence of particularized probable cause.

Id. at 1508-09. Consistent with this view, the court held that the plaintiff's fourth amendment rights had been violated and granted the plaintiff summary judgment on the issue. Id. at 1509.

558. Id. ("As we view them, the CTA rules and General Bulletin facially comply with the Fourth Amendment standards, so that employee who fail to comply with these rules and the General Bulletin may be discharged"). The question of whether the Rules and the General Bulletin were constitutionally applied to the bus drivers was not before the court and was, therefore, not decided. Id. at 1287.

559. See Turner v. Fraternal Order of Police, 500 A.2d 1005, 1008 (D.C. App. 1985) ("In a public employment context, it has been held that because of the paramount interest in public safety, bus drivers have no reasonable expectation of privacy with regard to submitting to blood and urine tests for the detection of intoxication or drug abuse") (citing Division 241). But see Capua v. City of Plainfield, 643 F.Supp. 1507, 1516 (D.N.J. 1986) ("In [Division 241], the court upheld warrantless searches of bus drivers who were involved in serious accidents or suspected of being intoxicated on the job, but only after two supervisory employees concurred as to the necessity of the test based on individualized reasonable suspicion."); American Federation of Federal Workers v. Weinberger, 651 F.Supp. 726, 733 (S.D. Ga. 1986) ("The reasonable suspicion standard has been deemed satisfied where there is actual evidence of a trustworthy nature pointing toward drug use, or where an accident involving government property has occurred") (citing Division 241); see also supra note 557.
testing. Indeed, the work rule in the case provided that urinalysis tests be given only when the driver was actually involved in a "serious accident" or when "suspected of being under the influence" of drugs while on duty, and only after two supervisory employees concurred in the decision to test. These characteristics were emphasized by the Seventh Circuit in reaching its decision. While the CTA's rules could have been more artfully drafted, the limited conditions under which urinalysis was authorized unmistakably distinguish the CTA policy from a random drug screening program.

b. *Allen v. City of Marietta*

Nine years later, the District Court for the Northern District of Georgia was presented with a fourth amendment challenge to a mandatory urinalysis of electrical employees working on high voltage wires in *Allen v. City of Marietta*. The employer in *Allen*, the Board of Lights and Water, received documented evidence that the plaintiffs were smoking marijuana on the job in violation of work policy. Having decided to discharge the plaintiffs, the Manager of the Board presented the employees with the choice of

560. 538 F.2d at 1267.
561. See supra note 555-56 and accompanying text.
562. For a working definition of "random" drug screening, see supra note 543.
563. 601 F.Supp. 482 (N.D. Ga. 1985). All of the plaintiffs in the *Allen* case worked in the Electrical Distribution Division of the Board of Lights and Water and worked around high voltage electric wires. Id. at 484.
564. Id. According to the record, the defendant Crane, who was the City Manager of the City of Marietta and the manager of the Board of Lights and Water, began receiving, in late 1980 or 1981, reports from various sources that employees of the Board were using drugs. Crane formed the belief that such drug usage may have been responsible for what appeared to be a large number of injuries to Board employees. Crane formed the belief that, given the extremely hazardous nature of the work done by the employees, such drug usage on the job constituted a threat to the safety of the employees and the general public, and he commenced an undercover investigation to determine which employees were using drugs on the job. Id.

After the successful use of an undercover agent, the City employed an informant, who had worked for the City in past investigations, to work in the Electric Distribution Division and document any employee drug use. In this capacity, the informant allegedly smoked marijuana with various employees on and off the job. Gathering information about drug use in the division, the informant kept records of which employees he observed smoking marijuana and the dates that he observed them. These records were submitted to the Superintendent of Electrical Distribution who allegedly noticed a correlation between the names turned in by the informant and people who had had "unexplained" accidents. Id.

The City Manager received all of the compiled information and eventually decided that he had sufficient incriminating evidence to terminate certain employees of the Board for use of drugs on the job. Id.
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resigning from their positions or being terminated. Upon their refusal to resign, the Manager insisted that they take a urinalysis test or be fired. The plaintiffs elected the urinalysis test, providing urine specimens which returned a positive result for marijuana in each instance and caused their discharge.

On motion for summary judgment, the plaintiffs in Allen asked the court to rule, as a matter of law, that the urinalysis tests violated their constitutional rights secured by the fourth and fourteenth amendments against unreasonable searches and seizures.

On a cross motion for summary judgment, the employer sought a court ruling, as a matter of law, that the urinalysis did not violate either amendment.

After determining that a urinalysis test constituted a "search" within the meaning of the fourth amendment, the District Court addressed the employees' contention that the urinalysis was an unreasonable search. The court held that no warrant was required for the drug testing and that the search was reasonable under the circumstances. The Allen Court reasoned:

One of the exceptions to the warrant requirement which appears to have emerged is a class of cases involving searches of government employees. The cases are not uniform, but all appear to involve a balancing of the individual's expectation of privacy against the government's right as an employer (as opposed to the government's right as a law enforcer) to investigate em-

565. Id.
566. Id.
567. Id. Each of the plaintiffs went into a bathroom stall and urinated into a glass jar. The jars were labeled and sent away for analysis. The test results were received two days later on July 14, and showed that each of the plaintiffs tested positive for the presence of marijuana in their bodies. All six plaintiffs were fired. Id.
568. Id. at 486. On September 7, 1983 the plaintiffs filed suit under 42 U.S.C. § 1983 for deprivation of fourth and fourteenth amendment rights against unreasonable searches and seizures. In separate counts, the plaintiffs alleged denial of substantive and procedural due process rights guaranteed by the fifth and fourteenth amendment. Id. at 485.
569. 601 F.Supp. at 486. The City also sought summary judgment on the due process issues. Id. See infra text accompanying notes 1123-55.
570. 601 F.Supp. at 489. The Allen court expressed reservations that requiring a person to provide a urine sample constituted a search within the meaning of the fourth amendment as contemplated by the Framers, but felt constrained by the current jurisprudential trend recognizing that urinalysis was within the purview of the fourth amendment. Id. at 488-89 (citing Schmerber, 384 U.S. 757; see supra notes 499-502 for a discussion of the Schmerber ruling) (citing Division 241, 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976); see supra notes 547-562 and accompanying text for a discussion of the Division 241 holding).
571. See infra notes 572-73. The Allen court arrived at this conclusion after an extensive review of a line of cases from which the court discerned the government employment administrative search exception to the warrant requirement. 601 F.Supp. 489-91.
ployee misconduct which is directly relevant to the employee's performance of his duties and the government's performance of its statutory responsibilities.\textsuperscript{573}

Acknowledging that government employees have as much of a right to be free from warrantless government searches as any other citizen, the District Court also pointed out that the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties.\textsuperscript{573} The Allen Court went on to hold:

The only facts before the court establish as a matter of law that the tests were administered in a purely employment context as part of the government's legitimate inquiry into the use of drugs by employees engaged in extremely hazardous work. The City has a right to make warrantless searches of its employees for the purpose of determining whether they are using or abusing drugs which would affect their ability to perform safely their work with hazardous materials. The court finds, therefore, that the urinalysis tests administered in this case were not unreasonable searches in violation of the fourth amendment.\textsuperscript{574}

It is unclear from the court's decision in Allen whether the court would uphold compulsory urinalysis tests, implemented with or without some basis of suspicion, in public employment involving ultra-hazardous activity. While the decision has apparently been

\textsuperscript{572} Id. at 489.
\textsuperscript{573} Id. at 491. The Allen court explained:

Thus, a government employee's superiors might legitimately search her desk or her locker or her jacket where the purpose of the search is not to gather evidence of a crime unrelated to the employee's performance of her duties but is rather undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibilities. Because the government as employer has the same rights to discover and prevent employee misconduct relevant to the employee's performance of her duties, the employee cannot really claim a legitimate expectation of privacy from searches of that nature.

\textit{Id.} A final factor to be placed into the balancing of expectations and interests is the fact that government investigation of employee misconduct always carry the potential to become criminal investigations. \textit{Id.} The court indicated that if the search is conducted for criminal investigatory purposes, the fourth amendment would not permit the search. \textit{Id.}

\textsuperscript{574} 601 F.Supp. at 491. Invoking the court's pendent jurisdiction, the plaintiffs also asserted state law causes of action for libel, invasion of privacy, and unreasonable search and seizure. \textit{Id.} In an amendment to the complaint, plaintiffs also raised charges of denial of equal protection and first amendment rights.

The Allen case was presently before the district court on the plaintiffs' motion for summary judgment, seeking rulings as a matter of law on several issues including determinations that the urinalysis tests violated the plaintiffs' fourth and fourteenth amendment rights, and that the hearings they received before the Pension Board, the internal grievance procedure panel, failed to satisfy due process requirements. \textit{Id.} at 486. The due process issues involved in Allen are detailed \textit{infra} text accompanying notes 1123-55.
interpreted by two courts in this vein and has been argued at trial for this proposition, a closer review of the case indicates otherwise. Procedurally, the Allen Court was ruling on a motion for summary judgment which limited them to the undisputed facts of record. The facts of the case indicate that the decision to perform urinalysis tests on the six plaintiffs in the case was not randomly made. Rather, the decision was based on documented evidence that these employees were observed smoking marijuana on several occasions by a private investigator and also upon a studied review of accident reports which demonstrated a correlation between the employees implicated by the private investigation and a series of "unexplained accidents." Thus, the Manager's decision to require the employees to submit to the urinalysis test or be terminated was based on some objective facts which reasonably caused him to focus on the six employees to suspect drug use; arguably a "reasonable suspicion" standard, though not so articulated by the court in Allen.

c. McDonell v. Hunter

Shortly after the Allen decision, the District Court for the Southern District of Iowa, in McDonell v. Hunter, expressly applied a "reasonable suspicion" standard when resolving the fourth amendment challenge asserted by employees of the Iowa Department of Corrections against a Department policy authorizing

575. See, e.g., McDonell v. Hunter, 612 F.Supp. 1122, 1130 (S.D. Ga. 1985) (where the court cites a line of cases which it considers to require "reasonable suspicion" for implementing a drug screening program, and then contrasts the holding in Allen, 601 F.Supp. at 491).

In Capua v. City of Plainfield, 643 F.Supp. 1507, 1515 (D. N.J. 1986), the defendant argued that Allen excepted government employment context searches from the reasonable suspicion standard. However, the district court in Capua rejected this reading of Allen, pointing out that only those employees in Allen toward whom a reasonable suspicion of drug use on the job was established were compelled to submit to the urinalysis or resign. Id. at 1516, accord, Lovvorn v. City of Chattanooga, Tenn., 647 F.Supp. 875, 881 (E.D. Tenn. 1986) (Allen requires "reasonable suspicion"); American Federation of Federal Employees, 651 F.Supp. 726, 733 (S.D. Ga. 1986) (same); Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford Union Free School District, 505 N.Y.S.2d 888, 891 (Sup. Ct. App. 1986) (same); Jones v. McKenzie, 628 F.Supp. 1500, 1508-09 (D.D.C. 1986) (same).

577. See supra note 564.
578. 612 F.Supp. 1122 (S.D. Iowa 1985), aff'd in part, modified in part, 809 F.2d 1302 (8th Cir. 1987). The decision currently under consideration is the ruling of the District Court for the Southern Distrist of Iowa, 612 F.Supp. 1122, for a discussion of the appellate decision, see infra text accompanying notes 1042-77.
standardless, on-demand urinalysis testing of correctional facility employees. After resolving that urinalysis constituted a search within the meaning of the fourth amendment by constructing a cogent analogy to the Supreme Court's decision in Schmerber, the District Court in McDonell declared:

It is this court's conclusion that all of the intrusions authorized by the Department's policy are intrusions into areas where plaintiffs and their class normally have a reasonable and legitimate expectation of privacy protected by the fourth amendment. The question then becomes whether the intrusions authorized by the policy are nevertheless reasonable and therefore not violative of the fourth amendment.

The District Court noted that the reasonableness of the urinalysis tests must be evaluated in terms of the particular employment context in which they were authorized - a penal institution. Acknowledging the paramount consideration of security in penal institutions, the District Court in McDonell observed:

The penal environment is fraught with serious security dangers. Incidents in which inmates have obtained drugs, weapons, and other contraband are well-documented in case law and regularly receive the attention of the news media. Within prison walls, a central objective of prison administrators is to safeguard institutional security. To effectuate this goal, prison officials are charged with the duty to intercept and exclude by all reasonable means all contraband smuggled into the facility. . . .

This strong state interest in preserving security and order within the prison, reasoned the court, does not, however, confer unlimited authority in ferreting out drug abusing employees; rather, the state's interest must be balanced against the correctional facility employees' reasonable expectations of privacy. In balancing the

579. 612 F.Supp. at 1126, 1131. A preliminary injunction was issued in February, 1984 by the same district court, from which appeal was taken. Id. at 1125. The preliminary injunction was affirmed by the Eighth Circuit in McDonell v. Hunter, 746 F.2d 785 (8th Cir. 1984).
580. 612 F.Supp. at 1127. See supra text accompanying note 539 for the district court's analysis of the issue whether urinalysis is a "search" for fourth amendment purposes.
581. 612 F.Supp. at 1128.
582. Id. ("Whether the authorized intrusions were reasonable must be evaluated in the context of the places of employment—penal institutions where security is a paramount interest").
583. Id. (quoting from Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982) (a case involving the constitutionality of strip searching a prison inmate's visitor).
584. Id. ("Although the preservation of security and order within the prison in [sic] questionably a weighty state interest, prison officials are not unlimited in ferreting out contraband") (quoting from Auger, 672 F.2d at 674).
585. Id.
competing interests in *McDonell*, the District Court announced that while correctional facility security considerations reduce the scope of reasonable expectations of privacy that one normally holds and makes reasonable some intrusions that would not be reasonable outside of the facility, prison employees do not lose all of their fourth amendment rights at the prison gates. 586

The District Court continued, stating that the ability of the prison to institute regulatory searches of persons entering Iowa's correctional facilities, including employees, as reasonably necessary security precautions was not disputed. 587 However, admonished the court, such searches "must be guided by some appropriate standards", 588 which the court noted were blatantly absent in the instant case, 589 and must not be overly intrusive. 590

Focusing on the prison's primary justification for the urinalysis testing, the potential identification of drug smugglers, the District Court in *McDonell* ruled that such potential does not make a governmental employer's search of an employee a constitutionally reasonable one: "The possibility of discovering who might be using drugs and therefore might be more likely than others to smuggle drugs to prisoners is far too attenuated to make seizures of body fluids constitutionally reasonable." 591 The District Court also

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586. *Id.*. The *McDonell* court instructed:

Correctional facility security considerations reduce the scope of reasonable expectations of privacy that one normally holds and makes reasonable some intrusions that would not be reasonable outside of the facility. However, security considerations do not cause prisoners to lose all of their constitutional rights at the prison gates.

*Id.* (emphasis in original) (citing *Bell v. Wolfish*, 441 U.S. 52, 558-59 (1979)); see *id.* ("... prison employees do not lose all of their Fourth Amendment rights at the prison gates") (emphasis in original) (citing *Armstrong v. New York State Commissioner of Correction*, 545 F.Supp. 728, 730 (N.D.N.Y. 1982).

587. 612 F.Supp. at 1128 ("There is no doubt that defendants can constitutionally conduct such 'regulatory' searches of persons entering Iowa's correctional facilities, including employees, as are reasonably necessary to serve considerations").

588. *Id.*

589. *Id.* at n.4. Scrutinizing the prison's drug screening program, the district court observed:

A fundamental problem with the Department's policy is that it lacks any standards whatsoever for its implementation. Who can authorize or make a search or a demand for a blood or urine sample? Without any standards, it appears that any institutional officer may authorize or make a search or demand for blood or urine at his or her own unfettered discretion, and that the procedures followed will be another matter within the unfettered discretion of the officer implementing the Department's policy. The only standard is that an after-the-fact written report be made to the institution's manager.

*Id.*

590. *Id.* at 1129.

591. *Id.* at 1130.
found untenable the prison's second argument that taking urine tests was reasonable because it was undesirable to have drug users employed at a correctional institution, even if they did not smuggle drugs to inmates:

No doubt most employers consider it undesirable for employees to use drugs, and would like to be able to identify any who use drugs. Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. There is no doubt about it - searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.)

The court then concluded that the fourth amendment allows an employer "to demand . . . an employee [to submit] . . . a urine specimen for chemical analysis only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the employee is then under the influence of alcoholic or controlled substances."

The prison offered in its defense the written consent forms signed by the plaintiffs, contending that McDonell, along with the other employees, validly consented to the searches under the Department's policy and, therefore, should not be heard to complain. The McDonell Court found the prison's contentions unpersuasive.

Observing that a non-custodial search can be justified on the basis of consent only if it is demonstrated that the consent was in fact voluntarily given, and not the result of duress or coercion, ex-

592. Id.
593. Id. This is the classic definition of reasonable suspicion adapted to the drug screening context. The diminished standard was devised in the context of border searches, by the Second Circuit in United States v. Ashbury, 586 F.2d 973, 976 (2d Cir. 1978). See supra text accompanying note 1093. In a footnote, the district qualified its holding, noting that [t]he Fourth Amendment, however, does not preclude taking a body fluid specimen as part of a pre-employment physical examination or as part of any routine periodic physical examination that may be required of employees, nor does it prohibit taking a specimen of blood, urine, or breath on a periodic basis as a condition of continued employment under a disciplinary disposition if such a condition is reasonably related to the underlying basis for the disciplinary action and the duration of the condition is specified and is reasonable in length.
Id. at 1130 n.6.
594. Id. at 1131 (The reported opinion contains, in an appendix, exemplars of the written consent forms used by the prison).
595. Id.
press or implied, under all of the circumstances, the District Court found that the record contained insufficient facts upon which to determine the factual issue of voluntariness and refused to assume it. Furthermore, the court found that the prison’s consent argument was an untenable attempt to bootstrap the court’s fourth amendment analysis. The District Court in McDonell held that the consent form could not operate as a “blanket waiver of all fourth amendment rights,” reasoning that the consent form, which it appeared the plaintiffs signed as a condition of employment when they were hired, served to alert employees to the fact that their fourth amendment rights were more limited inside the correctional institution. However, the consent could not be construed to be a valid consent to any search other than one that is, under the circumstances, reasonable and, therefore, permissible under the fourth amendment. The district court declared, “public employees cannot be bound by unreasonable conditions of employment. . . . Advance consent to future unreasonable searches is not a reasonable condition of employment.”

Thus, the District Court ruled that the prison’s demand that the plaintiff submit to a urinalysis, unsupported by a reasonable suspicion that he was using drugs, was an unreasonable search and seizure in violation of the fourth amendment.

d. Turner v. Fraternal Order of Police

In Turner v. Fraternal Order of Police, the District Court of Appeals for the District of Columbia reversed a lower court deci-

596. Id. (“We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances. . . .”) (quoting from Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973)).

597. 612 F.Supp. at 1131 (“Under this record, the court cannot rest its decision on an assumption that plaintiff McDonell and class members who signed consents voluntarily consented in advance to any search made under the Department’s policy”).

598. Id.

599. Id.

600. Id.

601. Id.

602. Id. (citing as authority Pickering v. Board of Education, 391 U.S. 563, 568 (1968)).

603. Id. The court then entered a permanent injunction, prohibiting the standardless administration of urinalysis tests and recommended procedures to be followed under a reasonable suspicion standard. Id. at 1132.

sion finding the Police Department’s testing program for District of Columbia policemen, which provided for urinalysis testing for illegal drugs when any supervisor suspects drug use or at the discretion of a member of the Board of Police and Fire Surgeons, unconstitutional under the fourth amendment. The appellate court in *Turner* framed the issue on appeal as whether, consistent with the fourth amendment, the Department for administrative purposes may compel police officers to submit to urinalysis testing based upon “suspected drug use” or “at the discretion” of members of the Board of Police and Fire Surgeons.

At the outset of its analysis, the *Turner* Court instructed that reasonable expectations of privacy vary with the context in which they are asserted; therefore, not all individuals enjoy the same expectation of privacy nor do they enjoy the same degree of expectation. The court pointed to examples of the narrower fourth amendment protection afforded military persons. Reasoning by analogy to the military cases, the District Court in *Turner* stated:

While as a matter of degree we do not necessarily extend to the uniformed civilian services the same narrowly circumscribed expectation of privacy accorded to members of the military, the fact remains the police force is a para-military organization dealing hourly with the general public in delicate and often dangerous situations. So we recognize that, as is expected and

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605. *Id.* at 1006. This was an appeal from an order of the Superior Court of the District of Columbia enjoining enforcement of Paragraph 2 of Special Order 83-21 of the Metropolitan Police Department because it violated the fourth amendment.

606. Special Order 83-21, “Drug Testing for Illicit Narcotics or Controlled Substance Abuse,” specifically provided:

Additionally, the Police and Fire Clinic will conduct urinalysis testing for narcotic or controlled substance use by any member of the force suspected of such drug use, as directed by any official of the Department. Members may also be directed to submit to urinalysis testing at the discretion of a member of the Board of Police and Fire Surgeons.

*Id.* at 1006 n.1.

607. The trial court conducted a hearing on the plaintiffs’ request for a preliminary injunction. On September 9, 1983, the trial court granted the preliminary injunction and held that Paragraph 2 of Special Order 83-21 was unconstitutional because:

[It] provides no guidelines under which such testing referred to in the order may be ordered or directed, and without such guidelines testing may be ordered under such circumstances as to be unreasonable and, therefore, in violation of the Fourth and Fifth Amendments of the Constitution of the United States.

612 F.Supp. at 1006-07 (quoting the unpublished opinion of the lower court).

608. 500 A.2d at 1007.

609. *Id.* (“Each individual’s privacy interest is shaped by the context in which it is asserted”) (“What is reasonable in any context may not be reasonable in another”) (quoting *Committee for 61 Rights v. Callaway*, 171 U.S. App. D.C. 73, 83, 518 F.2d 466, 476 (1975)).

610. *Id.* at 1008.
accepted in the military, police officers may in certain circumstances enjoy less constitutional protection than the ordinary citizen. We conclude that this is one of those circumstances.\textsuperscript{611}

Comparing the Police Department to the transit authority in \textit{Division 241},\textsuperscript{612} the \textit{Turner} Court concluded that the Police Department likewise possessed a “paramount interest in protecting the public” by ensuring that it had a police force fit, physically and mentally, to perform its jobs.\textsuperscript{613} The District Court in \textit{Turner} declared:

Without a doubt, drug abuse can have an adverse effect upon a police officer’s ability to execute his duties. Given the nature of the work and the fact that not only his life, but the lives of the public rest upon his alertness, the necessity of rational action and a clear head unbefuddled by narcotics becomes self-evident. Thus, the use of controlled substances by police officers creates a situation fraught with serious consequences to the public.\textsuperscript{614}

The strong public interest in preventing drug abuse in the Police Department, coupled with the “current widespread, large scale drug usage in all segments of the population,” led the \textit{Turner} court to conclude that the Police Department’s urinalysis policy was justified as a prophylactic measure.\textsuperscript{615} The court found the intrusion entailed in the urinalysis test was permissible in this case.\textsuperscript{616} Nevertheless, the \textit{Turner} Court refused to authorize carte blanche urinalysis testing under the Police Department’s “suspected drug use” language,\textsuperscript{617} but rather delineated the level of suspicion as requiring “a reasonable objective basis for medical investigation through urinalysis.”\textsuperscript{618} The district court explained:

This may be a basis short of the traditional ‘probable cause’ but nevertheless sufficient reasonably to warrant some medical investigation. Necessarily, this basis must be related to the police officer’s fitness for duty. There must be a reasonable, objective basis to suspect that a urinalysis will produce evidence of illegal drug use.\textsuperscript{619}

\textsuperscript{611} \textit{Id.}
\textsuperscript{612} See supra text accompanying notes 547-562 for a discussion of \textit{Division 241}.
\textsuperscript{613} 500 A.2d at 1008.
\textsuperscript{614} \textit{Id.}
\textsuperscript{615} \textit{Id.} (“Consequently, in the context of current widespread, large scale drug usage in all segments of the population the Department was justified in promulgating Special Order 83-21 in an effort to prevent the illicit use of narcotics by members of the police force”).
\textsuperscript{616} \textit{Id.}
\textsuperscript{617} \textit{Id.}
\textsuperscript{618} \textit{Id.} at 1008-09.
\textsuperscript{619} \textit{Id.} at 1009. The court instructed:

While the provision relating to the Police and Fire Surgeons Board is not before us in this case for decision, it is apparent that the term “discretion” should be construed
While phrased slightly different, the standard enunciated by the court in *Turner* is substantially the same as the "reasonable suspicion" standard adopted by the district court in *McDonell*.

e. City of Palm Bay v. Bauman

The Fifth District Court of Appeal of Florida in *City of Palm Bay v. Bauman*, affirmed a lower court ruling that the City's unannounced random urinalysis testing of police offers was unconstitutional, but modified the lower court's finding of the appropriate standard for searches to one of reasonable suspicion.

In February, 1984, the City of Palm Bay issued a Notice to the members of the City's Police Department outlining the City's policy against use of illegal drugs both on-duty and off-duty and inaugurating a compulsory random urinalysis program as part of the policy enforcement mechanism. The policy statement provided further that any member of the police force who refused to submit to the urine screening would be subject to discipline, including potential termination.

Following some clandestine drug screening of City fire fighters, conducted in mid-1983 under the auspices of an annual routine

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620. See supra text accompanying note 619.
621. See supra text accompanying note 593.
622. 475 So.2d 1322 (Fla. 5th DCA 1985).
623. Id. at 1326.
624. On February 24, 1984, the following notice was addressed "TO: ALL SWORN OFFICERS" and signed by City Manager, Robert G. Matte, and by Chief of Police, Charles R. Simmons:

The City's Personnel Policies and Procedures prohibit possession, consumption or being under the influence of drugs or intoxicating substances while on duty because sworn police officers are subject to call-out on a twenty-four (24) hour basis. Consumption of non-prescribed drugs or other illegal substances at any time is strictly prohibited. If a police officer has consumed alcohol prior to being called to duty, he/she shall notify the shift supervisor of that fact.

The City is actively taking steps to enforce the above policy. Urine samples may be required from police officers on a random basis. Police officers found to have consumed non-prescribed drugs or other illegal substances will be subject to discipline or discharge.

625. Id. In addition, the officers were informed that the names of those individuals who refused to take the test would be reported to the State Police Standards Commission for refusing to obey a lawful order. Id.
physical, which disclosed two positive results for past marijuana use, the City announced, in an October, 1983 Notice, the Department's anti-drug policy. This policy expressly prohibited the fire fighters from using drugs while on duty or being under the influence of drugs while on duty, but only intimated that off duty use of drugs was also prohibited. In February, 1984, the City Manager ordered all fire fighters to submit to the urine testing, advising them that the failure to consent to the testing would result in their termination. The urinalysis results revealed three employees who had tested positive for marijuana.

The trial judge entered a final judgment, permanently enjoining the City from compelling its police officers and fire fighters to submit urine samples at random and unspecified times for purposes of determining use of controlled substances without probable cause to believe the employee had been using a controlled substance.

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626. In June 1983, pursuant to a recommendation made by the City personnel director and implemented by the fire chief, all fire fighters were ordered to take annual physicals. One of the reasons for the physicals was to test urine specimens for evidence of past use of marijuana, although this was not disclosed to the fire fighters (except one was told during the testing). This testing revealed two “positives.” These individuals were not terminated, but ordered to counseling. *Id.*

627. On or just before October 18, 1983, the City Manager, Robert G. Matte, addressed the following notice to all City employees:

The City's Personnel Policies and Procedures provide — the possession, consumption or being under the influence of drugs or intoxicating beverage while on duty is considered a major offense. Violations may entail dismissal. The City will strictly apply the disciplinary measures provided.

The proviso relating the offense to “on duty” status must be judiciously evaluated. Those subject to call during off duty hours, which applies to most personnel in the City, are expected to be in a fit condition to respond and effectively perform assigned duties when they are required to report. *Id.* at 1323-24.

628. *See supra* note 627 for text of the Notice.

629. 475 So.2d at 1324.

630. *Id.*

631. *Id.* at 1325. The text of the trial court’s order was reprinted by the appellate court and provided in pertinent part:

That except for urine testing performed as a part of physical examinations required by City Personnel Policy for initial employment, or annually, or at other designated career times, the City of Palm Bay is hereby permanently enjoined from requiring Plaintiffs to give urine specimens for the purpose of determining the presence of controlled substances unless probable cause exists, to wit: reasonable suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in believing the police officer or fire fighter to have been on the job using, or after having recently used, a controlled substance.

*Id.*
odic physical examination from the permanent injunction.\textsuperscript{632} The City appealed to the Fifth District Court of Appeals of Florida, which affirmed the lower court's order with two important modifications.\textsuperscript{633}

The appellate court in \textit{Bauman} adopted the lower court's analysis on the fourth amendment issue, incorporating the pertinent portions of the trial judge's order directly into its opinion.\textsuperscript{634} The trial court outlined three policy considerations which contributed to the court's resolution of the fourth amendment challenge to the City's drug screening program.\textsuperscript{635} First, fire fighters must be possessed of all their physical and mental faculties on the job because their safety, as well as the safety of property, their fellow fire fighters, and the public is at stake.\textsuperscript{636} Second, because police officers use weapons, drive vehicles, and are often involved in life or death situations, they too must not be mentally or physically impaired by controlled substances.\textsuperscript{637} Moreover, the public knowledge of substance abuse within the police force would substantially diminish the community's confidence and respect for the Police Department.\textsuperscript{638} Third, public-sector employees are legitimately subject to more extensive regulation of their activities than their private-sector counterparts.\textsuperscript{639}

The lower court began its analysis by emphasizing that the instant case did not involve urine testing conducted as part of annual or other specified physical examination delineated in City policy.\textsuperscript{640} The trial judge suggested in dictum that if this were the case, no substantial fourth amendment issue would be involved.\textsuperscript{641} The court also emphasized that the instant case did not involve urine testing either alone or as part of a delineated City policy in-

\textsuperscript{632} \textit{See supra} note 631 for text of trial court's order.

\textsuperscript{633} \textit{Id.} at 1325-26. \textit{See infra} notes 660-68.

\textsuperscript{634} \textit{Id.} at 1324.

\textsuperscript{635} \textit{Id.}

\textsuperscript{636} \textit{Id.}

\textsuperscript{637} \textit{Id.}

\textsuperscript{638} \textit{Id.}

\textsuperscript{639} \textit{Id.} A fourth policy consideration discerned by the court was the non-probationary municipal employee's constitutionally protected property interest in his government employment against unjust and unlawful job deprivation. \textit{Id.}

\textsuperscript{640} \textit{Id.}

\textsuperscript{641} \textit{Id.} The court intimated: "Certainly, municipal police officers and fire fighters must expect to meet required minimum standards of physical condition in order to be hired and retained. Physical examinations conducted to insure that those standards are met to be reasonably expected even though urine testing is a part of those examinations." \textit{Id.} (dictum).
Drug Testing

voked on evidence of diminished capacity. Rather, observed the trial judge, the case before the court involved a mandatory urinalysis testing program, compelling all fire fighters to submit urine specimens or be subject to discipline up to and including discharge.

The trial judge acknowledged that a citizen had a reasonable expectation of privacy in the discharge and disposition of his urine, but indicated that the reasonable expectations of privacy held by the police officer and the fire fighter were lessened by the nature of their employment. The lower court explained that police officers and fire fighters, "because of the nature of their jobs, must reasonably expect their employer to have, and to demonstrate, legitimate concern that their ability to discharge their job responsibilities [was] not compromised by the use of controlled substances."

Once the lower court determined that the urinalysis test was a search within the meaning of the fourth amendment, the City attempted to circumvent a fourth amendment analysis by arguing that the employees consented to the search by signing the "Notice," thereby rendering the fourth amendment issue moot. The trial judge dismissed this argument as insubstantial, discerning an "abundance" of evidence demonstrating that the signatures on the "Notice" were procured under threat of disciplinary action. "Consent," declared the trial court, "cannot be inferred from an act so manifestly coerced."

The trial court in Bauman then focused its attention on whether the drug screening, "considered in the light of its scope, nature, incidence and effect," was unreasonable when the city's purpose for requiring the test was weighed against the rights of the fire

642. Id.
643. Id. The court emphasized the fact that all police officers and fire fighters were subjected to the testing procedure. Id.
644. Id. (citing as authority McDonell, 612 F.Supp. 1122).
645. Id. at 1325.
646. Id.
647. Id. at 1324.
648. Id.
649. Id. The court explained, "[t]his argument is without substance for it is abundantly clear from the evidence that such signatures were procured under threat of disciplinary action." Id.
650. "Consent cannot be inferred from an act so manifestly coerced." Id.
651. Id. at 1325.
fighters affected. Drawing a parallel to the anti-drug policy at issue in McDonell, the trial court in Bauman emphasized that Palm Bay’s “policy” failed to identify the person, or persons, either by name or position, who were authorized to require employees to submit to a urinalysis. Moreover, reprimanded the court, the City’s “policy” did not articulate any standards for its implementation, nor was it supplemented by separately promulgated written standards. Particularly bothersome to the Bauman court, however, was the fact that the policy required no showing of cause to justify compelling an employee to submit to a urine test:

Reasonable suspicion plays no part—the testing is to be all encompassing. Yet the Chief of Police has received no information, and has no independent knowledge, that any member of the Palm Bay Police Department has used marijuana... The total known involvement on and off the job, even after urine testing, is less than six (6) people. While not suggesting that this figure is insignificant, it is hardly a legal springboard for the trip the City now seeks to take.

Thus, exclaimed the court, “[w]ithout a scintilla of suspicion directed toward them, many dedicated fire fighters and police officers were told, in effect, to submit to such testing and prove themselves innocent, or be subjected to disciplinary action.” In the final balancing process, the trial court determined that the City’s proposed urinalysis program was “constitutionally unreasonable.” The Fifth Circuit agreed. The appellate court, however, did not agree with the trial court’s proposed requirement of probable cause as the appropriate circumstances under which the City would be justified in requiring the urinalysis tests, finding it to im-

652. Id.
653. 612 F.Supp. 1122. See supra text accompanying notes 578-603 for discussion of the district court’s ruling in McDonell.
654. 475 So.2d at 1325.
655. Id.
656. Id.
657. Id.
658. Id. The court held that
... urine testing not performed as part of physical examinations required annually or at other specified career times by City personnel policy, and designed to determine the presence of controlled substances, may constitutionally be required only on the basis of problem cause, to wit: reasonable suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person in believing the police officer or fire fighter to have been on the job using, or after having recently used, a controlled substance. The person, or persons, authorized to require such urine testing should be designated in writing by the City Manager.

Id.
659. Id. at 1325, 1327.
pose "too severe" of a standard.660

Instead, the Fifth Circuit in *Bauman* decided to join several cited federal courts, which addressed the drug screening issue, in their determination that a "reasonable suspicion" standard was the preferable basis upon which this type of search could be justified.661 As the Fifth Circuit explained, "the reasonable suspicion" test requires that to justify this intrusion, officials must point to specific objective facts and rationale inferences that they are entitled to draw from these facts in light of their experience.662 In Florida, pointed out the court, reasonable suspicion is equated with founded suspicion, which is "something less than probable cause, but something more than a mere suspicion," and requires further investigation.663 The Fifth Circuit in *Bauman* modified the trial court's final judgment by replacing the probable cause requirement with one of reasonable suspicion.664

Acknowledging the legitimate right of the City "to adopt a policy which prohibits police officers and fire fighters from using controlled substance at any time while they are so employed, whether such use is on or off the job,"665 the appellate court found the trial court's limitation of the City's ability to compel urinalysis tests to those situations in which it appears that the employee has "been on the job using, or after having recently used" a controlled substance to be overly restrictive.666 Accordingly, the Fifth Circuit eliminated the restrictive language from the trial court's order.667

f. *Caruso v. Ward*

In *Caruso v. Ward*,668 the state court was presented with a set of facts very similar to those of the *Bauman* case.669 On June 2, 1986,

660. *Id.* at 1325.
661. *Id.* at 1325-26.
662. *Id.* at 1326.
663. *Id.* (citing *Lewis v. State*, 337 So.2d 1031 (Fla.2d DCA 1976); *State v. Othen*, 300 So.2d 732 (Fla.2d DCA 1974)) ("It is a suspicion which has some factual foundation in the surrounding circumstances observed by the officer, when those situations are interpreted in light of the officer's knowledge") (citing *State v. Spurline*, 385 So.2d 672 (Fla.2d DCA 1980)); *State v. Stevens*, 354 So.2d 1244 (Fla. 4th DCA 1978)).
664. *Id.*
665. *Id.* The court placed special emphasis on the Department's ability to proscribe drug usage both on-duty and off-duty.
666. *Id.* (calling the trial court's on-duty standard "too narrow [of] a restriction").
667. *Id.*
669. *Id.* at 797 (Justice Farness, writing for the court in *Caruso* recognized that "[a] most identical set of facts as to the instance case was presented to the court in *City of Palm*
the New York City Police Department issued Department Interim Order Number 36 which would require members of the Department's Organized Crime Bureau (OCCB) to consent and to submit to future random drug screening, as a condition of their retaining their employment in the OCCB. As part of the Order, the OCCB members would be required to sign an initial consent form which set forth the Department's drug testing policy. As a condition of continued assignment to the OCCB, the officer would be required to consent, on-demand, to random urinalysis testing. Current members of the OCCB who refused to file the initial consent form would be transferred out of the OCCB. This was no small penalty, for an OCCB assignment was generally considered to be a desirable assignment presenting a path to advancement within the Department. Having once signed the initial consent form, an officer who subsequently refused to submit to a urinalysis test was subject to the full range of Department disciplinary measures. Additionally, those officers testing positive for the presence of illegal drugs might also be disciplined. The Patrolmen's Benevolent Association (PBA), the recognized union representative for all members of the New York City Police Department, filed suit seeking a permanent injunction preventing implementation of the Department's random drug screening program.

Prior to the issuance of Order 36, the entire Police Department was subject to a drug testing policy which required submission to urinalysis when there was a "reasonable belief" that the officer was using drugs. The PBA did not contest the right of the Department to have a drug screening policy as part of a health check-up or where a member was "reasonably believed" to be using drugs.

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670. Id. at 791. The OCCB is a division within the Police Department which specializes in narcotics, gambling, prostitution and other forms of organized crime. The Bureau had some 1200 who usually served four years in the OCCB. An assignment to the OCCB was a well sought after position because it represented one route to advancement within the Department. Id.

671. Id.

672. Id. The command to submit to the urinalysis could come at any time and was applicable to all officers of any rank within the Bureau. Id.

673. Id. Transfer out of the OCCB would be without penalty or loss of rank. Id.

674. See supra note 670.

675. 506 N.Y.S.2d at 791.

676. Id.

677. Id. The suit was filed on behalf of those members currently assigned to the OCCB as well as those who subsequently would be assigned to the Bureau. Id.

678. Id.

679. Id. at 791-92. Nor did the PBA object to drug testing as part of a health check-up
Rather, the sole point of objection concerning the proposed drug screening program was the elimination of the “reasonable belief” requirement and the resultant creation of a purely random urinalysis plan for the OCCB, while the rest of the Department would continue under the old “reasonable belief” system. The PBA contended that the random drug screening program violated the fourth and fourteenth amendment rights of the OCCB membership.

Citing several federal court decisions as support, the Caruso court determined, as a threshold matter, that urinalysis tests fell within the purview of fourth amendment restrictions. However, the court noted that not all searches and seizures are prohibited by the fourth amendment, rather, only unreasonable searches are proscribed. The next consideration addressed by the court was whether the urinalysis program outlined in Order 36 was reasonable and thus not violative of the fourth amendment. In making this determination, the court balanced the degree of intrusion of the officers’ right of privacy, entailed in the urinalysis test, against the legitimate interests of the Department, to be advanced by the urinalysis tests.

The Caruso court pointed out that, under the Order’s drug screening procedure, the officer was required to provide the urine sample in the presence of a superior officer of the same sex.

or where the individual officer was actually suspected of using drugs.

680. Id. at 792.
681. Id.
682. Id. The court decided to join the ranks of the majority holding that compelled urine testing is a search within the meaning of the fourth amendment. Id. (citing Schmerber, 384 U.S. at 767; McDonell, 612 F.Supp. at 1127; Allen, 601 F.Supp. at 488-9; and Bauman, 475 So.2d 1322).
683. Id. Rather, observed the Caruso court, only unreasonable searches and seizures are proscribed. Id.
684. Id.
685. Id. The court observed that “reasonableness” is not susceptible of precise definition but must be determined by balancing the degree of intrusion of the search on the person’s fourth amendment right of privacy against the need for the search and seizure to promote some legitimate government interest. Id. Thus, the Caruso court determined the issue to be whether the degree or scope of intrusiveness occasioned by compelling the police officers to submit to the urinalysis test was justified by an overriding government interest which would be advanced by the testing program.
686. Id. The court turned to the first step of the balancing process which entailed an assessment of the intrusiveness of the urine testing procedure. Recognizing that intrusiveness is a relative inquiry, the court held that like blood testing, urinalysis was sufficiently intrusive to warrant fourth and fourteenth amendment protection. Id. The Caruso court opined that, in fact, urine testing might be more invasive than blood testing, inasmuch as blood testing—“a benign procedure”—involved no embarrassment and was “no more intru-
Thus, observed the court, "the suspect officer would be required to perform before another person what is an otherwise very private bodily function which necessarily includes exposing one's private parts, an experience which even if courteously supervised can be humiliating and degrading."\textsuperscript{687} The Caruso court perceived no reason to believe that the police officer would find the procedure any less intrusive than would another citizen.\textsuperscript{688}

In its defense, the Department first contended that the police officers assigned to the OCCB had a diminished expectation of privacy in this area.\textsuperscript{689} The court reasoned that while it is true that police officers, by the very nature of their job, should anticipate that the Department would have serious concerns that the officers' ability to discharge their duties not be impaired by drugs and should anticipate that the Department may place reasonable conditions on their employment, including screening for drug use,\textsuperscript{690} it is equally true that, though reasonable expectations are diminished, the police officers still retain substantial fourth amendment rights.\textsuperscript{691}

Dismissing the Department's second defense that since employment in the OCCB was purely by invitation, as employers they had an absolute right to condition the employment on submission to random urinalysis,\textsuperscript{692} the court declared that "[w]hile a government may place conditions on [government] employment, it may not as a precondition require waiver of all rights under the Fourth Amendment."\textsuperscript{693}

\textsuperscript{687} Id. See infra text accompanying note 687.

\textsuperscript{688} Id. The Caruso court cited Tucker v. Dickey, 613 F.Supp. 1124, 1130 (D.C. Wisc. 1985)' (where the court found that urinalysis was similar to blood testing and body cavity searches).

\textsuperscript{689} Id.

\textsuperscript{690} Id.

\textsuperscript{691} Id. (citing Security and Law Enforcement Employees v. Carey, 737 F.2d 187, 202 (1984)).

\textsuperscript{692} Id.

\textsuperscript{693} Id. The court cited the Supreme Court's decision in Frost v. Railroad Commission, 271 U.S. 583, 593-94 (1926), where the Court stated:

It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United
Citing a long line of case law, the Caruso court also rejected the Department’s argument that the police officers consented to the urinalysis by signing the initial consent form.\(^\text{694}\) The Caruso court quoted the district court in McDonell, where it was said: "[A]dvance consent to future ‘unreasonable’ searches is not a reasonable condition for employment."\(^\text{695}\) The court was also unpersuaded by the Department’s contention that the urinalysis tests were not “arbitrary” within the meaning of the fourth amendment because no one officer in the OCCB was singled out, but rather, all were subject to the urinalysis test at approximately the same time.\(^\text{696}\) The Caruso court disagreed with this analysis, holding that "as to each person tested the procedure is arbitrary to the extent that it is a standardless search."\(^\text{697}\)

The Caruso court then turned to a consideration of whether the Department had shown sufficient justification to make its proposed standardless searches, which were based on no individualized cause, nevertheless “reasonable” for fourth amendment purposes.\(^\text{698}\) The court dismissed as insufficient the Department’s first justification that as an employer it had a vital interest in discovering the extent of drug abuse in the workplace and in identifying abusers.\(^\text{699}\) The Caruso court reasoned:

No doubt every employer would have a such information and find similar interest useful. But that by itself would not justify subjecting employees to testing. Any governmental agency could properly make out a case for drug testing as a useful investigatory tool in ruling out drug abusers and eliminating the deleterious effect that such use may have on an agency’s operation.\(^\text{700}\)

Finding that the Department presented neither direct nor circumstantial evidence to support its claim that random drug screening was necessary to combat a “drug problem” which existed in the OCCB, the court concluded that “... it is difficult to justify random testing as a deterrent when there is little indication that there

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\(^{694}\) 506 N.Y.S.2d at 794.

\(^{695}\) Id. (quoting McDonell, 612 F.Supp. at 1131).

\(^{696}\) Id.

\(^{697}\) Id. The Caruso court admonished: “The Fourth Amendment purpose is to protect each citizen and no unlawful government search can ever be justified on the premise that it will be applied equally to all members of the offended class.” Id.

\(^{698}\) Id.

\(^{699}\) Id.

\(^{700}\) Id. (in support of this statement, the Caruso court pointed to similar language in McDonell, 612 F.Supp. at 1130). See supra note 592.
is any significant drug use to deter.701

The Department argued further that random testing of the OCCB was necessary to restore police integrity and public confidence in the OCCB, to help deter corruption to which the OCCB, by its nature, was more susceptible, and to otherwise eliminate any unnecessary positive danger to others created by a drug impaired police force.702 While conceding the Department's legitimate interest in maintaining police integrity, order, and discipline within its agency,703 the Caruso court noted the Department's failure to document or demonstrate that drug use within the OCCB presented a discernible problem in any of these areas.704 The Caruso court found these justifications to be of no greater of a degree and to present no greater imperatives than those found in the line of recent decisions in the drug screening area which imposed a reasonable suspicion standard.705 Thus the court held that the Department failed to justify testing the OCCB officers' urine for drugs absent individualized suspicion of drug use.706

The court then enjoined implementation of the proposed random urinalysis plan as violative of the fourth amendment.707 How-

701. Id. at 795. The court in Caruso observed:

A further justification offered for testing is the deterrent effect it will have on drug use by the officers through fear that such use may be disclosed at any time. However, the Department has present almost no persuasive evidence that drug use is no more than a very occasional problem at best. By its own statistics only 13 officers last year and 9 to date in 1986 out of a force of over 26,000 were tested positive for drug use. 

Id. Displeased with the nature of the evidence offered in support of this argument, the Caruso court chided the Department:

Those statistics submitted of drug use by adolescents in the general population or in applicants to the Department are not terribly relevant. We can assume that a certain number of such applicants who show drug use are either denied appointment to the Department or are culled out during their probationary period . . . As to comparison with general population statistics, we can, also assume that one opting for the disciplined and highly supervised life of an officer is the type of person much less likely to violate the law and use drugs.

Id. Thus, concluded the court, the general population statistics were not very probative of what existed in the Department. Id.

702. Id. at 795-96.
703. Id. at 796.
704. Id.
705. Id. (citing among others, McDonell, 612 F.Supp. 1122; and Bauman, 475 So.2d 1322).
706. Id.
707. Id.

In a poignant conclusion, the Caruso court advised:

Once it was random searches of homes and personal effects that were our primary Fourth Amendment concern. Now as science becomes more adept at unlocking the secrets contained in our body and its fluids we must be careful that the private infor-
ever, the Caruso court expressly preserved the Department’s right to continue testing officers upon a reasonable suspicion basis. While random testing was constitutionally impermissible, the Caruso court reasoned that “[a reasonable suspicion] standard is flexible enough to afford the full measure of fourth amendment protections without posing a barrier to this employer’s legitimate right to seek out drug use by its employees.”

g. Bostic v. McClendon

In Bostic v. McClendon, the District Court for the Northern District of Georgia was presented with a motion and a cross motion for summary judgment in a suit brought by a former city clerk and a former police officer against the City of East-Point, Georgia, alleging that the City’s random drug testing program violated their fourth amendment rights.

The plaintiff clerk, Henrietta Bostic, was employed by the City from April 1979 to March 1985. The plaintiff police officer, Walter Thigpen, was also employed by the City until March, 1985. Based upon statements made by persons within the Police Department and complaints registered by persons from the community, none of which concerned Bostic, the Chief of Police of the East-
Point Police Department, McClendon, decided to use a urinalysis test to determine whether marijuana was being used within his department. Without prior notice, on February 26, 1985, all East-Point police personnel were assembled together and a urinalysis was performed. The department personnel were informed, at that time, that if they refused to submit to the test, they would be fired. Neither the clerk nor the police officer verbally objected at the time of the test.

Both plaintiffs were separately informed by the Chief in his office the following day, that their test results returned positive for the presence of marijuana. The plaintiffs were then placed on suspension without pay. Thigpen and Bostic were subsequently terminated by letter on February 28 and March 1, respectively. The letters of termination stated that the plaintiffs were terminated “for conduct unbecoming [their] position in accordance with the provisions of Section 4-213 of the City Charter.” Choosing not to appeal their terminations through the internal grievance procedure, the plaintiffs filed suit in federal district court, alleging that the Department’s urinalysis program violated the fourth amendment.

At the outset of its analysis, the district court determined that the Department’s urinalysis test was a search and seizure within the meaning of the fourth amendment. Next, the Bostic court

that an officer had supposedly smoked marijuana in front of her son and had taken some marijuana from another person. Neither plaintiff was specifically implicated in these complaints received by Chief McClendon, and Chief McClendon received no information suggesting that plaintiff Bostic had used marijuana prior to February 26, 1986. Id. at 248.

716. Id. The Chief received the approval of the City Manager. Id.
717. Id.
718. Id.
719. Id.
720. Id.
721. Id.
722. Id.
723. Id. The letters also informed plaintiffs of their right to appeal the personnel action to the Personnel Board of Appeals, and that if plaintiffs appealed the action, the termination would abate pending determination of the hearing before the Personnel Board of Appeals. Id.
724. The plaintiffs, through their attorney, informed the City Manager that they would pursue an appeal of their terminations. From the date they elected to pursue their appeal, the plaintiffs were again placed on suspension with pay, and were paid for the period between the date of their termination and the date of their election to appeal. On April 1, 1985, the date set for the hearing for their appeal before the City of East Point Personnel Board of Appeals, the plaintiffs informed the Board that they would not pursue the appeals. On the same day, the plaintiffs filed suit in the federal district court. Id.
dismissed the Department's defense that, since neither plaintiff verbally objected at the time the test was administered, the urinalysis test was conducted pursuant to each plaintiff's consent.\footnote{726} The district court held that for such silence to be construed as consent, the Department was required to demonstrate that the consent was, in fact, voluntarily given, free of duress and coercion, whether express or implied.\footnote{727} Based upon the undisputed fact that the employees were informed on the date of the test that refusal to submit a urine specimen would result in termination, and each plaintiff's testimony that they participated in the test because they feared losing their jobs, the court concluded that "[u]nder these circumstances, plaintiffs' consent to search was obviously not voluntary, but was the result of coercion."\footnote{728}

Since the fourth amendment provides individuals the right to be free from only "unreasonable government intrusions into their legitimate expectations of privacy,"\footnote{729} the district court's analysis focused next on the "reasonableness" of the Department's urinalysis testing procedure, by balancing the plaintiffs' legitimate expectations of privacy against the Department's interests to be served by the drug screening program.\footnote{730}

Assuming as evident the Police Department's "strong interest in protecting the public by ensuring that its employees were fit to perform their jobs,"\footnote{731} the Bostic court reasoned:

Considering the authority and discretion provided individual officers and the inherently dangerous and volatile environment in which they operate, there is no doubt that drug abuse can have a seriously adverse effect upon a police officer's ability to perform his duties . . . Therefore, the legitimate interest of the police department certainly encompasses ensuring that its officers do not use drugs on the job or use drugs off duty in a manner which affects their on-duty performance.\footnote{732}

\begin{thebibliography}{9}
\footnotesize
\item 1089 (D. N.J. 1985); Allen, 601 F.Supp. 482; Schmerber, 384 U.S. at 767).
\item \footnote{726} Id. at 249.
\item \footnote{727} Id. (citing Schneckloth, 412 U.S. at 248-49) (using the same language as McDonnell, 612 F.Supp. at 1131; see supra note 596).
\item \footnote{728} Id.
\item \footnote{729} Id. ("The Fourth Amendment does not prohibit all searches and seizures, but only provides individuals the right to be free from 'unreasonable' government intrusions into their legitimate expectations of privacy").
\item \footnote{730} Id. at 249-50.
\item \footnote{731} Id. at 250.
\item \footnote{732} Id. The Bostic court supplemented its thoughts with a passage from the appellate court's decision in Turner, 500 A.2d at 1008, where the court observed:

Given the nature of the work and the fact that not only his life, but the lives of the public rest upon his alertness, the necessity of rational action and a clear head un-befuddled by narcotics becomes self-evident. Thus, the use of controlled substances
\end{thebibliography}
Reflecting on the fundamental duty of the police force to keep order and protect the public peace, the district court discerned a second Department interest in preserving the community perception of a legitimate and respectable police force.\textsuperscript{733} The \textit{Bostic} court explained:

There is no doubt that the open violation of narcotics laws by officers serves to seriously undermine the legitimacy of their moral authority to enforce these laws as to others, and erodes the likelihood that the public will voluntarily support and acquiesce to the authority of those officers. The open violation of narcotics laws by its officers does hinder the police department’s ability to effectively carry out its statutory responsibilities . . . .\textsuperscript{734}

Notwithstanding this legitimate interest in detecting drug use, the \textit{Bostic} court declared that the Police Department was not authorized to use just any available method to detect such use.\textsuperscript{735} Balancing the nature of the Department’s legitimate interests and the individual police officer’s reasonable expectations of privacy, the district court concluded that the fourth amendment required reasonable suspicion as the basis for the Department’s demand for a urine sample from a police officer for chemical analysis.\textsuperscript{736} The court defined reasonable suspicion as “based on specific objective facts and reasonable inferences from those facts, in the light of experience, that a urinalysis will provide evidence of illegal drug use by that particular employee.”\textsuperscript{737}

The paucity of any objective facts on record which would indicate that the clerk had used marijuana\textsuperscript{738} led the district court to conclude, under the reasonable suspicion standard, that the Department’s urinalysis testing of the clerk was in violation of Bos-

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\textsuperscript{733} The \textit{Bostic} court observed:

Further, a police force is entrusted with the basic duty of keeping order and protecting the public peace, an obligation which is fundamental to the preservation of society. To a considerable degree, the ability of the police force to carry out this mandate depends on the public’s respect for and voluntary acquiescence to the legitimate authority of the individual officers.

\textit{Id.}

\textsuperscript{734} \textit{Id.}

\textsuperscript{735} \textit{Id.} (“That the police department has a legitimate interest in detecting drug use by its officers does not authorize it to use any method to detect such use”) (citing \textit{McDonell}, 612 F.Supp. at 1130; see supra note 592).

\textsuperscript{736} \textit{Id.}

\textsuperscript{737} \textit{Id.}

\textsuperscript{738} \textit{Id.}
tic's rights secured by the fourth amendment.739 The court granted the clerk's motion for summary judgment on this issue.740

The Police Chief was informed, four months prior to the testing, by another member of the force that he had seen officer Thigpen smoking marijuana.741 In addition, a police sergeant also informed the Chief that Thigpen and other officers were meeting after work and "doing some drugs."742 This information was also received four months before the Chief decided to administer the drug tests.)743 Despite the four month lapse between receiving the information pertaining to officer Thigpen and the decision to require a urine test, the Bostic court determined that this information "arguably would indicate that a urinalysis testing of [Thigpen] would produce evidence of illegal drug use."744 This determination in conjunction with the fact that the record was unclear as to whether the Chief had received any information which would indicate that Thigpen had used marijuana during the four months that preceded the testing745 created an issue of fact as to the "reasonableness" of subjecting Thigpen to the urinalysis test.746 Thus, the court was precluded from granting the plaintiff's motion for summary judgment.747

739. The court in Bostic declared:

It is undisputed that, prior to February 26, 1985, Chief McClendon was aware of no objective facts which might indicate that Ms. Bostic had used marijuana either on or off-duty. Rather, Ms. Bostic was subjected to the urinalysis testing became Chief McClendon suspected that certain other officers had used marijuana and he wished to determine the extent of the problem. While the Chief's intentions may have been laudable, the method he chose to utilize unreasonably infringed on Ms. Bostic's legitimate expectations of privacy. Id. at 250-51.

740. Id. at 251. ("As it was not based on any objective facts which would indicate that she had used marijuana, the urinalysis testing of Ms. Bostic was in violation of her rights secured by the Fourth Amendment"); see id. at 252.

741. See supra note 514.

742. 650 F.Supp. at 251.

743. Id.

744. Id.

745. Id.

746. Id.

747. Id. The court's decision in King v. McMickens, 501 N.Y.S.2d 679 (A.D. 1 Dept. 1986) involved another case in which the employer decided to drug screen two police officers as the result of an informant's tip implicating them in illegal drug activities.

Petitioner Henry King became a correction officer with the Department of Correction on May 1, 1972. Melvin King became a correction officer on January 21, 1974. On August 10, 1983 the Inspector General's office of the Correction Department received a report from the Office of Speical Prosecutor that a confidential informant had alleged that petitioners were involved in illegal drug activities. Specifically, the informant advised that the officers frequented a certain drug trafficking location and that they used illegal drugs at such location.
Perhaps the procedural setting of the case\textsuperscript{748} explains why the district court determined that the meager evidence of the Chief's knowledge of Thigpen's alleged activities four months prior to the testing decision and the record, unclear on whether the Chief had heard of more recent drug-related incidents involving Thigpen, were sufficient to create a factual issue of "reasonable suspicion", preventing summary judgment.\textsuperscript{749} The court's decision nevertheless raises important issues pertaining to the scope of the reasonable suspicion standard.

Suppose the record was clear that the Chief's decision was based solely on the information received concerning Thigpen's alleged activities four months ago, would the court have granted Thigpen's

Further investigation revealed that the location was known to the Police Department as premises used for drug trafficking. Thereafter, the investigator received information from the informant that petitioners were observed using drugs at the location. \textit{Id.} at 680.

The investigator assigned to investigate the allegations notified the plaintiffs that the Inspector General ordered each of them to submit to urinalysis. \textit{Id.} The officers were also personally directed to do so by the Captain of their Department. After first asserting they were unable to urinate, and thereafter conferring with a union attorney, the petitioners told the investigator and the Captain that they refused. \textit{Id.} Both were suspended for this refusal. \textit{Id.} Each was thereafter served with the charges and specifications, which read as follows:

Said officer on December 19, 1983 was ordered by the Inspector General Tyrone Butler, to report to MMU [Medical Management Unit] for a urinalysis. This order was conveyed through investigators Luis Velez \#28 and Richard Pagan \#29. Said officer refused to comply.

Rule: 3.15.090

3.15.030

\textit{Id.} at 680. After all of the evidence was submitted at the hearing on the plaintiffs' violation of Department rules, the hearing officer concluded: "Respondents' insubordinate refusal to obey the order constituted a violation of the Department's legitimate authority and precluded it from carrying out its obligation to assure the integrity and fitness of members." \textit{Id.} at 681. The hearing officer recommended dismissal from the department, and the Commissioner approved the findings and recommendations. \textit{Id.}

As one basis of appealing their discharge, the plaintiffs claimed that the compulsory urinalysis violated their fourth amendment rights against unreasonable searches. The court disagreed, reasoning that the correction officer occupied a sensitive position and was subject to para-military discipline: "He cannot perform his demanding duties if impaired by drugs. His reasonable expectation of privacy as a private citizen must yield to compelling governmental interests when he becomes an officer." \textit{Id.} at 681. Furthermore, added the court, probable cause was not required to compel the officers to take the urinalysis. \textit{Id.} Rather, reasonable suspicion was sufficient. \textit{Id.} Finding the information furnished by the information provided the basis for a reasonable suspicion that petitioners were engaged in activity inappropriate to their office, the court held that the Corrections Department satisfied the requirements of the fourth amendment and, therefore, properly ordered the officers to submit urine samples. \textit{Id.} Thus, concluded the court, "dismissal was not an excessive penalty, nor was it shocking to one's sense of fairness or disproportionate to the offense." \textit{Id.}

748. The \textit{Bostic} case was before the court on a motion for summary judgment. \textit{Id.} at 247.

749. \textit{See supra} notes 741-747 and accompanying text.
motion for summary judgment, finding as a matter of law that a test based on information that was four months old, without more, was unreasonable? It is suggested that regardless of which way the court would rule, a problem arises as to when the cutoff point for reasonableness should be. How far into the employee's past should the employer be permitted to look to justify his decision to test an employee for drugs? Four months? One year? His entire period of employment with that employer? College days? High school days? Where should the cutoff be? If the employer's reference period is too large, the court would be permitting the employee to justify his decision on a "bad apple" theory.

Is the time element just part of the overall issue of "reasonableness" that should be left to the fact-finder to decide? Should it be? Given the diversity of public opinion on the evil of drugs, it seems apparent that the employer as well as the fact-finder needs some guidelines to assist in determining whether facts are legally relevant to support "reasonable suspicion" to require testing of an employee.

Clearly, one should not be punished for his high school experiments or his college excesses, but the line becomes more difficult to draw when weeks or months are the quantity of time. This difficulty is best avoided by requiring any decision to conduct a urinalysis to have a demonstrated work-related basis, such as a documented decline in work proficiency, excess absenteeism or disciplinary problems. By tying the decision to test to such criteria, the employer would be unable to justify a decision to test, based on a rumor that a given employee was "doing drugs" after working hours. This rule should be equally applicable to the employer who has a valid work rule prohibiting the off-duty use of drugs. Use of drug screens as a preliminary investigative tool is objectionable in itself, but deploying drug screening as an intial follow-up on rumors is reprehensible. Given the highly intrusive nature of the procedure and the availability of other viable investigatory alternatives, such as surveillance, there is scarcely a justification to use a drug screen instead. But see infra text accompanying notes 994-1077 for a discussion of exceptions to the reasonable suspicion standard; see also id. infra note 932. Under these limited circumstances it is arguable, at least, that perhaps a drug screen is appropriate, provided that the informant is a reliable source. Some safeguards must be taken, however, to ensure that drug screens do not become a means of advancing personal vendettas between employees, or between management and the employees.

Drugs and the use of drugs are viewed differently by different people. America has been described as "infatuated by mind altering substances," - TIME MAGAZINE, Sept. 15, 1986, A Letter from the Publisher, at 6 (quoting TIME correspondent Jonathan Beaty) - and as a "drug society" - TIME, America's Crusade, supra note 1, at 64 (quoting Dr. Ronald K. Siegel, psychopharmacologist at UCLA). Meanwhile others discern an incipient change in the American mentality against drugs. See, e.g., TIME, America's Crusade, supra note 1, at 60; NEWSWEEK, Trying to Say "NO", supra note 3, at 14. One thing is clear, people's views on drugs vary widely. People delineate between "hard drugs," such as LSD and Heroin, and "soft drugs," such as marijuana. See BNA Special Report, supra note 8, at 70 ("The Peculiar Problem of Marijuana"). This perception is demonstrated by the divergent arbitration decisions: some arbitrators will sustain a discharge for smoking marijuana on company premises and time, while others will not; some require repeat occur-
comes too remote in time to support reasonable suspicion of drug use could be solved, by requiring all decisions to test to have same basis in poor or declining job performance, discipline problems, or attendance problems. Under this suggestion, it is clear that the Bostic court decision would have resulted differently.\textsuperscript{752}

h. Capua v. City of Plainfield

In an incisive decision, the District Court for the District of New Jersey in Capua v. City of Plainfield,\textsuperscript{753} held that the City of Plainfield, New Jersey, violated the fourth and fourteenth amendment rights of its fire fighters and police department personnel when it ordered an unannounced mass urine test for drug use, and then terminated the employment of those who tested positive.\textsuperscript{754}

\begin{quote}
In an admonitory introduction, characterizing the nature of the issues in the case, Judge Sarokin, writing for the district court in Capua, delivered an impassioned censure on the drug screening issue, unprecedented in the rulings discussed previously:

\textit{In the face of widespread use of drugs and its intrusion into the workplace, it is tempting to turn to mass testing as a solution. The issue presented by this case is the constitutionality of such testing of current employees by governmental entities. . . . Government has a vital interest in making certain that its employees, particularly those whose impairment endangers their co-workers or the public, are free of drugs. But the question posed by this litigation challenges the means by which that laudable goal is attained, not the goal itself.}

\textit{Urine testing involves one of the most private of functions, a function traditionally performed in private, and indeed, usually prohibited in public. The proposed test, in order to ensure its reliability, requires the presence of another when the specimen is created and frequently reveals information about one's health unrelated to the use of drugs. If the tests are positive, it may affect one's employment status and even result in criminal prosecution.}

\textit{We would be appalled at the spectre of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's "Big Brother" Society come to life.}

\textit{To argue that it is the only practical means of discovering drug abuse is not suffi-}
\end{quote}
On May 26, 1986, all fire fighters and fire officers employed by the City were ordered to submit to a surprise urinalysis test. Each fire department employee was required to submit a urine sample while under the surveillance and supervision of bonded testing agents employed by the City. The City repeated a substantially similar procedure on May 28 and June 12, 1986 until approximately all of the 103 fire fighters employed by the City were tested.

Prior to May 26, the Plainfield fire fighters had no notice of the City's intent to conduct mass urinalysis. Moreover, unannounced mass urinalysis testing had not been provided for in the collective bargaining agreement between the fire fighters and the City. Nor was any written directive, order, departmental policy, or regulation promulgated establishing the basis for such testing and prescribing appropriate standards for collecting, testing, and utilizing the information desired.

Between July 10 and July 14, 1986, sixteen fire fighters were advised that their respective urinalysis had proved positive for the presence of controlled dangerous substances and were immediately terminated without pay.

At about the same time, employees of the Plainfield Police De-
partment were subjected to similar urine testing. On May 26, 1986, plaintiff Monica Tompkins, a communications operator for Plainfield Police, was ordered to submit a urine sample under the surveillance of a female testing agent. On July 10, Tompkins was advised by the Chief of Police that her urinalysis had been positive. As a result, Ms. Tompkins was informed that she could either resign without charges being brought, or she would be immediately terminated.

The plaintiff fire fighters filed suit in federal district court seeking to have the City's urinalysis testing declared unconstitutional as violating their fourth amendment rights, and to have the testing program permanently enjoined from implementation. Tompkins filed a related action, which the court chose to consider jointly with the fire fighters' suit.

Employing an analysis similar to that used by the courts in McDonell, Allen, and Bauman, the district court concluded that the City's compelled urinalysis testing program constituted a search and seizure within the meaning of the fourth amendment.

The Capua court framed the issue before the court as "whether the intrusion occasioned by compelling members of the Plainfield Fire Department to submit to compulsory urine testing [was] sufficiently justified by the governmental interest in ferreting out drugs so as to be 'reasonable' within the meaning of the fourth amendment." The district court proceeded to identify the competing interests of the fire fighters and the City.

Applying the two-part test for assessing an individual's reasonable expectation of privacy enunciated by Justice Harlan's concur-

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763. Id.
764. Id.
765. Id.
766. Id.
767. Id.
768. Id.
769. 612 F.Supp. at 1127. See supra note 580.
770. 601 F.Supp. at 489. See supra note 570.
771. 475 So.2d at 1324. See supra note 647.
772. 643 F.Supp. at 1513.
773. Id.

The Court issued a Temporary Restraining Order mandating the immediate reinstatement of the suspended Plainfield fire fighters and prohibiting further urine testing by defendants pending a plenary determination in the case. Id.

On July 31, 1986 the defendants moved to vacate the restraining order. The court denied the defendants' motion, but granted leave to re-apply if specific, individualized evidence could be produced demonstrating that a particular fire fighter's job performance was impaired as a result of drugs. No such evidence was ever produced. Id.
rence in Katz v. United States, the court determined that the City's "mass urine testing program subjected the plaintiffs to a relatively high degree of bodily intrusion." The court offered several reasons for reaching this conclusion, including the traditionally recognized private nature of the urination process, the substantial intrusion on "interests of human dignity and privacy" occasioned by compelled urination under the observation of a government officer, and the dangers of disclosure of unrelated personal medical information "as a result of telltale urinalysis, ranging from embarrassment to improper use of such information in job assignments, security, and promotion."

The district court in Capua after noting the absence of provisions for mass urine testing in the collective bargaining agreement between the City and the fire fighters, the failure of the City to inform the fire fighters that it was within the City's authority to conduct such tests, and the failure to warn the fire fighters, prior to May 26, 1986, that the submission to a compulsory urinalysis would become a condition of continued employment, concluded that "[t]here can be no doubt on this record that the members of the Plainfield Fire Department reasonably expected to be free from intrusive government urine testing while on the job."

The City contended that fire fighters, as public servants, had a

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775. 643 F.Supp. at 1514. The court reiterated its introductory remarks. See supra note 754.
776. Id.
777. Id.
778. Id. at 1515.

Distinguishing the case under consideration from Shoemaker v. Handel, 795 F.2d 1136 (1986), the Capua court emphasized:

Plainfield had not established any procedural guidelines to govern the urine testing, and in particular had not taken any precautions to vouchsafe confidentiality. Quite to the contrary, following the suspension of those fire fighters who had tested positive for drugs, the City of Plainfield publicized its actions to the media. While no individuals were identified by name, the exposure has subjected all Plainfield fire fighters to public suspicion and degradation.

643 F.Supp. at 1515.
779. Id.
780. Id.
781. Id.
782. Id. The district court in Capua added that the "[p]laintiffs' reasonable expectation of privacy fell subject to the unbridled discretion of their government employer, contrary to the very tenet of the Fourth Amendment." Id. (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979) (where the Supreme Court said that the fourth amendment safeguards are necessary "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field' ").
diminished expectation of privacy, or in fact, no expectation of privacy at all with respect to job-related inquiries made by the municipality, including the challenged urinalysis tests. Arguing that the City's urinalysis program fell within the holdings of Allen and Division 241, the City contended that it shouldered the ultimate responsibility for insuring that its fire fighters were fully capable of protecting the safety and welfare of the members of the community; and, therefore, the City's interest in the discovery and elimination of drug abuse among its fire fighters took precedence over any privacy interest individually held by the fire fighters.

The district court in Capua rejected the City's argument finding both the Allen decision and the Division 241 decision inapposite to the facts of the instant case. The court distinguished both holdings on the basis that in each case, the decision to test was based upon some reasonable, individualized suspicion that the employees subjected to the urinalysis were using drugs on the job. By contrast, emphasized the Capua court, "[t]he City of Plainfield proceeded in its urine testing campaign without any specific information or independent knowledge that any individual fire department employee was under the influence of drugs . . . [the City] had no general job related basis for instituting this mass urinalysis, much less any individualized basis."

As a second justification, the City argued that the widespread, large scale drug use in all segments of the population led to the "reasonable and logical inference that some of those affected may ultimately be employed in a public-safety capacity", and that mass round-up urinalysis was the most efficient way to detect drug use. The Capua court found this argument equally unpersuasive, stating "[i]t is beyond dispute that the taking and testing of urine samples achieves the City's desired goal, namely the identification of employees who use drugs. But under the law, the results achieved cannot justify the means utilized and the constitutionality of a search cannot rest on its fruits." Focusing on the reason-

783. Id.
784. 601 F.Supp. at 489.
785. 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976).
786. 643 F.Supp. at 1515.
787. Id. at 1516.
788. Id.
789. Id.
790. Id.
791. Id. (citing McDonell, 612 F.Supp. 1122. See supra note 592 for the "classic" discussion on this issue by the McDonell court, which has served as the template for subse-
ableness of the City’s urinalysis program, the district court found that, as to each individual tested under the City’s mass urinalysis program the search was unreasonable, because the City “lacked any specific suspicion as to that fire fighter.” The court observed:

[The City] undertook this search driven by the mere possibility of discovering that some fire fighters were using drugs and therefore might be impaired in their job performance at some future time because of this drug use. Such attenuated protestations of concern for the welfare of the Plainfield community, without more, cannot render the seizure of urine specimens constitutionally reasonable.

Refusing to accept a “mere suspicion” standard as proposed by the City, the Capua court adopted the reasonable suspicion standard for conducting drug screens, as an appropriate balance between the legitimate interests of both parties.
In a final effort to salvage the City’s urinalysis program, the City argued that the ruling in *Shoemaker v. Handel*, which recognized an exception to the individualized suspicion requirement, provided controlling precedent for the case at hand. The *Capua* court disagreed, noting that, although *Shoemaker* creates an exception to the individualized suspicion requirement, the exception is very narrowly tailored to apply only in cases involving "highly regulated industry." Determining that the fire fighters did not qualify as "voluntary participants in a highly-regulated industry" within the meaning of *Shoemaker*, the district court concluded that the "circumscribed ruling in *Shoemaker* [could not] be applied to the instant search." Additionally, while the *Shoemaker* decision was largely influenced by the recognition that random drug testing, without individualized suspicion, was the only "effective means" to dispel long standing public suspicion of criminal influences permeating the horse racing industry, the state’s interest in assuring the public of the integrity of the Plainfield Fire Department was not similarly implicated in the *Capua* case. According to the *Capua* court:

Clearly, no one can deny that the public has an interest in the integrity of its fire fighting forces. Yet, the ability of fire fighters to perform their jobs is not dependent upon the public’s “perception” of this integrity in the same way as the racing industry’s. In other words, fire fighters can still continue to serve the public effectively, even in the face of unpopular public “perception”.

The district court observed that, unlike the *Shoemaker* case where the demonstration of propriety was the essential purpose of the random drug testing, the determination of job-related capability was the driving motive behind the City of Plainfield’s pro-

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on duty. Police officers and fire fighters are subject to constant observation by their superiors and co-workers. Certainly one so under the influence of drugs as to impair the performance of his or her duties must manifest some outward symptoms which, in turn, would give rise to a reasonable suspicion.

*Id.*


797. 643 F.Supp. at 1518.

798. *Id.*

799. *Id.* (quoting *Shoemaker*, 795 F.2d at 1142 n.5 (“Our holding applies only to breathalyzer and urine sampling of voluntary participants in a highly-regulated industry”)).

800. *Id.* at 1519.

801. *Id.*

802. *Id.*

803. *Id.*
Drug Testing

gram.804 "Such determination," declared the Capua court, "does not require mandatory mass urinalysis, but can be safely accommodated by an individualized suspicion standard."805

In the final analysis, the district court concluded in Capua that, after balancing the City's interest against the significant invasion of the fire fighters' individual privacy occasioned by the City's urine testing program, they were compelled to find that the blanket urinalysis program was unreasonable and violative of the fourth amendment.806

i. Lovvorn v. City of Chattanooga, Tennessee

The most recent decision to strike down blanket drug screening of police officers under the fourth amendment was rendered by the District Court for the Eastern District of Tennessee in Lovvorn v. City of Chattanooga, Tennessee.807 In Lovvorn, the City Commissioner and the Chiefs of Police and Fire for the City of Chattanooga jointly decided to administer compulsory urine tests for marijuana to all members of the Chattanooga Fire and Police Departments.808 None of the specifics for the testing program were ever put in writing, including the methods for testing, the standards for analyzing specimens, the procedures for implementation of discipline and for the release of testing information.809

The members of both departments were never formally informed of the Chiefs' decision until shortly before the scheduled date of the first group of urine tests.810 The fire fighters were all tested, in

804. Id.
805. Id. The Capua court added:

The Plainfield Fire Department has a long record of satisfactory service in protecting the safety of its citizenry. The citizens of Plainfield have not voiced any concern regarding their performance or their efforts. The public is well aware of the careful screening tests and exhaustive training undergone by all fire fighters. The civil service test and, the physical capacity requirements, all attest to the meticulous and conscientious manner in which fire fighters are selected. It is this process that establishes and ensures public confidence in its fire fighters.

Id. Thus, concluded the court: "The City of Plainfield is not seeking to combat public perception of 'untoward influence' undermining its fire force. On the contrary, these fire fighters daily prove their ability and their commitment on the job. Therefore, the state's interest in this case does not require the use of departmentwide urinalysis." Id. at 1519-20.

806. Id. at 1520.
808. Id. at 877. This decision was apparently the result of an isolated incident in early 1984, when some "civilian" employees of either the Police or Fire Department were "caught or almost caught" smoking marijuana and were disciplined. Id.
809. Id.
810. Id.
groups, over the period of late April through early May. The firemen were informed that, under penalty of discharge, they were required to submit to the urine tests. Except for fifteen or less employees, the urine specimens were given by the firemen under the direct supervision of a Deputy or Assistant Fire Chief.

Fire fighters testing positive twice on the urinalysis test were suspended from their jobs, informed of the results, and given a hearing before the Fire Chief in which to offer any explanation they might have. At the time of their suspension, the employees’ names were released to the local press. Citations were filed against these fire fighters for violating the Fire Department’s work rule, which prohibited both on-duty and off-duty use of drugs and disciplined, ranging from probation to demotion in rank to termination, was meted out according to the recommendations of the Fire Chief.

As a result of the May tests, and after some additional tests in August and September 1985, ten employees were terminated by the City, five resigned, and seventeen were placed on probation. Fire fighters who tested “trace” or “minus trace” were put on probation and subjected to future unannounced drug screens. Several of the fire fighters who were terminated in 1985 were rehired after participating in a drug rehabilitation program, but were subject to unannounced urine re-tests, apparently to monitor potential recidivism.

Because one of the rehired fire fighters again tested positive, and because the Department was informed that some fire fighters in 1985 had switched or adulterated their urine samples, the City

811. Id.
812. Id.
813. Id.
814. The court indicated that there was some confusion as to what constituted a positive result that triggered the disciplinary machinery. Id. at 878.
815. Id.
816. Id.
817. These fire fighters were cited for disobeying Chattanooga Fire Department Rules and Regulations § 38, General Conduct, 38.11 which states:
No member shall report for, or be on duty under the influence of any intoxicating liquors, drugs or compounds, nor shall he absent himself from duty, or render himself unfit to fully perform his duties for reasons, attributable to, or produced by indulgence in intoxicants.
Id. at 878.
818. Id.
819. Id.
820. Id.
821. Id.
Commissioner decided in the summer of 1986 to give mandatory urine tests to the entire Fire Department once again. These tests would not be limited, however, to those fifteen or less fire fighters who gave unobserved samples in 1985, but were planned to encompass the entire Fire Department. The Commissioner had not conducted any kind of conventional investigation of drug use in the Chattanooga Fire Department nor had there been any objective indication that the performance of any member of the department, or the department as a whole, had been affected by the use of drugs.

A group of fire fighters filed suit against the City, seeking an injunction against the proposed 1986 testing and a declaratory judgment that the proposed program violated the fourth amendment.

Following the blueprint of the McDonell and Allen decisions, the Lovvorn court determined that a urinalysis, by analogy to Schmerber, constituted a search under the fourth amendment. The court in Lovvorn next identified the competing interests of the City and the fire fighters. The court's explanation of the City's interest offered concrete examples of the safety concerns involved, rather than merely speaking in conclusory terms of "protecting public safety and welfare," like the preceding decisions.

There can be no doubt that the City here has a compelling interest in having its fire fighters free from drugs. Fighting fires is hazardous work. Fire fighters must be able to make snap decisions and to react quickly. Fighting fires at some locations is pre-planned and fire fighters must be able to recall such things as the location of water sources and of hazardous chemicals.

In Lovvorn, the City was primarily interested in testing the fire fighters for marijuana use and introduced expert testimony by which the City established that, depending on various factors, marijuana adversely affects a user's perception, decision-making time,
short-term memory and motor skills.\textsuperscript{833} The City argued that the fire fighters, who lived in the same quarters and routinely undressed in each others' presence and used common restroom facilities, should not as a rule be offended by exposing themselves in the act of urination in the presence of another of the same sex.\textsuperscript{834} The \textit{Lovvorn} court concluded, however, that while the degree of intrusion varies from one individual to the next, most people, including fire fighters, have a certain degree of subjective expectation of privacy in the act of urination.\textsuperscript{835} The court further observed that, although observation of the fire fighter, urinating while submitting the specimen certainly contributed to the intrusiveness of the test, observation alone did not render the urine tests constitutionally infirm, because the City demonstrated that no less intrusive means of conducting the test ensured the integrity of the sample.\textsuperscript{836}

The \textit{Lovvorn} court adopted the reasonable suspicion standard as the appropriate quantum of individualized suspicion necessary before the department could implement the urinalysis program.\textsuperscript{837} Refusing the City's request for some lesser standard based on analogy to the administrative search exception for highly regulated industries,\textsuperscript{838} the court reasoned that even if the administrative search exception were applicable in the present case, the City's program nevertheless lacked clearly defined standards for the searches and mechanisms for protecting privacy\textsuperscript{839} concerns which were absolutely necessary to qualify under the exception.\textsuperscript{840} The district court also found that, contrary to the City's characterizations, the military exception to reasonable cause was inapplicable in the instant case.\textsuperscript{841}

The court in \textit{Lovvorn} held that the absence of safeguards to insure that the urinalysis tests were not subject to the standardless

\textsuperscript{833} Id.
\textsuperscript{834} Id. at 880.
\textsuperscript{835} Id.
\textsuperscript{836} Id. at 880 n.5.
\textsuperscript{837} Id.
\textsuperscript{838} Id. at 881.
\textsuperscript{839} Id.
\textsuperscript{840} Id. The court indicated that in the administrative search cases, the courts relied on other safeguards to protect the individual's expectation of privacy including clearly defined standards for the searches and mechanisms for alleviating privacy concerns, not to mention the requirement of some modicum of cause. \textit{Id.} (citing Delaware v. Prouse, 440 U.S. 648, 655 (1979); Donovan v. Dewey, 452 U.S. 594, 604 (1981); and Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)).
\textsuperscript{841} Id. at 882.
discretion of the Fire Department officials required the City to demonstrate "an individualized suspicion linked in some way with objective facts[,] as opposed to an inarticulate hunch," that the individual fire fighter was using illegal drugs.\textsuperscript{842} Reviewing the record, the district court concluded that the facts existing did not permit a finding of reasonable suspicion that the fire fighters were using illegal drugs in violation of Department work rules on which the City could properly conduct the proposed 1986 department-wide test.\textsuperscript{843}

Thus, the proposed testing was constitutionally infirm under the fourth amendment.\textsuperscript{844} The district court emphasized, however, that the City was not foreclosed from testing the fire fighters for drugs in the future, so long as the City's decision to test was based on reasonable suspicion.\textsuperscript{845}


The Second Department of the New York Appellate Division recently extended the reasonable suspicion standard adopted by the courts in the public safety and health cases to the public schools in \textit{Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District}.\textsuperscript{846} In \textit{Patchogue-Medford}, the court invalidated a school directive requiring probationary teachers to submit to a urinalysis as a condi-

\begin{itemize}
  \item \textsuperscript{842} \textit{Id.}
  \item \textsuperscript{843} \textit{Id.}
  \item \textsuperscript{844} \textit{Id.} The \textit{Lovvorn} court explained:
  \begin{quote}
    As stated above, the scope of the search, and the measures adopted must be reasonably related to its objectives and not excessively intrusive. . . . If the City had objective facts indicating drug usage by those 15 or so fire fighters who, according to one or more anonymous tipsters, substituted urine samples at the 1985 tests, such might be reasonable cause to test those 15 or so fire fighters . . . However, to test the entire Fire Department on that information would be beyond the permissible scope of such tests.
  \end{quote}
  \textit{Id.} (citations omitted).
  
  The court suggested that mass urinalysis testing was not the only viable method to accomplish the City's objectives, stating:
  
  The City need not rely on mass drug testing to detect drug usage by members of the Chattanooga Fire Department. If indeed the use of drugs is causing deficient performance on the part of the fire fighters, this should be detectable to a considerable extent by properly designed personnel procedures to detect such drug abuse symptoms as absenteeism, aberrant conduct and financial difficulties. It does not appear that the City has expended any effort on this approach.
  
  \textsuperscript{845} \textit{Id.} at 883.
  \item \textsuperscript{846} 505 N.Y.S.2d 888, 119 A.D.2d 35 (1986).
\end{itemize}
tion of receiving tenure in the absence of any reasonable suspicion that any of the teachers were using or ever used illegal drugs.\footnote{\textit{Id.} at 889, 119 A.D.2d at 36.}

In May of 1985, the Superintendent of Schools informed certain probationary teachers that they would be required to submit urine samples to school nurses, and that compliance with the directive would be a condition of his/her recommendation for tenure.\footnote{\textit{Id.}} Prior to the date on which the urine specimens were to be submitted, the union representative of these teachers commenced suit seeking an injunction prohibiting the school district from implementing the drug testing program.\footnote{\textit{Id.}} The Supreme Court for Suffolk County ruled in favor of the teachers union, enjoining implementation of the school's urinalysis program.\footnote{The union, Patchogue-Medford Congress of Teachers was the named plaintiff in the case. The union sought a judgment "prohibiting the school district from directing probationary teachers eligible for tenure to submit to urine tests for detecting the use of controlled substances." \textit{Id.}} The school district appealed, arguing that the implementation of a drug screening program was a proper exercise of the district's legitimate supervisory responsibilities.\footnote{\textit{Id.} at 892. The unpublished order and judgment was dated July 1, 1985. \textit{Id.}} The union countered that the school district's urinalysis policy violated the teachers' fourth amendment rights because its implementation was not founded on any basis of individualized suspicion.\footnote{\textit{Id.} at 890 (citing to \textit{Division 241}, 538 F.2d 1264 (7th Cir. 1976), \textit{cert. denied}, 429 U.S. 1029 (1976); \textit{Allen}, 601 F.Supp. 482, 488-89 (N.D. Ga. 1985)).}

The appellate court began its analysis in \textit{Patchogue-Medford} by deciding, "in accord with a number of other courts passing on the issue,"\footnote{\textit{Id.}} that urinalysis, although involving no physical intrusion into the body, was nevertheless a search within the meaning of the fourth amendment.\footnote{\textit{Id.}} The appellate court then turned to the heart of the issue, whether the urinalysis testing, under the facts of the case, was unreasonable.\footnote{\textit{Id.} at 890.} This determination, explained the court, required the court to carefully "weigh the affront and invasion of privacy inherent in such testing against the need for such testing and the benefits that would result from it,"\footnote{\textit{Id.}} such as, "the possible identification of probationary teachers who are unfit to..."
In the first stage of its analysis, the appellate court considered the "critical" issue of whether the probationary teachers retained a justifiable expectation of privacy on entering the teaching profession. Distinguishing the teaching profession from pervasively regulated industries, in which the employees enjoy a significantly diminished expectation of privacy, the court concluded that the fourth amendment required, at a minimum, that there be some degree of suspicion before the dignity and privacy of a teacher could be compromised by compelled submission to a urinalysis test.

Writing for the court in Patchogue-Medford, Justice Rubin acknowledged that "[w]hile teachers do not surrender their fourth amendment rights to privacy merely because they go to work for a public school, . . . [the] board of education [also] has a legitimate interest in overseeing its employees and investigating potential misconduct relevant to the employee's performance of his or her duties." This legitimate interest extends to eliminating drug use from the teaching staff because "... illegal drug usage can have an adverse impact upon a teacher's ability to safeguard and supervise pupils in his or her charge."

However, reasoned the court,

the need of public employers to conduct urine tests to ascertain illegal drug usage in the teaching profession, important as it may be, is not as crucial as in other governmental positions, such as that of police officer, fire fighter, bus driver, or train engineer, where given the nature of the work, the use of controlled substances would ordinarily pose situations fraught with imminent and grave consequences to public safety.

Even in these occupations, observed the court, various courts have held that compulsory urine tests are constitutionally impermissible in the absence of an articulable bases for suspecting that the public employee is using illegal drugs. The court concluded that it

857. Id.
858. Id.
859. Referring to the horse racing industry, liquor sales, and casino gambling. Id.
860. Id. ("Since teaching is not such a pervasively regulated industry, the Fourth Amendment requires at a minimum, that there be some degree of suspicion before the dignity and privacy of the teacher may be compromised by forcing him or her to undergo a urine test").
861. Id. at 890-91.
862. Id. at 891.
863. Id.
864. Id. (citing, inter alia, Bauman, 475 So.2d 1322; Turner, 500 A.2d 1005; Caruso, 506 N.Y.S.2d 789; Division 241, 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029 (1976); Allen, 601 F.Supp. 488-89).
necessarily followed that "the degree of suspicion should be no less when the employees called upon to submit to such testing are teachers."\textsuperscript{865}

 Rejecting the union's argument that urinalysis tests are permissible under the fourth amendment only upon a showing of full-scale probable cause, the court in \textit{Patchogue-Medford} adopted the reasonable suspicion standard as the appropriate basis for constitutionally compelling a public school teacher to submit to a urine test for controlled substances.\textsuperscript{866} Applying the reasonable suspicion standard to the facts of the case, the \textit{Capua} court found that the school district failed to show an objective factual basis for inferring that any one of the subject teachers was using or had used illegal drugs.\textsuperscript{867} In announcing its judgment, the court declared:

 Striking absent from the record as even a scintilla of suspicion, much less reasonable suspicion. We concluded, based on the record before us, that the ordering of a urine test for drug abuse was an act of pure bureaucratic caprice. It follows ineluctably that the proposed investigatory urine tests are unconstitutional, and were properly prohibited.\textsuperscript{868}

The \textit{Patchogue-Medford} court accordingly affirmed the lower courts' order and judgment enjoining implementation of the program.\textsuperscript{869}

 In \textit{Patchogue-Medford}, the Supreme Court of New York, Appellate Division for the Second District seized the opportunity to address the issue and correctly decided that standardless, compulsory urine testing of public school teachers constituted an unreasonable search and seizure which violated the fourth amendment.\textsuperscript{870} The appellate court properly adopted the fourth amendment balancing test utilized by the trial court, considering both the school district's reasons for implementing its drug screening policy and the privacy concerns of the untenured public school teachers.\textsuperscript{871} Upon weighing these interests, the court aptly concluded that the school

\textsuperscript{865} 505 N.Y.S.2d at 891 ("Certainly, the degree of suspicion should be no less when the employees called upon to submit to such testing are teachers").

\textsuperscript{866} \textit{Id.} In rejecting the probable cause standard, the \textit{Patchogue-Medford} court reasoned that "[p]robable cause is not required where the search is not aimed at the discovery of evidence to be used at a criminal trial." \textit{Id. But see infra} note 924.

 In adopting the "reasonable suspicion" cases, the court again cited as dispositive the federal and state cases cited earlier in its analysis. \textit{Id. See supra} note 864.

\textsuperscript{867} \textit{Id.}

\textsuperscript{868} \textit{Id.}

\textsuperscript{869} \textit{Id. at} 892.

\textsuperscript{870} \textit{Id. at} 891.

\textsuperscript{871} \textit{Id. at} 890-91.
district's "ordering of a urine test for drug abuse was an act of pure bureaucratic caprice," and was, therefore, unconstitutional and properly enjoined from implementation by the lower court. The deficiency in the appellate court's analysis in Patchogue-Medford appears when the court rashly adopted the reasonable suspicion standard as the appropriate basis for compelling a public school teacher to submit to a urine test for controlled substance abuse.

In determining the appropriate cause standard, the appellate court cited to both federal and state judicial decisions which dealt with the drug screening issue in cases involving public safety and/or health employees. Although the court recognized that the cited cases dealt with government employment in which the employer's need to conduct urine tests to ascertain illegal drug usage by its employees was more crucial than in the teaching profession, the court failed to reconcile its ultimate holding with this factual distinction.

After noting that, with respect to such positions as police officer, firefighter, bus driver and train engineer, the cited cases held that compulsory urine tests were constitutionally impermissible in the absence of an articulable basis for suspecting that the public employee was using illegal drugs, the appellate court concluded, "[c]ertainly, the degree of suspicion should be no less when the employees called upon to submit to such testing are teachers." The court then flatly refused a probable cause standard, because such a standard was not required where the search was not aimed at the discovery of evidence for use in a criminal trial. In the next sentence, the appellate court fell back on the public safety

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872. Id. at 891. See supra text accompanying note 868.
873. Id. at 892.
874. Id. at 891.
875. See supra note 864. For a discussion of the several cited decision, see supra text accompanying notes 547-62 (Division 241); 563-77 (Allen); 604-21 (Turner); 622-67 (Bauman); and 668-709 (Caruso).
876. 505 N.Y.S.2d at 891 ("We are cognizant of the fact that illegal drug usage can have an adverse impact upon a teacher's ability to safeguard and supervise pupils in his or her charge. However, the need of public employers to conduct urine tests to ascertain illegal drug usage in the teaching profession, important as it may be, is not as crucial as in other governmental positions, such as that of police officer, firefighter, bus driver, or train engineer, where, given the nature of the work, the use of controlled substances would ordinarily pose situations fraught with imminent and grave consequences to public safety.").
877. See infra notes 878-883 and accompanying text.
878. 505 N.Y.S.2d at 891. See also supra note 863 and accompanying text.
879. 505 N.Y.S.2d at 891. See also supra note 865 and accompanying text.
880. 505 N.Y.S.2d at 891. See also supra note 866 and accompanying text.
cases and precipitously concluded that the reasonable suspicion standard adopted by these cases was the appropriate basis for constitutionally compelling a public school teacher to submit to a urinalysis test. 881

The court offered no justifications for jumping to this conclusion, but rather, merely recited the list of public safety cases as legal authority. 882 While it cannot be argued that the degree of suspicion should be no less than in a situation involving a police officer, for example, the court fails to explain in Patchogue-Medford why it believed that some greater degree of suspicion was not required. 883

In each of the cases upon which the appellate court relied as authority for its conclusion, the state's strong interest in protecting public safety from the grave and imminent consequence posed by employees in public safety and/or health related positions who use illegal drugs served as the court's justification for adopting the more lenient reasonable suspicion standard. 884 Yet, in Patchogue-Medford, the appellate court openly admitted that the same crucial interest was lacking in the case under consideration. 885

The court's reliance on the public safety cases seems to be misplaced. Did the appellate court consider the school district's interest in safeguarding and supervising pupils from a drug impaired teacher to rise to the same level as the states interest in protecting the public safety and welfare from drug impaired fire fighters and police officers? Or, did the court consider the least presence of a threat to public safety to warrant a reasonable suspicion standard? 886 While the former approach is clearly less problematic then

881. 505 N.Y.S.2d at 891. See also supra note 866 and accompanying text.
882. Id.
883. Once the court in Patchogue-Medford determined that probable cause was too strict of a standard and that reasonable suspicion established the minimum standard, the court impulsively settled for the minimum standard without explaining its selection. See infra notes 886-888.
884. See supra note 875.
885. See supra text accompanying note 863.
886. If the least presence of a threat to public safety warrants use of the reasonable suspicion standard, it is clear that hardly an employment context would not qualify for its application. It would require only a little imagination on the employer's part to envision a potential threat to safety. An example of how attenuated the proffered justifications can become is provided in the amicus curia brief filed by the New York Civil Liberties Union in Patchogue-Medford, in which the NYCLU argued:

Obviously, the immediate and direct life-threatening concern is lacking in the school setting. Schools are not inherently dangerous environments. Teaching is not an avocation regularly fraught with life-threatening situations. The closest that the District's argument comes to advancing any danger of direct physical harm is outside of
the latter, the *Patchogue-Medford* opinion provides no insight as to which approach, if either, the court utilized.\textsuperscript{887}

The failure to offer any reason for selecting the reasonable suspicion standard rather than a more stringent standard, short of probable cause, creates dangerous precedent for subsequent drug screening decisions outside of the public safety and/or health employment context.

The *Patchogue-Medford* court's cavalier reasoning in deciding to adopt the "reasonable suspicion" standard for drug screening of specific teachers encourages the adoption of the reasonable suspicion standard across the board for all public employees. The lack of explanation in the court's decision can, justifiably, be interpreted to indicate that in any instance where safety may be implicated by a drug-impaired employee, the employer need only demonstrate a reasonable suspicion of drug use/abuse to justify compelling the employee to take a urine test. One must wonder, in what case will safety not be implicated to some extent? Are the courts prepared to adopt the reasonable suspicion standard in such a wholesale manner without considering the underlying justification for its use in the public safety and/or health cases? One should hope not.

The *Patchogue-Medford* decision was ripe with potential to meaningfully contribute to the drug screening discussion in an employment context other than those involving police officers, fire fighters, and public mass transit employees. Unfortunately, the decision missed the mark as a result of the court's failure to clearly articulate its reasons for adopting the reasonable suspicion stan-

\textsuperscript{887} See supra notes 878-883 and accompanying text.
standard for compelling public teachers to submit to urinalysis tests.

k. National Treasury Employees Union v. Von Raab*

The first judicial decision on the merits to involve a challenge to a federal government urine testing program, National Treasury Employees Union (NTEU) v. Von Raab, came down heavily against the government in a trenchant opinion by United States District Justice Robert F. Collins for the Eastern District of Illinois. The NTEU initiated the action in federal district court on August 12, 1986 seeking an injunction to block the United States Customs Service from further urine collection and analysis as part of a "drug-testing" program implemented on July 21, 1986.

Under the terms of the Custom's drug-testing plan, United States Customs Service workers who sought promotion into certain enumerated "covered positions" were required to submit to a urinalysis. "Drug screening through urinalysis is a condition of employment for placement into positions covered by the program." The covered positions specified by the Customs program included positions that (1) directly involved drug interdiction, (2) required the carrying of fire arms, or (3) involved access to classified information. Customs employees who tested positive through drug screening were subject to loss of consideration for the positions applied for and also were subject to removal from the service. Any tentative selectee for the promotion who refused to undergo the drug screen lost consideration for that position.

Urine samples were tested by using immunoassay as well as gas chromatography/mass spectrometry techniques. A "collector" was actually physically present in the lavatory during the urination process, though observation was supposed to be "close but not "di-

* After this article was sent to the printer, the Fifth Circuit rendered a decision on the merits, vacating the judgement of the district court. National Treasury Employees Union v. Von Raab. No. 86-3833 (3rd Cir. April 22, 1987) (Hill, J. dissenting). For a discussion of the Third Circuit's ruling on the merits, see infra note 932.

888. 649 F.Supp. 380 (E.D. La. 1986) (appeal pending before the Fifth Circuit Court of Appeals), denying stay pending appeal, 808 F.2d 1057 (5th Cir. 1987).
889. Id.
890. Id. at 382.
891. Id.
892. Id.
893. Id.
894. Id.
895. Id.
896. Id.
rect' for the purpose of ensuring the integrity of the specimen".897 One Customs worker, who had already been tested, described the procedure as follows: "The laboratory representative accompanied each of us into the restroom, one by one. He placed some dye into the urinal and then stepped behind a partition. The representative was able to observe me from my shoulders up from behind the partition while I urinated into the sample jar."898 Prior to voiding into the sample jar, the employees were required to fill out a pre-test form, stating medications taken within the last thirty days and any circumstances in which the subject may have been in contact with illegal substances over the last thirty days.899

The case was before Justice Collins on the Customs Service's motion to dismiss the plaintiffs' action on the ground that the plaintiffs had failed to state a claim upon which relief could be granted.900 The plaintiffs opposed the motion to dismiss and moved for preliminary injunctive relief.901 The trial court decided to consolidate the hearing on the motion for preliminary injunctive relief with a trial on the merits.902

After disposing of the preliminary issues of venue, NTEU's standing to sue,903 and the court's subject matter jurisdiction,904 the trial court turned to the merits of the plaintiffs' petition for declaratory and injunctive relief, "find[ing] numerous constitutional infirmities", not the least of which was violation of the fourth amendment.905

Focusing first on the plaintiff's challenge to the plan under the fourth amendment, Justice Collins determined, as a threshold matter, that the Customs Service's urine testing program constituted "a full blown search within the meaning of the fourth amendment to the United States Constitution,"906 citing the district court deci-

897. Id.
898. Id.
899. Id.
900. The defendant's motion to dismiss actually asserted four grounds for dismissal: "(1) venue does not lie in this district; (2) plaintiffs lack standing to bring this action; (3) this Court lacks jurisdiction over this dispute; and (4) plaintiffs have failed to state a claim upon which relief may be granted." Id. at 381.
901. Id.
902. The trial court consolidated the motion for preliminary injunctive relief with the trial on the merits with the concurrence of the parties pursuant to Federal Rule of Civil Procedure 65(a)(2). Id.
903. Id. at 382-84.
904. Id. at 384-86.
905. Id. at 386.
906. Id. The district court in NTEU explained:
sions in Capua,\textsuperscript{907} McDonell\textsuperscript{908} and Jones v. McKenzie\textsuperscript{909} as authority for its conclusion.\textsuperscript{910}

Expanding on remarks made in open courts two days earlier, Justice Collins branded the Customs Service's drug testing program as a "dragnet" approach made without reasonable cause or probable suspicion:\textsuperscript{911}

Under the Customs Directive at issue, the searches and seizures are to be made in the total absence of probable cause or even reasonable suspicion. The plan does not call simply for the testing of those whom the defendant reasonably suspects of using or selling drugs at the work site. Rather, the plan uses a dragnet approach of testing of all workers who seek promotion into so-called "covered positions." This dragnet approach, a large-scale program of searches and seizures made without probable cause or even reasonable suspicion, is repugnant to the United States Constitution.\textsuperscript{912}

The trial court determined that the Customs workers possessed a reasonable expectation of privacy in their urine.\textsuperscript{913} Speaking in the vernacular, Justice Collins explained:

While body fluids and body wastes are normally disposed of by flushing them down a toilet, Customs workers do maintain a legitimate expectation of privacy in their urine until the decision is made to flush the urine down the toilet and the urine is actually flushed down the toilet.\textsuperscript{914}

The trial court quoted from the district court's decision in McDonell as additional support for its finding that the Customs workers had a reasonable and legitimate expectation of privacy in their

\begin{itemize}
  \item Drug testing of Customs workers' bodily wastes is even more intrusive than a search of a home. When analyzing urine specimens, the defendant is searching for evidence of illicit drug usage. The drug testing plan is no minor frisk or pat-down. It is rather a full-scale search that triggers application of Fourth Amendment protections.
  \item The mandatory collecting of urine samples pursuant to the drug testing plan constitutes a seizure within the meaning of the Fourth Amendment. Indeed, the urine is seized from the Customs workers in that they must hand over a jar of their bodily wastes for analysis by the defendant.
\end{itemize}

\textit{Id.} (citations omitted).

\textsuperscript{907} 643 F.Supp. at 1513. \textit{See supra} note 772.
\textsuperscript{908} 612 F.Supp. at 1127. \textit{See supra} note 580.
\textsuperscript{909} 628 F.Supp. 1500, 1508 (D.D.C. 1986).
\textsuperscript{910} 649 F.Supp. at 386 ("This Court rejects defendant's contention that urinalysis does not involve search and seizure within the meaning of the Fourth Amendment. Quite to the contrary, the Court finds that the drug testing plan falls squarely within the ambit of the Fourth Amendment. Testing of urine, like the testing of blood, is a full-blown search and seizure").
\textsuperscript{911} \textit{Id.} at 387.
\textsuperscript{912} \textit{Id.}
\textsuperscript{913} \textit{Id.}
\textsuperscript{914} \textit{Id.}
Without further legal analysis, the trial judge declared in
conclusory terms that the Customs Service's "drug testing plan
constitute[d] an overly intrusive policy of searches and seizures
without probable cause or suspicion, in violation of legitimate ex-
pectations of privacy." Adding, gratuitously, that the goal of the
Custom Service was legitimate, the Court nevertheless held that
the means selected by the defendant violated the protections of
the fourth amendment.

Refusing to find voluntary "consent" to the Customs Service's
drug testing program because the price of not consenting was loss
of government employment or some other government benefit,
the trial court dismissed the Custom Service's argument that the
Customs workers voluntarily waived their fourth amendment
rights and submitted to the urinalysis in exchange for promotion
to governmental positions. The court concluded, instead, that
the consent given was the result of coercion, express or implied,
and further held that it was unconstitutional for the Customs Ser-
tice to condition public employment on "consent" to such a search
in the first place.

Having found the Customs Service's drug screening plan violated
the fourth amendment, the NTEU court denied the Customs Ser-
tice's motion to dismiss and permanently enjoined the Service
from conducting further tests under the plan.

The Commissioner instituted a hiring freeze at the U.S. Customs Service in the wake of
the district court's decision striking down the Commission's testing program for all appli-
cants to fill the open positions within the Customs Service. In an affidavit filed on Novem-
ber 20 with a federal district court in Louisiana, Commissioner William Von Raab said Cus-
toms could not in good conscience fill the positions unless it could test the new hires. The
affidavit accompanied a motion for stay of the court's November 12 order pending appeal.

Subsequently on December 17, 1986, U.S. District Court Judge Collins, who decided the
The trial court's sparse legal analysis, scarcely over two pages, pales in the presence of the thorough and comprehensive analysis of other district court decisions such as the Capua opinion. As a result of Justice Collins "bare-bones" analysis many issues remain unresolved. For example, although the trial court uses "reasonable suspicion" language in its conclusion, it is less than clear that the trial court would have upheld the program from invalidation under the fourth amendment if the plan had been based on reasonable suspicion. The trial court also failed to address the fact

Customs' case at the district court level, ordered the Commissioner to appear in his courtroom to show cause why he should not be held in contempt for violating the court's order permanently enjoining further drug testing under the plan declared unconstitutional. INDI-vidual Employment Rights (BNA), Dec. 23, 1986, Customs' Drug Testing After Order Is Investigated, at 2.

The district judge acted after receiving a report that several days after the program was struck down, the Customs Commission wrote an applicant for a customs inspector position that satisfactory completion of drug screening would be a condition of employment. Judge Collins declared that he would "grant [Von Raab] an opportunity to explain this potential violation but remind[ed] the defendant that lack of compliance with [the] court's injunction will not be tolerated." Id. 922. See supra text accompanying notes 753-806.

923. See infra text accompanying notes 924-928.

924. Id. at 387. It appears from discussion in a latter portion of the opinion that the trial court was unwilling to even acknowledge the government's interest in eliminating drug use by government employees absent a statistical showing of a drug problem within the Customs Service:

That the drug testing plan is not rationally related to the achievement of a legitimate governmental interest is highlighted by the conspicuous absence of any statistics by the defendant showing any drug problem whatsoever among federal workers. Indeed, in a United States Government Memorandum from the Commissioner of Customs to all Customs Employees, dated March 13, 1986, the Commissioner stated, "I believe that Customs is largely drug-free . . ." Plaintiffs' Exhibit No. 2 at 1. Since Customs has not demonstrated a drug problem among its work force, the drug testing plan is an overly intrusive scheme that bears no rational relationship to the protection of an endangered governmental interest. The defendant simply has not shown that a legitimate governmental interest has been threatened.

Id. at 390. The court continued, creating further doubt that the "reasonable suspicion" language at the end of its fourth amendment analysis was a signal that the program was salvageable:

Even if it could show that its interest in a drug-free work force were threatened, the means selected to achieve that end are overly intrusive. After weighing the legitimate governmental interests of the plan against the severity of the intrusiveness, the Court concludes that the drug testing plan is unreasonable.

* * *

It is up to the government to obtain evidence in a constitutionally permissible manner against those who are suspected of illicit drug usage. If the government has probable cause to suspect a particular Customs worker is using or selling illicit drugs on the job, a warrant should be obtained in a court of law.

Id. at 390-91.

In fact, the district court in American Federation of Federal Employees v. Weinberger,
that the Customs Service, by its very nature, has daily contact with the illegal importation of drugs. Moreover, the trial court failed to deal with the fact that the specified positions subject to urinalysis involved persons in the thick of the enforcement procedure, where the potential for bribery, illegal retention of seized drugs, and a panoply of other corruption was a real evil that could inhibit the operational efficiency of the Customs Service's anti-drug enforcement program. In light of the decisions discussed previously, it appears that a reasonable suspicion standard would suffice to uphold the Customs Service's testing program, although the NTEU court offers no such indication. However, it is arguable that the peculiar nature of the Custom Service's operation and involvement in the illegal drug scene may warrant the recognition of a narrowly tailored, limited administrative search exception to the fourth amendment, which would permit testing, without individualized reasonable suspicion, on a random basis.

The Customs Service appealed to the Fifth Circuit Court of Appeals, seeking a stay of the trial court's ruling; however, in a ruling issued on January 14, 1987, the motions panel of the appeals court denied the stay, reasoning that it was unnecessary because the Fifth Circuit agreed to hear the appeal on an expedited basis.

651 F.Supp. 726 (S.D. Ga. 1986), has interpreted the NTEU decision to require probable cause in order to compel a government employee to submit to a urinalysis. Id. at 733.

925. See infra note 930 for Fifth Circuit Judge Higginbotham’s view on this aspect of the trial court’s decision. National Treasury Employees Union v. Von Raab, 809 F.2d 1057, 1060-62 (Higginbotham, Jr. Specially Concurring).

926. Id.

927. See supra note 924. See also supra text accompanying note 593 for the courts’ standard definition of “reasonable suspicion” in the drug screening context.

928. See infra text accompanying notes 994-1041 for a discussion of the courts’ ruling in Shoemaker. Query: Can some of the Shoemaker rationale be borrowed to create a limited exception for the Customs Service employees?

929. See supra note 921. National Treasury Employees Union v. Von Raab, 808 F.2d 1057 (5th Cir. 1987) (Higginbotham, J. Specially Concurring). In a related development, the district court declined to find the Commissioner in contempt for informing a person tentatively selected for a Customs job that he would have to undergo drug testing. The person received the letter after the court’s ruling. See supra note 921. The government, however, convinced the judge that the action was a bureaucratic oversight. Customs has shown “reasonable diligence” in complying with the order, the court said. National Treasury Employees Union v. Von Raab, No. 86-3522 (E.D. La. Jan. 21, 1987) (order dismissing Rule to Show Cause on contempt allegations).

930. 808 F.2d at 1059-60. The trial court’s decision was criticized by Judge Higginbotham, who specially concurred in the Fifth Circuit’s decision to deny the stay. 808 F.2d at 1060-62 (Higginbotham, J. Specially Concurring). With regard to the trial court’s disposition of the fourth amendment issue, Judge Higginbotham stated:
There is a substantial question whether requiring the samples as a condition of hire for the three job categories is a search of seizure at all. It seems odd to think of a government agent as "seizing" urine by requiring the sample as a condition to consider applying for a sensitive job applied for with full notice of the requirement. But it is argued, government may not require a waive of constitutional rights as a condition of employment. Again, such an abstraction sheds little light on this problem; it begs the question of what right.

Id. at 1062. The Judge explained:

If the government has the right to insist upon proof that its policemen of drug dealers not be drug users, and surely it does, the reasonableness of any invasion of right and the correlative reasonableness of the expectation of privacy is a function of the relevant of the job requirement to the job to be done. Certainly it is permissible, even essential, that persons selected for these jobs not be users of illegal drugs. The decision by the executive branch that this testing is necessary protection of its interest is entitled to some deference and I find no record basis here for a substitution of judicial judgment.

931. Id. at 1059.

932. As time would ultimately tell, the Fifth Circuit opted for a narrowly drawn exception to the reasonable suspicion standard for the Customs Service's drug screening program, when it entered judgment on the merits in the NTEU case in late April 1987. National Treasury Employees Union v. Von Raab, No. 86-3833 (3rd Cir. Apr. 22, 1987) (Hill, J. dissenting) (Edward, J., Sixth Circuit, sitting by designation) (available on WESTLAW on April 24, 1987, in the "CTA3" file).

At the outset of its analysis, the Fifth Circuit, in NTEU, embellished the lower court's discussion of the history behind the Customs Service's mandatory urinalysis program for critical positions. Justice Rubin emphasized that "[f]or some time, the United States Customs Service . . . viewed the interdiction of narcotics smuggling as its top priority and . . . forbid[d]en its employees to use the very drugs they [were] employed to intercept." Id., slip op. at 2. Pursuant to these policies, the Commissioner of the Customs Service implemented the urinalysis drug screening program, initially for applicants tentatively selected to engage in three kinds of "critical" jobs at the Service, but later extended the testing program to cover current employees seeking transfer to one of these "critical" job categories. Positions covered by the three categories included criminal investigators, intelligence officers, customs inspectors and the clerical employees assigned to assist in these three tasks. Id. The court indicated that inasmuch as no applicant for initial employment was a party to the suit, the court would only consider the constitutionality of the Customs Service's program as to the current employees seeking promotions and transfers into the "critical" job categories. Id.

Pointing out that the Customs Service did not attempt to justify implementation of the program on the ground that a significant drug abuse problem existed in the Service, the court cited to the Customs Service's anti-drug policy statement, released at the time the testing program was instituted, wherein the Commission declared:

[The Customs Service] is charged with stemming the tide of illicit drugs entering (the United States). . . . [Consequently], Customs employees, more than any other Federal workers, are routinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use. . . . as well as [to] illegal substances themselves. . . . [Illegal drug use] undermines . . . the integrity of the Service. . . . and because illicit drugs are so expensive, drug users may be particularly susceptible to offers of bribes by smugglers.

Id. The Fifth Circuit briefly reviewed several aspects of the Customs Service's testing pro-
1. **American Federation of Government Employees v. Weinberger**

Police officer employees and their labor union filed suit in the
United States District Court for the Southern District of Georgia against the Department of Defense (DoD) in *American Federation of Government Employees v. Weinberger*, challenging the constitutionality of a civilian drug screening program and seeking a preliminary injunction against implementation of the program, pending resolution of the plaintiffs’ claims on the merits.

In April 1985, the Department of Defense issued its Directive 1010.9, calling for mandatory, periodic drug testing by urinalysis of civilian DoD employees holding “critical” jobs. Army Regulation 600-85, Interim Change 111 was promulgated in February 1986, to implement the DoD Directive, rendering it applicable to civilian employees holding “critical” positions with the Department of the

GC/MS confirmation technique, its use of elaborate chain of custody procedures, and the program’s provision for the employee to subject his “positive” specimen to an independent analysis of the employee’s choice. *Id.*, slip. op. at 9.

Because it was not raised as an issue on appeal, the Fifth Circuit did not address the “penumbral rights” portion of the trial court’s decision. *Id.* In concluding, the Fifth Circuit in *NTEU* vacated the trial court’s permanent injunction and permitted the testing to resume as to both applicants and current employees seeking transfer. *Id.*

Justice Hill dissented on the basis that the testing program was an ineffective means for achieving the Customs Service’s goals, reasoning that a substantial amount of the current work force was not subjected to the test; once accepted into the critical position the employee was never tested again; and the five day advance notice enables employees to cheat on the test by abstention from using drugs until the test was over. Finding the testing program ineffective, Justice Hill also found it to be unreasonable and would have declared it unconstitutional: “I see no reason to allow this invasion of the employees’ fourth amendment rights without some concomitant benefit to society.” *Id.*, slip. op. at 10-11 (Hill, J. dissenting).

Query: Is the Third Circuit’s rationale in *NTEU* limited to employees in contact with illicit drugs, or can it be extended to employees who have extensive access to, otherwise illegal, drugs, such as, employees in the hospital pharmacy, nurses, or doctors? Does the Third Circuit’s holding rest solely on the high level of exposure to illicit drugs? If so, can the rationale be applied to any vice squad of a local police force? Should the holding in *Caruso* (OCCB) be reconsidered? See supra text accompanying notes 698-706 for a discussion of a similar argument advanced by the Police Department to justify blanket testing of the Organized Crime Control Bureau in *Caruso*. Should the decision in *AFGE* also be reconsidered in light of the Third Circuit’s decision in *NTEU*? See infra text accompanying notes 975-76.

933. 651 F.Supp. 726 (S.D. Ga. 1986). 934. *Id.* The plaintiffs brought this action seeking injunctive relief and a declaratory judgment with respect to the validity of Directive 1010.9 of the Department of Defense (DoD Directive) and Army Regulation 600-85. Interim Change No. 111. In essence, the plaintiffs challenged the constitutionality of periodic drug testing of civilian employees occupying “critical” positions with the Department of Army.


The case was before the *AFGE* court on the defendants motion to dismiss. 651 F.Supp. at 728.

935. *Id.*
Army. The regulation listed as critical positions: (1) law enforcement; (2) positions involving national security of the army at a level of responsibility in which drug abuse could cause disruption of operations or the disclosure of classified information that could result in serious impairment of national defense; and (3) jobs involving the protection of property or persons from harm, or those where drug abuse could lead to threats to the safety of personnel.

In June 1986, the individual plaintiffs were issued DA Form 5019-R, which the officers were required to sign as a condition of continued employment in their current "critical" positions. The form indicated that if an employee was currently in a critical job and refused to sign the form, then the employee was voluntarily or involuntarily reassigned or demoted to a non-critical job or terminated as a federal employee. If the employee signed the form and later refused to submit to a urinalysis test, the employee would be non-selected, reassigned, demoted, or terminated according to applicable regulations. In addition to listing the three sets of circumstances under which a urine test would be ordered and the penalties for failure to sign or submit, DA Form 5019-R also purported to operate as a prior consent to all three types of drug screening.

Under the terms of the drug testing program, three types of testing would be conducted to verify that a "critical" employee was not currently using drugs: (1) periodic, on an unannounced basis; (2) when there was probable cause to believe that the employee was under the influence of drugs; and/or (3) when there was a mishap or safety investigation being conducted in relation to an accident involving government-owned vehicles, aircraft, or equipment. The directive provided further that to insure the integrity of the sample being submitted, a staff member of the same sex
would observe the employee while he submitted the sample.\textsuperscript{943}

Initial testing utilized the EMIT test, marketed by SYVA Company.\textsuperscript{944} The regulations precluded any permanent disciplinary action being taken against an individual whose urine tested positive under the EMIT test.\textsuperscript{945} Rather, all positive EMIT tests were required to be verified by the gas chromatography testing process.\textsuperscript{946} If the verification test returned negative, not revealing the presence of drugs or drug metabolites in the urine specimen, no action was to be taken against the employee.\textsuperscript{947} A positive verification lead to the transfer of the employee to a non-critical position of a similar type and at a comparable rate of pay, if such a position was available.\textsuperscript{948} If no such position was available, the employee was terminated.\textsuperscript{949}

Testing was to begin at Fort Stewart on October 7, 1986. Individual plaintiffs and the labor organization representing them filed suit on October 6, 1986, in order to forestall the scheduled testing.\textsuperscript{950}

The district court began its discussion of the fourth amendment issue with a brief observation of the novelty of employment drug screening, noting the recent massive national movement against the scourge of drugs which prompted the introduction of a myriad of drug testing programs for public sector employees at the local, state and federal levels, which in turn led to constitutional challenges in the courts of increasing frequency.\textsuperscript{951} From the recent decisions in this area, the \textit{AFGE} court discerned a judicial trend beginning to emerge that "testing of civilians by urinalysis, absent some form of individualized suspicion, is in almost all cases offensive to the mandates of the fourth amendment."\textsuperscript{952}

\begin{itemize}
\item[943.] \textit{Id.} at 729 n.2.
\item[944.] \textit{Id.} at 729.
\item[945.] \textit{Id.}
\item[946.] \textit{Id.}
\item[947.] \textit{Id.}
\item[948.] \textit{Id.} at 729-30.
\item[949.] \textit{Id.} at 730.
\item[950.] \textit{Id.}
\item[951.] \textit{Id.} at 731-32.
\item[952.] \textit{Id.} The \textit{AFGE} court observed:
\end{itemize}

\ldots a judicial trend is finally beginning to emerge clearly, and with each new decision on the subject of periodic drug testing it becomes more apparent that testing of civilians by urinalysis, absent some form of individualized suspicion, is in almost all cases offensive to the mandates of the fourth amendment. In fact, almost every court faced with facts similar to those of the case at bar has held or conceded that urinalysis constitutes a search within the meaning of the fourth amendment, and not a single case has held drug testing of law enforcement personnel by urinalysis to be
Turning to the threshold issue of whether a urinalysis constituted a search within the meaning of the fourth amendment, the district court concluded that the overwhelming weight of judicial authority had firmly settled the issue in the affirmative.\textsuperscript{533} The \textit{AFGE} court, however, seized the opportunity to contribute several poignant insights into the highly intrusive nature of the urinalysis search which has received little attention in the other decisions already considered.\textsuperscript{534}

The court observed that because a urinalysis test can produce a positive test for marijuana or marijuana metabolites for up to two to three weeks after ingestion, the employer may be subject to adverse employment consequences where no drug impairment is involved.\textsuperscript{535} The court explained, "[t]hese tests enable the individual or organization administering them to monitor the off-duty conduct of employees, and represent a technological advance that must be cautiously examined and which, if overzealously implemented, could threaten much of the privacy most citizens now take for granted."\textsuperscript{536} The urinalysis test's ability to yield a positive result days and even weeks after drug use enables the employer to control the employee's off-duty behavior.\textsuperscript{537} The \textit{AFGE} court queried, "[i]f the employer can fire a person for smoking marijuana on a Saturday night, what prevents him from regulating such things as off-duty alcohol consumption or even sleeping habits in an effort to ensure that the employee works to his full capacity?"\textsuperscript{538}

Given this potential scope of intrusion into the private affairs of an individual inherent in urine testing, the district court concluded that urinalysis is "qualitatively very, very different from the intrusion involved in the taking of fingerprints or fingernail and hair clippings"\textsuperscript{539} and resembles most closely the taking of a blood sample.\textsuperscript{540} Therefore, like a blood sample, urinalysis is a highly inva-

\textsuperscript{533} Id. at 732.
\textsuperscript{534} Id. ("If at one time it might have been possible to argue that urinalysis does not constitute a search or seizure, such an argument is now entirely untenable. That this is so was relatively clear at the time this action was brought.") ("In light of the cases decided since this suit was filed, a contrary position can hardly be argued").
\textsuperscript{535} See infra text accompanying note 555-558.
\textsuperscript{536} Id. at 732 n.5 (citing Comment, Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy, 13 J. Legis. 269, 279 (1986)).
\textsuperscript{537} 558. Id.
\textsuperscript{538} 559. Id. at 733.
\textsuperscript{539} 560. Id. (citing Schmerber, 384 U.S. 757; \textit{NTEU v. Von Raab}, 649 F.Supp. at 386-87).
sive search subject to fourth amendment restrictions.\textsuperscript{961}

The government contended that, even if urinalysis was a search under the fourth amendment, the periodic drug testing of police officers at a federal military installation was reasonable even when not implemented on the basis of reasonable suspicion.\textsuperscript{962} However, the district court pointed out that in the context of mandatory urinalysis screening of government employees whose positions are such that their drug use could endanger the public safety or welfare, the courts to consider the issue have generally held that mandatory testing can be conducted only upon a reasonable suspicion basis.\textsuperscript{963}

Arguing against the court's application of this standard, the government contended that several factors rendered the "reasonable suspicion" standard inappropriate with respect to the plaintiffs in the case.\textsuperscript{964}

First, the government distinguished its drug testing program from those random testing programs stricken down by the other courts on the basis that its program was less intrusive.\textsuperscript{965} While some of those programs declared unconstitutional routinely involved direct observation of the employee as he or she urinated, the army civilian testing program only resorted to direct observation when the employee was suspected of attempting to tamper or adulterate his urine specimen.\textsuperscript{966} The absence of routine direct observation, argued the government, rendered its testing program unintrusive.\textsuperscript{967} Next, citing Shoemaker v. Handel, which held random urine testing of horse jockeys absent individualized suspicion to be permissible, the government adduced that "'[t]he Army's interest in having drug-free employees in these positions is at least as great as the New Jersey Racing Commission's need for drug-free jockeys. . . .']"\textsuperscript{968} Thus, the government urged that, because the intrusiveness of the test was minimal and the governmental interest supporting testing were of the utmost importance, mandatory testing without reasonable suspicion was permissible.\textsuperscript{969}

\begin{itemize}
  \item \textsuperscript{961} Id.
  \item \textsuperscript{962} Id.
  \item \textsuperscript{963} Id. (noting as the exception the district court's ruling in NTEU v. Von Raab, 649 F.Supp. 380, which the AFGE court interpreted as requiring probable cause).
  \item \textsuperscript{964} See infra text accompanying note 965-982.
  \item \textsuperscript{965} 651 F.Supp. at 733.
  \item \textsuperscript{966} Id. at 733-34.
  \item \textsuperscript{967} Id. at 734.
  \item \textsuperscript{968} Id.
  \item \textsuperscript{969} Id.
\end{itemize}
The AFGE court found the government's argument indefensible. While acknowledging that the cited precedent made reference to the intrusiveness of programs calling for direct observation of the employee while he or she urinates and pointed to the humiliation and embarrassment associated with such a procedure, the district court in AFGE found it "doubtful that a program not requiring direct observation [went] very far toward minimizing the overall intrusion." The direct observation of the employee urinating is not the essence of intrusion that is entailed in a urinalysis test. As the district court in AFGE explained: "[T]he very taking of the sample makes for a quite substantial intrusion that could not be negated even if an employee were allowed to produce his urine sample in the privacy of an executive washroom, with no observation whatsoever."

Moreover, the AFGE court noted that while the courts have considered direct observation as one more factor militating against the urinalysis program involved in a given case, the absence of direct observation had yet to be deemed by a court to be a factor supporting random urinalysis. As to the government's reliance on the Shoemaker holding, the AFGE court concluded that it was distinguishable on the facts from the instant proceeding and, according to the trend of the recent cases, represented an aberration in the prevailing case law.

970. Id. at 734-35.
971. Id. at 734.
972. Id. The court pointed to the Ninth Circuit's discussion in Kirkpatrick v. City of Los Angeles, 803 F.2d 485, 489 (9th Cir. 1986), which the AFGE considered instructive:

In concluding that [strip searches] did not violate the officers' fourth amendment rights, the district court overemphasized the reasonable manner in which the searches were conducted. Although reasonableness in the conduct of the search is a consideration, the fact that a strip search is conducted reasonably, without touching and outside the view of all persons other than the party performing the search, does not negate the fact that a strip search is a significant intrusion on the person searched. We conclude that strip searches of [sic] police investigative purposes are governed by the reasonable suspicion standard even when they are conducted in a courteous manner with the minimum invasion of privacy possible.

973. 651 F.Supp. at 734 ("One court has reviewed a procedure almost identical to the one under consideration and was in no way persuaded that the intrusion was minimal") (citing NTEU v. Von Raab, 649 F.Supp. 380).
974. Id. The AFGE court noted:

As to the enigmatic case of Shoemaker v. Handel, it has been referred to but has been rejected or distinguished by all of the courts that have dealt with the mandatory drug testing of law enforcement personnel subsequent to the Shoemaker decision. Shoemaker held that the "administrative search exception" applied to employees voluntarily participating "in the heavily regulated horse-racing industry." 795 F.2d at 1142...
The government argued next that the duties and responsibilities of the plaintiffs, as police officers at a federal military installment, could not be compared with those of ordinary police officers. The government asserted that testing, even in the absence of reasonable suspicion, was required because even a hint of police corruption undermined confidence in law enforcement and the officer's crucial ability to make life or death decisions.\(^{975}\)

The district court pointed out that these same arguments were found to be insufficient governmental interests in cases involving local law enforcement personnel and determined that they did not militate any more strongly in favor of testing, without individualized suspicion, in the instant case.\(^{976}\) However, the court indicated that, insofar as the government asserted that the plaintiffs' employment touched upon national security concerns and involved access to weapons more dangerous than those available to local police, the government's position might have some force.\(^{977}\)

Without all the facts present, the district court was unable to determine whether, in fact, the plaintiffs had duties and responsibilities that were intimately or even regularly related to national security concerns.\(^{978}\) The court advised the government that it

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The court added, citing to the court's decision in *Caruso v. Ward*, 506 N.Y.S.2d 789, 798 (Sup. Ct. 1986):

A New York court, in determining that reasonable suspicion is required before New York City police officers may be subjected to mandatory urinalysis, made the following assessment of the *Shoemaker* district court opinion and of the decision's applicability outside of the "regulated industry" context: "*Shoemaker*... on close examination... either [is] not applicable to the facts in the instant proceeding, or is clearly distinguishable therefrom or [is] simply out of step with the rest of the authorities."\(^{977}\) Thus, concluded the *AFGE* court, "[t]he facts of *Shoemaker* are distinguishable from the facts before the Court and, as the trend of recent cases indicates, the decision does not seem to be in keeping with the prevailing case law." 651 F.Supp. at 735.

975. *Id.*


977. *Id.* ("Yet the government points to the presence of 'dangerous government property and property relating to national security' at the Forst Stewart installation where the plaintiffs are employed. The government also has indicated that, while these plaintiffs usually carry only a .38 caliber pistol, 'other weapons are available if necessary, such as in the case of a terrorist or other hostile attack.' These and similar concerns have some force").

978. *Id.* The *AFGE* expressed doubt that the government's characterization would prove to be accurate:

[T]he Court questions whether these officers in fact have duties and responsibilities that are intimately or even regularly related to national security concerns, or they are simply police officers who happen to be employed at a federal installation. At present, the Court is of the opinion that the latter characterization is the more accurate.

*Id.*
Drug Testing

should be prepared at a full hearing on the merits to substantiate their argument with evidence concerning the true nature of the day-to-day activity of the plaintiffs, the actual exposure of the plaintiffs to top-secret, classified, or sensitive information, and the ways in which the duties of these plaintiffs differ from or are comparable to those of a local police officer. The AFGE court warned that the government's burden was not an insubstantial one:

[I]n order for a search as intrusive as that proposed by the DoD and Department of the Army to pass constitutional muster, the duties of the employees who will be subjected to standardless testing must be shown to be more than remotely or conceivably related to national security, or the duties it performed under the influence of drugs must be shown to pose a potential danger to persons or property well beyond the danger inherent in ordinary police or transportation employment.

Addressing the government's final argument on the "reasonableness" issue that drug use was "simply incompatible" with federal employment, the district court did not quarrel with the proposition, but pointed out that the government was confused as to what was at issue in the case. The court explained, "[t]he question here . . . is not whether drug use, off-duty or on-duty is incompatible with federal employment, [r]ather, the question is by what means is it permissible to come by evidence of such drug use."

Turning to the issue of consent, the AFGE court refused to accept the government's argument that the plaintiffs signatures on DA Form 5019-R operated as an advance consent to subsequent urinalysis tests. The court pointed out that, in order for the employee's consent to remove the government's urinalysis program from review under the fourth amendment, the consent had to be

979. Id.
980. Id.
981. Id.
982. Id. The court offered the following illustration:

The growing of marijuana in an employee's basement would certainly not be appropriate, but surely the government cannot be heard to say that a warrantless search of all civilian employees' basements is permissible in order to find out who is growing marijuana. Similarly, the random search of civilian employees' urine, a bodily fluid generally retained for disposal when and where an individual chooses, is impermissible under any but the most urgent of circumstances.

Id. (The court also cited to the district court's discussion on this same issue in McDonell, 612 F.Supp. at 1131). See supra text accompanying note 592 for the language from McDonell quoted by the AFGE court.

983. 651 F.Supp. at 736.
voluntarily given otherwise it was nugatory. The facts on record convinced the court that the signature on DA Form 5019-R were procured by coercion and therefore, the purported consent was inoperative.

The upshot of the government's final fourth amendment argument was that applying the fourth amendment to the government's urinalysis program unduly limited its employee relations policies. The district court in AFGE considered this argument not only "misguided" but also "truly frightening in its implications." As support for its "undue burden" argument, the government, citing to dicta in Allen v. City of Marietta, argued:

[Placing fourth amendment restrictions on public employers not placed on private employers would make government service (at least relatively) a safe haven for drug use. While "[g]overnment employees do not surrender their fourth amendment rights,' their reasonable expectation of privacy vis-a-vis their employer is not different from that of employees in the private sector."

The government continued, arguing that "[c]onditioning public employment on consent to a reasonable drug testing procedure simply puts public-sector employees on the same footing as private-sector employees, who are subject to employer searches."

The district court in AFGE found the government's argument

984. Id.
985. Id. The court declared:

[W]ith respect to the "voluntary" nature of the consent given, it is clear that the signing of these forms was coerced. The affidavit of one of the plaintiffs indicates that his superior came to his home with a 5019-R form and, in response to this plaintiff's question whether it was necessary to read the form, the superior officer state: "I don't give a s—— whether you read it or not, if you do not sign it you will be fired."

Id.

The court also refused to accept the government's ancillary argument that because transfer, not termination, was the result of a refusal to sign there was no coercion involved in securing the employee's signature on the consent form. The court found the argument incredible, "in light of the terms of the form providing for transfer or demotion or 'separation.' " Id. Moreover, the Court questioned exactly how many "noncritical" positions existed to which trained police officers could be transferred. Id. The Court found that it was "patently clear" that the officers legitimately feared termination when they signed the forms. Id. Thus, concluded the AFGE court, the consent was not voluntarily given. Id.

986. Id.
987. Id. at 732; see also id. at 736 ("That the Department of Justice should contend that the government is unduly limited by the fourth amendment in its employee relations is disturbing, and seems to this Court to be an entirely inappropriate and dangerous argument").
988. Id. at 736 (citing Allen, 601 F.Supp. at 491 (footnote omitted)).
989. Id. at 736-37.
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disconcerting. While acknowledging that private-sector employees may be "forced to consent" to random urine testing without individualized suspicion, the district court admonished:

... it will be a dark day indeed when the United States government finds it appropriate to abandon the strictures of the Constitution in favor of a less burdensome "private-sector" set of rules that can allow for infringement of constitutional rights. The court rejects the government's argument on this point, and sincerely hopes that it will not be advanced in the future.

The AFGE court granted the plaintiffs' request for injunctive relief. The court then preliminarily enjoined implementation of the DoD's civilian employee drug testing program unless based on reasonable suspicion that the employee had engaged in drug use.


The United States District Court for the District of New Jersey carved out an exception to the reasonable suspicion requirement for a constitutionally permissible urinalysis testing program in Shoemaker v. Handel, where it upheld the New Jersey Racing Commission's random and blanket urinalysis testing of jockeys licensed by the State of New Jersey to ride in thoroughbred horse races within the State.

The statutorily created New Jersey Racing Commission regulates the horse racing industry of that state and is vested with the broad power necessary to supervise the industry, including the "full power to prescribe rules, regulations and conditions under which all horse racing shall be conducted." The regulations promulgated by the Commission apply to "all race tracks, all race meetings, all persons and to all matters" within its jurisdiction.

Over the years the Commission had enacted regulation designed to preserve the fact and appearance of integrity of the racing per-

990. See supra note 987 and accompanying text.
991. 651 F.Supp. at 737.
992. Id. at 739.
993. Id.
995. Id.
997. Id. at 1093 (citing N.J.A.C. 13:70-1.1 et seq).
formance. As part of this regulatory scheme, the Commission promulgated regulations authorizing the use of breathalyzer tests to detect the presence of alcohol in the blood of jockeys, trainers, officials and grooms, and urinalysis tests for jockeys to detect the presence of controlled dangerous substances not authorized by a valid prescription from a licensed physician. These regulations

998. 795 F.2d at 1138.

999. The challenged regulations were:

13:70-14A.10. Breathalyzer test Officials, jockeys, trainers and grooms shall, when directed by the State Steward, submit to a breathalyzer test and if the results thereof show a reading of more than .05 percent of alcohol in the blood, such person shall not be permitted to continue his duties. The stewards may fine or suspend any participant who records a blood alcohol reading of .05 percent or more. Any participant who records a reading above the prescribed level on more than one occasion shall be subject to expulsion, or such penalty as the stewards may deem appropriate.

13:70-14A.11. Urine test

(a) No jockey shall use any Controlled Dangerous Substance as defined in the "New Jersey Controlled Dangerous Substance Act", N.J.S.A. 24:21-1, et seq. or any prescription legend drug, unless such substance was obtained directly, or pursuant to a valid prescription or order from a licensed physician, while acting in the course of his professional practice. It shall be the responsibility of the jockey to give prior notice to the State Steward that he is using a Controlled Dangerous Substance or prescription legend drug pursuant to a valid prescription or order from a licensed practitioner.

(b) Every jockey for any race at any licensed racetrack may be subjected to a post-race urine test, or other non-invasive fluid test at the direction of the State Steward in a manner prescribed by the New Jersey Racing Commission. Any jockey who fails to submit to a urine test when requested to do so by the State Steward shall be liable to the penalties provided in N.J.A.C. 13:70-31.

(c) Any jockey who is requested to submit to a post-race urine test shall provide the urine sample, without undue delay, to a Chemical Inspector of the Commission. The sample so taken shall be immediately sealed and tagged on the form provided by the Commission and the evidence of such sealing shall be indicated by the signature of the tested jockey. The portion of the form which is provided to the laboratory for analysis shall not identify the individual jockey by name. It shall be the obligation of the jockey to cooperate fully with the Chemical Inspector in obtaining any sample which may be required and to witness the securing of such sample.

(d) A "positive" Controlled Dangerous Substance or prescription drug result shall be reported, in writing, to the Executive Director or his designee. On receiving written notice from the official chemist that a specimen has been found "positive" for controlled dangerous substance, or prescription legend drug, the Executive Director or his designee shall proceed as follows:

1. He shall, as quickly as possible, notify the jockey involved, in writing;
2. For a jockey's first violation, he shall issue a written reprimand and warning and notify the jockey that he will be subject to mandatory drug testing and that any further violation shall result in the sanctions described in paragraphs (3) and (4) below;
3. For a jockey's second violation, he shall require the jockey to enroll in a Supervisory Treatment Program approved by the New Jersey Racing Commission upon such reasonable terms and conditions as he may require. The jockey shall be permitted to participate unless his continued participation shall be deemed, by the Executive Di-
were proposed on June 18, 1984, were adopted on January 14, 1985, became effective on February 19, 1985, and operational on April 1, 1985.\textsuperscript{1000} The avowed purpose behind the regulations was three-fold: to promote the Commission’s primary goal of increasing the safety of participants in the race; to promote the integrity and public perception of the dranleness of the industry; and to rehabilitate those who were found to abuse alcohol and drugs.\textsuperscript{1001}

One hallmark of the Commission’s drug screening program was the extensive provision of notice and information, pertaining to the new drug rules and urinalysis procedure, provided by the Commission to all those affected by the new program.\textsuperscript{1002} Oral and written notice of the adoption of these rules were provided to all persons affected and to the Jockey’s Guild.\textsuperscript{1003} Included with the 1985 applications for a jockey license was a letter from the Commission Executive Director explaining the new testing program, a sample certification form used in the drug test, and copies of the new regulations.\textsuperscript{1004} The effective date of the new rules was publicly announced on several occasions and on the effective date the Commission held an informational question-and-answer session for jockey representatives and the Jockey Guild to explain the new regulations.\textsuperscript{1005}

The regulations establishing the urine testing program provided that every official, jockey, trainer, and groom for any race might be subjected to a urine test for the detection of use of “Controlled

\begin{itemize}
  \item rector or his designee, to be detrimental to the best interests of racing. It shall be the jockey’s responsibility to provide the Commission with written notice of his enrollment, weekly status reports, and written notice that he has successfully completed the program and has been discharged. If a jockey fails to comply with these requirements, he shall be liable to the penalties provided in N.J.A.C. 13:70-31.

4. For a jockey’s third or subsequent violation, he shall be liable to the penalties provided in Subchapter 31 and may only enroll into a Supervisory Treatment Program in lieu of said penalties, with the approval of the New Jersey Racing Commission.

(e) The results of any urine test shall be treated as confidential, except for their use with respect to a ruling issued pursuant to this rule, or any administrative or judicial hearing with regard to such a ruling. Access to the reports of any “positive” results shall be limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee and the subject jockey, except in the instance of a contested matter.

1000. 619 F.Supp. at 1093.
1001. \textit{Id}.
1002. \textit{See infra} text accompanying notes 1003-04.
1003. 619 F.Supp. at 1093. Notices were also posted at the race tracks. \textit{Id}.
1004. \textit{Id} (The court included an exemplar of the certification form in an appendix to its opinion).
1005. \textit{Id}.
Dangerous Substance[s]" or prescription legend drugs unless obtained pursuant to a valid physician's prescription.\textsuperscript{1006}

The district court found that while post race urine tests were required "at the direction of the State Steward," the Commission implemented the urine testing program by a method of random selection.\textsuperscript{1007} The names of all participating jockeys at a given race were placed in an envelope.\textsuperscript{1008} The State Steward or a representative drew the names of three to five jockeys for testing.\textsuperscript{1009} A representative of the Jockey's Guild was invited to supervise the selection of names.\textsuperscript{1010} The Commission reserved the right to alter the number of names to be drawn each day.\textsuperscript{1011} If a jockey's name were drawn more than three times in a seven-day period, the Steward disregarded the selection and drew another name.\textsuperscript{1012}

The jockeys whose names were selected were required to provide urine samples after their last race of the day.\textsuperscript{1013} They were given plastic containers for this purpose.\textsuperscript{1014} They were also required to fill out certification forms concerning the use of prescription or non-prescription medications.\textsuperscript{1015} The certification form was to provide information about drugs covered by an exception in the regulations for any "substance . . . obtained directly, or pursuant to a valid prescription or order from a licensed physician."\textsuperscript{1016} The form provided for the optional disclosure of the condition for which the disclosed drug is a treatment.\textsuperscript{1017} The certification forms contained two identical numbers.\textsuperscript{1018} One number was removed and fastened to the urine sample, while the other number remained on the form.\textsuperscript{1019} The anonymous urine sample was then sent to a laboratory for testing, and the form was sent to the Executive Director of the Commission and stored in a safe.\textsuperscript{1020}

\textsuperscript{1006} Jockeys were subject to the tests on a daily basis, while the grooms, trainers, and officials were tested with less frequency. \textit{Id.} at 1094.
\textsuperscript{1007} 795 F.2d at 1140 (The selection process is also described by the district court in its opinion for the decision on the merits, 619 F.Supp. at 1094-95).
\textsuperscript{1008} \textit{Id.}
\textsuperscript{1009} \textit{Id.}
\textsuperscript{1010} \textit{Id.}
\textsuperscript{1011} \textit{Id.}
\textsuperscript{1012} \textit{Id.}
\textsuperscript{1013} \textit{Id.}
\textsuperscript{1014} \textit{Id.}
\textsuperscript{1015} \textit{Id.}
\textsuperscript{1016} \textit{Id.}
\textsuperscript{1017} \textit{Id.}
\textsuperscript{1018} \textit{Id.}
\textsuperscript{1019} \textit{Id.}
\textsuperscript{1020} \textit{Id.}
Urine test results were sent by the laboratory to the Executive Director and were available to that official, a designee, and the Commissioners.\textsuperscript{1021} Pursuant to the express provisions of the regulations, the results were kept confidential even from the enforcement agencies.\textsuperscript{1022} Discipline under the rules for positive test results was administered on a progressive basis and hearings were provided for any individual contesting the test process or test results regardless of whether it constituted their first, second, or third violation.\textsuperscript{1023}

Five nationally renowned jockeys brought an action challenging the constitutionality of the Commission’s random urine screening program, alleging that the tests violated their rights as guaranteed by the Fourth, Fifth, and Ninth Amendments as well as the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.\textsuperscript{1024} The bulk of the district court’s analysis was devoted to the fourth amendment unreasonable search and seizure issue.\textsuperscript{1025}

The district court concluded in \textit{Shoemaker} that the Commission’s urinalysis testing program did not violate the jockey’s reasonable expectation of privacy.\textsuperscript{1026} The court reasoned that the jockeys participated in a sport that is “subject to pervasive and

\begin{itemize}
  \item \textsuperscript{1021} Id.
  \item \textsuperscript{1022} Id.
  \item \textsuperscript{1023} Id. See supra note 999 for the discipline scheme set forth in Regulation 13:70-14A.11.
  \item \textsuperscript{1024} 795 F.2d 1137. The plaintiffs were: William Shoemaker, Angel Cordero, Jr., William Herbert McCauley, Philip Grove, and Vincent Bracciole. 608 F.Supp. at 1153.
  \item The specifics of the plaintiffs’ challenges to the Commission’s regulations were outlined by the district court in its decision on the merits as follows:
    \begin{itemize}
      \item (a) subject jockeys to unreasonable searches and seizures in violation of the Fourth Amendment;
      \item (b) fail to provide a hearing during which plaintiffs can challenge the results of the breathalyzer and urine tests in violation of the due process clause of the Fourteenth Amendment;
      \item (c) discriminate against jockeys as a group by singling them out for breathalyzer and urine testing in violation of the equal protection clause of the Fourteenth Amendment;
      \item (d) require the disclosure of private medical information, potentially relevant to violations of the criminal law of the State of New Jersey, without adequate safeguards for maintaining its confidentiality in violation of their privacy rights under the Fourteenth Amendment.
    \end{itemize}
  \item 619 F.Supp. at 1097.
  \item \textsuperscript{1025} The current section addresses only the fourth amendment issue. For a discussion of the due process, privacy, and equal protection issues, see infra text accompanying notes 1181-1227; 1314-75; 1416-39 respectively.
  \item \textsuperscript{1026} 619 F.Supp. at 1100, 1104.
\end{itemize}
continuous regulation by the state”; “the jockeys were licensed by the state and have received ample notice of the regulations and therefore were required to accept the unique benefits and burdens of their trade, which include[s] submission to inspections which reasonably further legitimate state interests;” and “the state ha[d] a vital interest in ensuring that horse races [were] safely and honestly run and that the public perceives them as so.”

Not only did the district court in Shoemaker hold that the tests were not an unreasonable intrusion upon the jockeys’ privacy, but also that the tests themselves were reasonable. The district court was satisfied that the Commission had met its burden of showing that the urinalysis tests were aimed at achieving some legitimate purpose - securing the safe and honest operation of the horse racing industry in New Jersey - and that the urinalysis procedures were reasonable and minimized the intrusion on the privacy interests of the individual jockey tested.

Dismissing the plaintiffs’ argument that the regulations on their face gave the State Steward “unfettered discretion” in selecting jockeys for the urinalysis tests, the district court in Shoemaker pointed out that “[t]he fair characterization of these tests [was] that they [were] administered neutrally, with procedural safeguards substituting for the lack of any individualized suspicion.” The court noted that all jockeys were treated equally: “[E]very jockey participating in racing on a given evening [had] an equal chance of being selected to give a urine sample under the name drawing system. The state reserve[d] the right solely to vary the total number of jockeys tested at each race meeting from three to five.”

Additionally, the regulations at issue in Shoemaker provided only civil and administrative penalties for positive results, such as fines, suspension or expulsion from racing in New Jersey. The Racing Commission indicated that it would not turn results over to criminal enforcement authorities, and that it was not under any

1027. 619 F.Supp. at 1102.
1028. Id. at 1100 (“The court has applied the reasonableness test and has weighed the legitimate government interest in maintaining the integrity of the racing industry and the safety of the sport against the legitimate expectations of privacy retained by jockeys and finds that the breathalyzer tests, as administered under the regulations, are reasonable in the absence of a warrant”).
1029. Id.
1030. Id. at 1103.
1031. Id.
1032. Id.
legal compulsion to do so. The court also noted that the regulations promoted rehabilitation.

The jockeys argued that the urine tests measured more than just impairment at the race track inasmuch as previous private use of certain drugs, off of race track premises, might generate a “positive” result without any indication of a jockey’s present impairment. However, the court found that the state had been sufficiently careful in implementing its testing procedure so as to guard against false positives, which might serve to punish the jockeys for their private behavior off of regulated premises.

The district court concluded:

Given the public interest in clean, safe racing, the ability of the Racing Commission, under its broad statutory mandate, to revoke any license ‘in the public interest’, and the availability of penalties which affect only a jockey’s status to race in the State of New Jersey and fines, the court finds the procedures used sufficient to protect the jockeys’ interest. Under the circumstances presented in this case, the court is persuaded that the urine regulations, as administered by the Commission, do not violate plaintiffs’ right to freedom from unreasonable searches and seizures.

The jockeys appealed the district court’s decision to the Third Circuit, where the appellate court affirmed the lower court’s decision on the fourth amendment issue as well as on all other issues.

Although Shoemaker created an exception to the individualized suspicion requirement, the Third Circuit instructed that the exception created was very narrowly tailored. The Third Circuit explicitly tied its decision to affirm to the unique circumstances surrounding “closely regulated industries”. In the court’s own words: “Our holding applies only to breathalyzer and urine sam-

1033. Id.
1034. Id.
1035. Id. at 1104.
1036. The court pointed out that the certification forms were used to eliminate false positives; that positive cut-off, threshold levels were set high so that only a significant drug presence would register positive; that special procedures were being used to guard against misinterpretation of positives for marijuana use, given its long period of retention in the body; and that a complete appeal procedure has been put in place, permitting the jockey to contest the testing procedure, the test result, and any discipline administered. Id.
1037. Id.
1039. See infra notes 1040-41 and accompanying text.
1040. 795 F.2d at 1142. See id. at 1142 n.5.
pling of voluntary participants in a highly-regulated industry."

n. McDonell v. Hunter (On appeal)—Extending the Shoemaker Rationale to Prison Guards?

Following the district court’s injunction in McDonell permanently enjoining the Iowa Department of Corrections officials and their agents from compelling correctional institution employees to submit to a urinalysis test unless based on reasonable suspicion that the employee was presently under the influence of controlled substances, the Department of Corrections appealed to the United States Eighth Circuit Court of Appeals. The Eighth Circuit affirmed the lower court’s order, but substantially modified the standard upon which constitutionally permissible drug screens could be performed in the prison context.

After briefly reciting the operable facts in the case and the essential terms of the district court’s order, the Eighth Circuit considered the fourth amendment issue. The appellate court approved the lower court’s preliminary analysis which found that the fourth amendment applied to urinalysis tests. The Eighth Circuit proceeded to balance the Department of Correction’s need to conduct urinalysis tests against the invasion of correctional employees’ privacy interests caused by the urinalysis tests.

The Department of Corrections officials asserted a strong need to see that prison guards were not working while under the influence of drugs or alcohol, arguing that prison security demands that those who have contact with prison inmates must be alert at all times. They also urged that the use of drugs by a corrections officer was a positive indication that such officer might bring drugs into the prison for the use of the inmate.

Addressing these contentions, the court first determined that properly administered urinalysis tests were not as intrusive as a strip search or a blood tests. The court also recognized the Department’s legitimate interest in having fully functional correc-

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1041. 795 F.2d at 1142 n.5.
1042. 809 F.2d 1302 (8th Cir. 1987).
1043. See infra text accompanying notes 1058-62.
1044. 809 F.2d 1304-05.
1045. 809 F.2d 1307 ("We agree with those courts which have held that urinalysis is a search and seizure within the meaning of the fourth amendment").
1046. Id. (citing Camara, 387 U.S. at 537).
1047. Id.
1048. Id. at 1307-08.
1049. Id. at 1308.
tional employees handling the inmates on a daily basis, and the corresponding diminished expectation of privacy held by the prison employees. The Eighth Circuit then pointed to the decision in Shoemaker v. Handel, where the Third Circuit, looking to a strong state interest in conducting an unannounced search and to a reduction in the justifiable privacy expectation of the subject of the search, upheld the random selection of jockeys for urine testing, based on the state's "strong interest in assuring the public of the integrity of the persons engaged in the horse racing industry." The Eighth Circuit in McDonell declared: "We believe the state's interest in safeguarding the security of its correctional institutions is at least as strong as its interest in safeguarding the integ-

1050. Id.
1051. Id. ("Urinalysis properly administered is not as intrusive as a strip search or a blood test. While the prison officials have the same legitimate interest in maintaining prison security . . ., the infringement upon the privacy interest of correctional institution employees, already diminished, is lessened. Officials have a legitimate interest in assuring that the activities of those employees who come into daily contact with inmates are not inhibited by drugs or alcohol and are fully capable of performing their duties").

Chief Judge Lay for the Eighth Circuit, concurred in part with the Eighth Circuit decision in McDonell but sharply dissented, stating that he would have affirmed the district court's decision in full. Id. at 1310 (Lay, C.J. concurring in part, dissenting in part). Chief Judge Lay agrees with the majority's determination that urinalysis is a search within the meaning of the fourth amendment, but parts ways with the majority in the rest of the analysis of the urinalysis issue.

Justice Lay found the majority's reliance on the Capua holding in resolving the issue of intrusiveness to be misplaced, criticizing the court for placing too great of importance on the fact that urinalysis did not entail a physical intrusion into the body. Id. at 1311. Justice Lay explained:

A search's intrusiveness does not hinge merely upon whether or not a person's skin is punctured or body touched in some way, but must be evaluated in terms of the individual's legitimate expectations of privacy in the context in which the search is conducted.

As the court in Capua recognized, "[a] urine test done under close surveillance of a government representative, regardless of how professionally or courteously conducted, is likely to be a very embarrassing and humiliating experience."

Chiding the majority for exceeding the scope of its appellate review, the Chief Justice charged that by extending the scope of the district court's order delineating the circumstances under which the Iowa Department of Corrections may compel its employees to submit to urinalysis tests, the majority engaged in de novo fact finding outside the "clearly erroneous" standard of review. Id. at 1311-12. Chief Justice Lay denounced both of the majority's modifications to the trial court's order — the systematic random selection exception and the twenty-four hour extension period — as based not on facts in the record but on de novo findings on the appellate level rendering the modification both "improper and insupportable." Id. at 1312. See supra text accompanying notes 1058-62 for the two modifications made by the majority in McDonell to the trial court's order.

1052. Shoemaker, 795 F.2d 1132 (3rd Cir. 1986).
1053. Id. at 1142.
urity of, and the public confidence in, the horse racing industry."¹⁰⁵⁴

The Eighth Circuit continued, reasoning that, inasmuch as warrantless searches of government employees had been found reasonable where the searches were directly relevant to the employee’s performance of his duties and the government’s performance of its duties, urinalysis was not unreasonable when conducted for the purpose of determining whether correctional employees were using or abusing drugs and adversely affecting their ability to safely perform their work within the prison.¹⁰⁵⁵

The appellate court opined that “the use of drugs by employees who come into contact with the inmates in medium or maximum security facilities on a regular day-to-day basis poses a real threat to the security of the prison.”¹⁰⁵⁶ The McDonell court then determined that the only effective way to control this potential danger was to permit limited uniform and random testing by the least intrusive means available, which the court considered to be urinalysis testing.¹⁰⁵⁷

The Eighth Circuit then held that urinalysis tests were permitted to be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons.¹⁰⁵⁸ In addition, the court stated that selection process must not be arbitrary or discriminatory.¹⁰⁵⁹ The appellate court continued, holding that urinalysis testing within the institution’s confines, other than uniformly or by systematic random selection of those employees so designated, would be permissible only on the basis of a reasonable suspicion that the employee was then under the influence of drugs or alcohol, or that the employee had used a controlled substance

¹⁰⁵⁴ 809 F.2d at 1308.
¹⁰⁵⁵ ⁰
¹⁰⁵⁶ ⁰
¹⁰⁵⁷ ⁰. The appellate court added, “[i]n our opinion it is also logical to assume that employees who use the drugs, and who come into regular contact with the prisoners, are more likely to supply drugs to the inmates, although the trial court did not agree with this observation.” ⁰
¹⁰⁵⁸ ⁰. In reaching its conclusion, the Eighth Circuit declared:

Because the institutional interest in prison security is a central one, because urinalyses are not nearly so intrusive as body searches, . . . and because this limited intrusion into the guards’ expectation of privacy is, we believe, one which society will accept as reasonable, we modify the district court’s order and hold that urinalyses may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons.

¹⁰⁵⁹ ⁰.
within the twenty-four hour period prior to the required test.\textsuperscript{1060}

Notably, the appellate court also rejected the lower court’s limitation on the right to test on reasonable suspicion only those employees who were “then under the influence of alcoholic beverages or controlled substances.”\textsuperscript{1061} Without offering an explanation, the Eighth Circuit declared: “We do not agree with this limitation and hold that urinalysis testing should also be permitted where there is a reasonable suspicion . . . that controlled substances have been used within the twenty-four hour period prior to the required test.”\textsuperscript{1062}

The significance of the Eighth Circuit’s ruling in \textit{McDonell} should not be underestimated, for it is the first case in which a federal court of appeals has defined the circumstances under which a government body is constitutionally permitted to conduct random drug tests on law enforcement officers.\textsuperscript{1063} The implications of the decision are tremendous, particularly when one considers the manner in which the court reached its conclusion.

When making reference to this \textit{Shoemaker} case and the legal analysis employed by the District Court for the Southern District of Iowa in reaching its decision, the Eighth Circuit in \textit{McDonell} ignored entirely the important role played by the pervasive regulation of the horse racing industry in the \textit{Shoemaker} holding.\textsuperscript{1064} The court pointed to no pervasive regulation in the prison context which substantially diminished the prison guard’s reasonable expectations of privacy as did the regulations in \textit{Shoemaker}.\textsuperscript{1065} Rather, based on the dubious determination that a urinalysis is less intrusive than a blood test,\textsuperscript{1066} the unsubstantiated belief that society will condone such intrusions,\textsuperscript{1067} and the perceived congruence between the interests asserted by the Racing Commission in \textit{Shoemaker} and those asserted by the prison officials in \textit{McDonell}...
the Eighth Circuit concluded that the same result as in *Shoemaker* should be reached, at least for certain prison guards. The *McDonell* court’s extrapolation from the *Shoemaker* ruling is clearly at odds with the *Shoemaker* court’s proviso that the decision it reached was narrowly limited to the highly-regulated horse racing industry. The appellate court’s analysis in *McDonell* that the state’s interest in safeguarding the security of its correctional institutions is at least as strong as [the state’s] interest in safeguarding the integrity of, and public confidence in the horse racing industry,” was the very same argument wisely rejected by the court in *AFGE v. Weinberger*. The *AFGE* court’s rationale for rejection of this type of argument is equally persuasive when applied to the appellate court’s analysis in *McDonell*. Additionally, the Eighth Circuit surmised that the district court’s restriction on the right to test on reasonable suspicion only those employees who were “then under the influence of alcoholic beverages or controlled substances” was too narrow and adjusted the limit by adding a twenty-four hour prior period. The court offered no reason for its determination that the district court’s standard was too restrictive, and provided no clue as to the origin of, or the basis for, the twenty-four hour prior period which the court tacked on. The Eighth Circuit’s loosely reasoned decision created dangerous precedent, extending an unauthorized invitation to other courts to manipulate the *Shoemaker* decision to include employment contexts which clearly do not fit into the narrow “pervasively-regulated industry” exception to the reasonable suspicion standard any time they perceive strong state security interests at stake. The *McDonell* case is expected to be appealed to the Supreme Court, which to date has not ruled on the issue. The Third Circuit ruling and any subsequent Supreme Court decision on appeal could have a major impact on the Reagan Administration’s announced intention of drug testing all federal government employ-

1068. *Id.* at 1308.
1069. *Id.* See supra note 1058 and accompanying text.
1070. *Shoemaker*, 795 F.2d at 1142 n.5.
1071. 809 F.2d at 1307.
1073. *Id.* See supra text accompanying notes 970-974.
1074. 809 F.2d at 1309.
1075. *Id.*
Drug Testing

ees in "sensitive" positions,1076 as well as drug screening practices

1076. Declaring that President Reagan's recent Executive Order 12564 on mandatory drug testing will violate the Fourth Amendment rights of federal workers, the National Treasury Employees Union filed suit in federal court September 18 seeking an injunction to halt the plan. INDIVIDUAL EMPLOYMENT RIGHTS (BNA), Sept. 30, 1986, Mandatory Drug Tests Draw Suit, at 10.

"These invasive tests will be imposed despite the fact that there is no documented problem of drug abuse among the federal workforce, without the existence of probable cause, and for a large number of employees without any grounds whatsoever to believe they are impaired by, or users of, illegal drugs," declares the suit. *Id.*

President Reagan, saying he expects the nation's 2.8 million federal workers to "show the way" toward drug-free workplaces, signed the executive order September 15. *Id.*

Under the order drug testing would be mandatory for workers in "sensitive" positions involving law enforcement, public health and safety, or national security. Presidential appointees and others in positions requiring "a high degree of trust and confidence" may be required to submit to drug testing at the discretion of the agency head. See *supra* note 9 for a discussion of Executive Order 12564.

Testing of workers in non-sensitive positions would be permitted when there is "reasonable suspicion" that an employee is using drugs, as part of an accident or safety investigation, or as follow-up to counseling and rehabilitation through a federal employee assistance program. Agency heads also would be authorized to introduce voluntary testing programs for workers in non-sensitive positions, as well as for all job applicants. *Id.*

The NTEU suit charges that the order will violate employees' Fourth Amendment rights to be free of unreasonable search and seizure. *NTEU v. Reagan*, USDC E.La., No. 86-4058, Sept. 18, 1986.

Denying the President's motion to dismiss for (1) lack of ripeness; (2) improper venue; and (3) exclusive jurisdiction of administrative forums, the district court in *NTEU v. Reagan*, ruled that the Civil Service Reform Act did not preclude its jurisdiction over a claim for declaratory and injunctive relief to block the testing. *NTEU v. Reagan*, slip op. at 3 (E.D. La. Jan. 14, 1987) (not published in Federal Supplement) (Civil Action No. 86-4058, 86-3522). The court based its decision on its determination that "[in the context of urinalysis drug testing, adequate protection of federal employees' constitutional rights of privacy and freedom from unreasonable searches and seizures is not provided for by the CSRA."

As of this writing the *NTEU v. Reagan* case has not been heard by the District Court of Louisiana on the merits. It is clear that the Eighth Circuit's decision in *McDonell* could potentially impact on the outcome of the case. At least insofar as the court's opinion in *McDonell* can be read to imply that any time a substantial public safety interest can be identified some smaller quantum of suspicion other than reasonable suspicion may properly serve as the basis for a decision to test, it offers support for the random testing of federal employees in "sensitive" positions, espoused by Executive Order 12564. See *supra* note 9 and accompanying text. Notably, however, the *NTEU v. Reagan* case is before United States District Judge Collins, the same judge who rendered the trial court opinion in *NTEU v. Von Raab*, 649 F.Supp. 380 (E.D. La. 1986). See *supra* notes 888-932 and accompanying text. Will the judge take a similar vehement stand against the program in *NTEU v. Reagan*, or will his opinion be tempered by the Fifth Circuit recently vacating his decision in *NTEU v. Von Raab*? See *supra* note 932 for a discussion of the Fifth Circuit's opinion vacating the trial court's permanent injunction. The Fifth Circuit's reversal in *NTEU v. Von Raab*, can be read narrowly to be a limited exception carved out of the reasonable suspicion rule for the special circumstances of the Customs Service; and arguably would not be controlling in the trial court's decision, involving the "sensitive" government employee classification. See *supra* notes 9 and 932 and accompanying text. Will Judge Collins persist in his anti-urinalysis campaign — somewhat of a counter-revolution — or is the Fifth Circuit's criticism of
generally in public safety and security employment contexts.\textsuperscript{1077}


The review of the recent fourth amendment decisions regarding the use of drug screening in public-sector employment document a judicial trend toward adoption of the reasonable suspicion standard as the appropriate basis upon which a public employer may require an employee to submit to a urinalysis for detection of illegal drug use.\textsuperscript{1078} The courts have defined reasonable suspicion as "based on specific objective facts and reasonable inferences from those facts in the light of experience, that a urinalysis will provide evidence of illegal drug use by that particular employee."\textsuperscript{1079}

The rationale behind the courts' choice of reasonable suspicion was expressly disclosed by the court in \textit{Caruso v. Ward}\textsuperscript{1080} where the court rejected a random drug screening plan but permitted
testing of the police officers upon a reasonable suspicion basis.\textsuperscript{1081} \[\text{In making this allowance the Caruso court reasoned that "[a reasonable suspicion] standard is flexible enough to afford the full measure of fourth amendment protections without posing a barrier to this employer's legitimate right to seek out drug use by its employees."}\textsuperscript{1082}

The primary purpose behind the fourth amendment is to protect the individual from the "arbitrary discretion of the official in the field."\textsuperscript{1083} Although not always easy in practice, arbitrariness in drug screening can be conceptually divided into two distinct, but interrelated, categories: First, a drug screening program may be arbitrary in scope. That is, a urine screening program is arbitrary when indiscriminately administered to each and every employee in an employer's "fishing expedition" to determine the existence and extent of employee drug abuse. Second, a drug screening program may be arbitrary if its implementation lacks sufficient justification. This is true whether conducted individually or in mass. A periodic, unannounced, blanket drug test of all employees is arbitrary in scope.\textsuperscript{1084} While a purely random selection of employees to be compelled to submit to a urine screen is arbitrary inasmuch as the employer has no reason for subjecting the particular chosen employees to the test.\textsuperscript{1085}

While the "reasonable suspicion" standard was adopted by the courts to eliminate arbitrariness in drug screening, it is suggested that the standard, as presently articulated by the courts,\textsuperscript{1086} is not capable of achieving that purpose. The standard's requirement of \textit{individualized} suspicion\textsuperscript{1087} alleviates the arbitrariness in scope.

\begin{flushright}
1082. \textit{Id.} at 799.
1086. See \textit{supra} note 1079 and accompanying text.
1087. "Individualized suspicion" is incorporated into the definition of reasonable suspicion by the last five words of the definition — "use by that particular employee" and requires the employer to have reasonable suspicion of drug use by each employee subjected
\end{flushright}
problem; however, it only partially resolves the problem of insufficient justification for conducting the screening test.

Requiring individualized suspicion of drug use/abuse forces the employer to identify particular employees to subject to a urine screen, but the reasonable suspicion standard provides no guidelines for making the identification. Couched in cryptic terms, the reasonable suspicion standard, as enunciated by the courts which have adopted it, articulates no factors that would legitimately lead an employer to suspect one of his employees of drug use/abuse. Likewise the courts have failed to indicate how the

to testing. See supra note 1079 and accompanying text. Thus, while the plaintiff police officer’s fourth amendment rights were not impinged in Bostic, 650 F.Supp. 245, because the police department possessed information which “arguably would indicate that subjecting him to urinalysis would uncover drug use,” the plaintiff clerks fourth amendment rights were violated because the department was aware of no objective facts which indicated that the clerk was using marijuana either on-duty or off-duty. See supra notes 739 and 747 and accompanying text.

1088. Reasonable suspicion has been defined by one commentator as: “that degree of suspicion failing somewhere in between an inarticulable hunch and probable cause to arrest or search.” Comment, Search and Seizure, 36 Baylor L. Rev. 41 (1984). See discussion supra text accompanying notes 748-752, 870-887 for a discussion of some of the definitional and conceptual problems of the “reasonable suspicion” standard.

1089. One drug screening opponent, Ira Glasser, executive director of the ACLU, recommends “an unused method for detecting [drug abuse]—it’s called ‘two eyes’.” NEWSWEEK, Can You Pass?, supra note 12, at 50. Most employees who are drug abusers reveal telltale signs of their problem, such as changes in behavior, physical appearance, and work performance. Some objective factors which would prove useful in formulating a reliable and reasonable suspicion that an employee is using drugs, absent catching the employee red-handed, include:

ACCIDENTS: Taking of needless risks; disregard for safety of others; higher than average accident rate on and off the job.

WORK PATTERNS: Inconsistency in quality of work; high and low periods of productivity; poor judgment/more mistakes than usual and general carelessness; lapses in concentration; difficulty in recalling instructions; difficulty in remembering own mistakes; using more time to complete work/missing deadlines; increased difficulty in handling complex situations.

ABSENTEEISM: Acceleration of absenteeism and tardiness, especially Mondays, Fridays, before and after holidays; frequent unreported absences later explained as “emergencies”; unusually high incidence of colds, flu, upset stomach, headaches; frequent use of unscheduled vacation time; leaving work area more than necessary (e.g. frequent trips to water fountain and bathroom); unexplained disappearance from the job with difficulty in locating employee; requesting to leave work early for various reasons.

RELATIONSHIP TO OTHERS ON THE JOB: Overreaction to real or imagined criticism; avoiding and withdrawing from peers; complaints from co-workers; borrowing money from fellow employees; complaints of problems at home, such as separation, divorce and child discipline problems; persistent job transfer requests.

PHYSICAL SIGNS OR CONDITION: Weariness, exhaustion; untidiness; yawning excessively; blank stare; slurred speech; sleepiness (nodding); unsteady walk; sunglasses worn at inappropriate times; unusual effort to cover arms; changes in appear-
factors might be weighed or how many factors are needed to formulate a reasonable suspicion.\textsuperscript{1090} Moreover, the courts have failed to define a rational inference and to identify which officials have the authority as well as the ability to make these determinations.\textsuperscript{1091}

\textbf{MOOD:} Appears to be depressed all the time or extremely anxious all the time; irritable; suspicious; complains about others; emotional unsteadiness (e.g. outbursts of crying); mood changes after lunch or break.

\textbf{ACTIONS:} Withdrawn or improperly talkative; spends excessive amount of time on the telephone; argumentative; has exaggerated sense of self-importance; displays violent behavior; avoids talking with Supervisor regarding work issues.

\textit{Owens/Corning Fiberglass, Wanakachie, Texas, Supervisor's Drug/Alcohol Abuse Training Manual, "Behavior & Job Performance 'Warning Signs'";} Caroline Power & Light Company, \textit{Supervisors Reference Manual: Drug and Alcohol Abuse,} at 20-21 (This manual goes through various illicit drugs and the symptomatic behavior resulting from their abuse);

\textit{Edison Electric Institute Guide to Effective Drug Policy and Program Development,} 21 (Edison Electric Institute Industrial Relations Division, 1982) (objective consideration for monitoring an employee's fitness for work include changes in quality and quantity of work; increased number of mistakes or bad judgment calls; lessened efficiency; difficulty concentrating; high absenteeism; participates in great deal of risk taking; long lunch breaks or wanders excessively; uncooperative; less social; too social; or change in choice of friends.)

The decision to test an employee for drug use must be an informed one. In addition to these objective factors, in order to accurately detect an employee's behavioral change, the supervisor must be familiar with an employee's routine day-to-day behavior. A total stranger would not make the determination. The data which is collected must be specific and center on job performance or any usual behavior on the job. Typically, isolated occurrences of poor productivity or altered mood, unless violent and irrational, should not be sufficient to compel a drug test—everyone has an "off day."

1090. While a rigid calculus is neither possible nor desirable, the courts could offer some sorely needed guidance in this area. As a crucial starting point, the courts should establish that the decision to test an employee for drugs must be job-related. \textit{See supra note 1089.} Thus, otherwise unsubstantiated rumors such as "X was doing drugs last weekend" should not serve as a justification for testing "X" for drugs on Monday morning. \textit{See supra note 750.} Beyond this threshold requirement, the courts, by eliminating circumstances which common sense dictates does not warrant the use of an intrusive procedure such as urinalysis, would substantially diminish the chances of an employer arbitrarily applying the "reasonable suspicion" standard. For example, only serious work-related injuries should warrant an employee's demand that the employee submit to a urinalysis for drugs. Although "serious" need not be defined with the precision and exactitude to be found in a schedule of compensable losses under a workmen's compensation statute, common sense indicates that every trip to the first-aid cabinet for a band aid does not warrant a drug screen being taken. Likewise, one isolated absence or even an occasional absence does not warrant compelling the employee to submit to a urine screen. Nor would one off-day when the employee does not perform to par. Job performance or discipline problems sufficient to warrant a drug screen of an employee, unless the incident is exceptionally serious or violent, must demonstrate a pattern of declined proficiency/ productivity or increased insubordination.

1091. If the decision to test is to be based on work-related considerations, as it should be, then the individual doing the initial observation, at least, should be a supervisory employee familiar with the particular employee, his work habits, his demeanor, \textit{etc.} \textit{See supra note 1089.} Should this observation be conformed by an independent, detached supervisory
Although collectively the courts have identified these very shortcomings in the drug testing policies that they declared unconstitutional under the fourth amendment, the courts have failed to formulate guidelines for employers and safeguards for employees in these areas. As a result, a large portion of the potential arbitrariness in public employer drug screening policies remains unrestricted. The reasonable suspicion standard is an appropriate approach to reconciling conflicting employer and employee interests in the drug screening issue. However, a standard casually borrowed from cases involving different types of searches, which is not modified to the specific circumstances of a drug screening context, is only marginally helpful in accurately identifying and judiciously balancing the competing interests.

If the reasonable suspicion standard is to serve as a meaningful and effective tool in fourth amendment review of challenged employer drug screening policies, the courts must refine the standard by adapting it to the peculiar circumstances of drug screening. Otherwise, the flexibility of the reasonable suspicion standard perceived by the courts will prove too pliable to be practicable.


The fifth and fourteenth amendments require that the government provide due process before depriving a person of life, liberty, or property. The applicability of the constitutional guarantee of procedural due process depends in the first instance on the presence of a legitimate "property" or "liberty" interest within the

employee? Should a medical opinion be solicited before the employee is sent to submit a urine specimen? The courts have not touched upon such considerations in their decisions.

1092. See supra notes 617-19 (Turner); 653-58 (Bauman); 707 (Caruso); 735-40 (Bostic); 778-806 (Capua); 834-43 (Lovvorn); and 867-68 (Patchogue) and accompanying text.

1093. The diminished standard of reasonable suspicion was devised in the context of border searches by the Second Circuit in United States v. Asbury, 586 F.2d 973, 976 (2d Cir. 1978). Initially defined as a "reasonable basis on which to conduct the search," id., "reasonable suspicion" was subsequently refined and adopted in the person context by the Eighth Circuit in Hunter v. Auger, 672 F.2d 668, 675 (8th Cir. 1982), as "reasonable grounds, based on objective facts, to believe that a particular [individual]" will be found to have what is being searched for.

1094. See supra notes 1088-1092 and accompanying text.

1095. See, e.g., Caruso, 506 N.Y.S.2d at 799 ("[The reasonable suspicion] standard is flexible enough to afford the full measure of Fourth Amendment protections without posing a barrier to the exercise of this employer's legitimate right to seek out drug use by its employees").

1096. U.S. Const. amends. V, XIV.
meaning of the fifth or fourteenth amendment.\textsuperscript{1097}

The Supreme Court's decisions in \textit{Board of Regents v. Roth}\textsuperscript{1098} and \textit{Perry v. Sinderman}\textsuperscript{1099} provide the proper framework for analysis of whether an individual's government employment constitutes a "property" interest under the Due Process Clause of the fifth or fourteenth amendments.

In \textit{Roth}, the court explicated:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral need expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.\textsuperscript{1100}

The court continued, emphasizing that property interests do not need to be rooted in the Constitution to be protected:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support those benefits.\textsuperscript{1101}

The \textit{Roth} court deduced from these principles that a person may have a protected property interest in public employment if contractual or statutory provisions guarantee continued employment absent "sufficient cause" for discharge.\textsuperscript{1102}

In \textit{Sindermann}, the court held that if a state college professor was able to prove his allegations that the state had established a \textit{de facto} tenure system under which he had obtained tenure, then the teacher would establish a legitimate claim of entitlement to continued employment absent sufficient cause for discharge.\textsuperscript{1103}

Thus, whether a given employee has a property interest within the meaning of the Due Process Clauses of the fifth and fourteenth amendments will depend on the facts and circumstances of the particular case. If a person is hired for a government position

\textsuperscript{1098} 408 U.S. 564 (1972).
\textsuperscript{1099} 408 U.S. 593 (1972).
\textsuperscript{1100} 408 U.S. at 577.
\textsuperscript{1101} Id. at 576-78.
\textsuperscript{1102} Id.
\textsuperscript{1103} 408 U.S. 593.
which is clearly terminable at the will of his superiors, the employee does not have a property interest in the position which mandates a fair procedure for determining the basis for this termination. If the government gives the employee assurances of continual employment or dismissal for only specified reasons, then there must be a fair procedure to protect the employee's interests when the government seeks to discharge him from the position.\footnote{1104} 

Once it is determined that the Due Process Clause applies, "the question remains what process is due."\footnote{1105} An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case."\footnote{1106} The form of the notice and the procedure for delivery or posting of the notice must be reasonably designed to ensure that the interested parties in fact will learn of the proposed action which may adversely affect their interest.\footnote{1107} 

In \textit{Boddie v. Connecticut},\footnote{1108} the Supreme Court described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing \textit{before} he is deprived of any significant property interest."\footnote{1109} Thus, this principle has been held to require "some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment.\footnote{1110} Although the pre-termination

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\item \footnote{1104} \textit{Id. Sindermann}, 408 U.S. at 601. A property interest in employment sufficient to invoke procedural due process protections need not be a formal contract or tenure system, but may be created by ordinance or by implied contract. \textit{Id.; Bishop v. Wood}, 426 U.S. 341, 344 (1976).
\item \footnote{1105} \textit{Morrissey v. Brewer}, 408 U.S. 471 (1972).
\item \footnote{1106} \textit{Loudermill}, 470 U.S. at 542 (quoting\textit{ Mullane v. Central Hanover Bank & Trust Co.}, 339 U.S. 306, 313 (1950)).
\item \footnote{1107} The seminal case on proper notice under the due process clause is \textit{Mullane v. Central Hanover Bank & Trust Co.}, 339 U.S. 306 (1950) (notice by newspaper publication of judicial action to settle accounts of trust fund was constitutionally sufficient notice for beneficiaries whose whereabouts could not be determined but violated due process because it was insufficient notice for known beneficiaries with ascertainable residence). The \textit{Mullane} Court declared in the oft quoted passage: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." \textit{Id.} at 314.
\item \footnote{1108} 401 U.S. 371 (1971).
\item \footnote{1109} \textit{Id.} at 379 (emphasis in original).
\item \footnote{1110} \textit{Roth}, 408 U.S. at 469-70; \textit{Sinderman}, 408 U.S. at 599; \textit{Loudermill}, 470 U.S. at 543. The Supreme Court explained in \textit{Loudermill}:\textit{\textquotedblleft The need for some form of pretermination hearing, \ldots is evident from a balancing of the competing interests at stake. These are the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous\textquotedblright}.\textit{Id.} at 543. \textit{Loudermill}, 470 U.S. at 543.
\end{itemize}
hearing is necessary, it does not have to be elaborate; it need not be a full-scale trial.\textsuperscript{1111} The formality and procedural requisites for the hearing may vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.\textsuperscript{1112} In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action.\textsuperscript{1113}

In cases of public employment terminations, the pre-termination hearing need not definitively resolve the propriety of the discharge.\textsuperscript{1114} It should serve as an initial check against a mistaken decision by ascertaining whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.\textsuperscript{1115}

In a nutshell, the essential requirements of due process are notice and opportunity to respond.\textsuperscript{1116} The opportunity to present reasons, either in person or in writing, why the proposed action should not be taken is a fundamental due process requirement.\textsuperscript{1117} The Supreme Court declared in Cleveland Board of Education v. Loudermill, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the termination."

\textsuperscript{1111} Id. (citing Matthews v. Elderidge, 424 U.S. 319, 335 (1976)). See id. at 506 (applying the Matthews balancing analysis, the Court determines that some form of pretermination hearing was necessary but did not need to be elaborate).

\textsuperscript{1112} Id.


\textsuperscript{1114} Matthews, 424 U.S. at 334.

In only one case, Goldberg v. Kelly, 397 U.S. 254 (1970), has the Supreme Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the Goldberg court itself pointed out, that case presented significantly different considerations than are present in the context of public employment. See id. at 264. In Goldberg the Court was dealing with the termination of welfare benefits. Id. The perceived dire consequences of cutting of a welfare recipient's benefits in the face of "brutal need" counseled in favor of a full adversarial evidentiary hearing prior to termination of the welfare payments. Id. The court emphasized that welfare assistance is given to persons on the very margin of subsistence:

The crucial factor in this context—a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may may deprive an eligible recipient of the very means by which to live while he waits.


\textsuperscript{1116} Id.

\textsuperscript{1117} Loudermill, 470 U.S. at 546; see also Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1281 (1975).
The Court warned, however, that this was all that was necessary, stating, "[t]o require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."1119

These are the basic legal principles which the courts bring to an analysis of a public employee’s due process challenge of his employers drug screening policies.

1. Current Judicial Rulings on Due Process Issues Pertaining to Public-Sector Employment Drug Screening

Due process challenges to public-sector employment drug screening policies have focused on two issues. First, whether the public-sector employee who has a property interest in continued government employment has been afforded the constitutional requirements of procedural due process when discharged on charges of drug use/abuse.1120 Second, whether urine tests are sufficiently accurate and reliable to justify their use in employment decisions—subsumed in this inquiry is the issue whether the Due Process Clause requires confirmatory testing before adverse employment decisions are made.1121 A third and more difficult issue, is whether a positive urinalysis, which may not reflect current impairment at the work site, can be used consistent with the Due Process Clause to discharge an employee for violation of work rules prohibiting on-duty use of controlled substances.1122

a. Allen v. City of Marietta

In Allen v. City of Marietta,1123 the electrical employees also contended that they were deprived of their City jobs based on a

1118. Id. (citing Arnett, 416 U.S. at 170-71; and Gass, 419 U.S. at 581.
1119. Id. Although the courts do not condone the utilization of post-termination hearings as a substitute for pre-termination procedural due process, the courts will consider the sufficiency of post-termination procedure to cure any pre-termination defect. See, e.g., Best v. Boswell, 696 F.2d 1282, 1289 (11th Cir. 1983), reh'g. denied, 703 F.2d 582, cert. denied, 464 U.S. 828 (1983); Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980); Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981).
1120. See infra notes 1123-63; 1166-93; 1223-37 and accompanying text.
1121. See infra notes 1164-1165, 1203-12 and accompanying text.
1122. The courts have not yet addressed this issue. Presented with the issue in Jones, the court declined to discuss the impairment-presence controversy. See supra note 189 and accompanying text.

For an interesting view of this issue, see infra text accompanying notes 1702-14 (Roadway Express, Inc. v. Teamsters Local 705, AAA) (collective bargaining arbitration case).
positive urinalysis without being afforded procedural due process as guaranteed by the Constitution.\textsuperscript{1124}

The terms of the plaintiff's employment were delineated in Marietta City Ordinance Number 3394,\textsuperscript{1125} which provided that the City could not take adverse employment actions against City employees without just cause.\textsuperscript{1126} "Just cause" was defined to include "delinquency, negligence, work slow-downs, inefficient performance of, or inability to perform assigned duties, unauthorized absences, and conduct undermining the operation of the city, or violations of the city's safety regulations."\textsuperscript{1127} The ordinance also provided that prior to termination for unsatisfactory performance, the employee would be given notice of the deficiency and time to rehabilitate his performance.\textsuperscript{1128} If improvement was not demonstrated, the employee would either be demoted or discharged.\textsuperscript{1129} If the employee's actions were deemed by the City Manager to be "so malicious or flagrant as to constitute a hazard to the effective operation of city services," the employee was subject to immediately dismissal.\textsuperscript{1130}

The City's employee handbook, which was distributed to the electrical workers of the Board of Lights and Water, outlined the City's Safety Rules and Regulations which were expressly mandatory, and a requirement for employment.\textsuperscript{1131} Included

\begin{itemize}
\item \textsuperscript{1124} Id.
\item \textsuperscript{1125} Marietta City Ordinance No. 3394 provided in pertinent part:
\begin{quote}
Any employee may be suspended, demoted or dismissed for just cause subject to approval of the City manager. Just cause shall include, but shall not be limited to: delinquency, negligence, insubordination, work slow-down, inefficiency in performance or inability to perform assigned duties, unauthorized absences, conduct undermining the operations of the city, or violations of the city's safety regulations.
\end{quote}
A permanent employee whose work is not satisfactory over a period of time shall be notified by his department head as to the problem and deficiency. If, after reasonable notice, the permanent employee fails to perform up to the requirements and standards of the classification held, the incumbent may be demoted or dismissed.
All employees shall be subject to immediate dismissal when the actions of the employee are construed by the City Manager to be so malicious or flagrant as to constitute a hazard to the effective operation of city services.
\textit{Id. at 492.}
\item \textsuperscript{1126} See supra note 1125 for pertinent provisions of City Ordinance Number 3394.
\item \textsuperscript{1127} Id.
\item \textsuperscript{1128} Id.
\item \textsuperscript{1129} Id.
\item \textsuperscript{1130} Id.
\item \textsuperscript{1131} The employee handbook given to every City employee, including employees of the Board of Lights and Water, contained a Comprehensive Safety Program. Section II of this Comprehensive Safety Program contained the following information:
\begin{quote}
SECTION II: Safety Rules and Regulations. The purpose of this section is to establish and maintain safety rules and regulations for the welfare and benefit of all City employees, to insure a safe working environment, and maintain efficient services
\end{quote}
\end{itemize}
among the rules and regulations was a separate category proscribing the use of intoxicating beverages or drugs on city premises, or on the job or during working hours. The handbook provided further that any City employee, including the electrical workers of the Board of Light and Water, whose acts were deemed irresponsible or unsafe or which either caused or developed a potential to cause any form of injury or damage to members of the community or to public or private property, while acting within the scope of their employment, were subject to immediate dismissal upon recommendation of the Safety Committee and approval by the City Manager.

After examination of these employment policies, the Allen court determined that the electrical workers clearly could not be discharged but for good cause and, therefore, had a property interest in continued employment with the city, of which they could not be deprived without due process.

The record indicated that the plaintiffs were not given notice or an opportunity to be heard prior to their termination; rather, they were called in one day and informed that the City had evidence that they were using drugs while on duty and were

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to the citizens and customers of the City of Marietta and the Board of Lights and Water.

A. Application.

1. Every employee shall carefully study (not merely read) those safety rules applicable to his duties. Compliance with these safety rules is mandatory and is considered a requirement for employment.

* * *

D. Intoxicating Beverages and Drugs.

Use of intoxicating beverages or drugs on city premises or on the job or during working hours is prohibited and shall be sufficient cause for disciplinary action. Any employee under the influence of intoxicating beverages or drugs shall not be allowed on the job.

E. Conduct of Employees.

* * *

2. Any act deemed irresponsible or unsafe on the part of any employee of the City of Marietta or Board of Lights and Water which either causes or develops a potential to cause any form of injury or damage to persons or property either public or private under the normal scope of City or Board employment shall be grounds for immediate dismissal of said employee upon recommendation of the safety committee and approval of the City Manager.

Id.

1132. See supra note 1131 for pertinent provisions of the City's Employee Handbook.
1133. Id.
1134. 601 F.Supp. at 492.
1135. Id.
1136. Id. at 493.
presented the choice of resigning or being fired. The district court pointed out that, under the terms of both the ordinance and the employee handbook, the plaintiffs were not necessarily entitled to a pre-termination hearing despite the fact that they had a constitutionally protected property interest. The court reasoned that on-duty drug use may have fit into that category of conduct which threatens the health or safety of other employees or the general public for which the plaintiffs would be subject to immediate dismissal without a hearing, as provided in both the handbook and the ordinance.

Reasoning in the alternative, the Allen court concluded that, even if on-duty drug use did not fall into that category, an adequate post-termination hearing would cure the absence of a pre-termination hearing.

Proceeding under the City's newly revised grievance procedure, the plaintiffs appealed their terminations to the Pension Board of the Board of Lights and Water. Prior to the review of their termination by the Pension Board, each plaintiff was informed that he was terminated for using drugs while on duty in violation of the City's Safety Rules and Regulations. Each plaintiff was also

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1137. Id.
1138. Id. The court was referring to Paragraph 2 of the Safety Rules and Regulations, see supra note 1131; and the immediate dismissal language in Ordinance 3394, see supra note 1125.
1139. Id.
1141. At the time plaintiffs were terminated the City had a three-step grievance procedure. The final step in this procedure was an appeal to the City Manager whose decision was binding on all parties. As it was the City Manager who terminated them, this grievance procedure did not represent much of an opportunity for dispassionate review of the deprivation of plaintiffs' jobs. After this lawsuit was filed, however, the Board of Lights and Water passed a resolution implementing a new grievance procedure. The new grievance procedure added an appeal from the decision of the City Manager/Board Manager to the Pension Board of the Board of Lights and Water ("Pension Board"). In light of the fact that plaintiffs did not receive a pre-termination hearing and the fact that the post-termination grievance procedure in place at the time of their discharge was facially inadequate to satisfy the requirements of due process, defendants offered to allow plaintiffs a hearing before the Pension Board and allowed them to waive the first three steps of the grievance procedure. Id.
1142. The City's Safety Rules and Regulations provided in pertinent part:
SECTION II: Safety Rules and Regulations. The purpose of this section is to establish and maintain safety rules and regulations for the welfare and benefit of all City employees, to insure a safe working environment, and maintain efficient services to the citizens and customers of the City of Marietta and the Board of Lights and Water.
A. Application.
1. Every employee shall carefully study (not merely read) those safety rules applica-
given a list of witnesses who would testify at the hearing and a brief description of the nature of the testimony they would offer. The plaintiffs argued that the descriptions of testimony to be offered were insufficient. The court, however, determined that the list provided by the City was sufficient to give the plaintiffs fair notice of the charges against them and was sufficient to give plaintiffs an opportunity to prepare to defend themselves against the charges of drug on the job.

The plaintiffs were represented by counsel at the hearing, who cross-examined the City's witnesses who testified against the plaintiff and were permitted to put on any witnesses who could testify in behalf of the plaintiffs. All plaintiffs who were present at the hearing were able to testify on their own behalf but declined to do so.

Emphasizing that the essential elements of due process were notice and a fair opportunity to be heard, the district court in Allen declared that it was apparent that the plaintiffs had been given reasonable notice of the charges against them prior to their post-termination hearing and were given a fair opportunity to refute the charges. The plaintiffs then contended that they were deprived of due process when the Pension Board failed to give them specific reasons for their decision to affirm their terminations. Dismissing the plaintiffs' contention, the court stated that, while greater elaboration in the Pension Board's decision would have

ble to his duties. Compliance with these safety rules is mandatory and is considered a requirement for employment.

* * *

D. Intoxicating Beverages and Drugs

Use of intoxicating beverages or drugs on city premises or on the job or during working hours is prohibited and shall be sufficient cause for disciplinary action. Any employee under the influence of intoxicating beverages or drugs shall not be allowed on the job.

Id. at 492.

1143. Id.

1144. Id.

1145. Id.

1146. Id. at 494.

1147. Id. Explaining their failure to testify at the hearing, the plaintiffs contended that they did not feel at the time that the City had made out a case against them and they also felt that the hearing was a sham. Id.

1148. Id. The court added, "[t]hat plaintiffs did not testify or deny the charges against them is not the fault of defendants"). Id.

1149. Id.

1150. The Pension Board's decision simply states without elaboration the board's unanimous finding that John Crane had cause for his decision to terminate plaintiffs based on the information presented to him. Id.
been desirable and perhaps even required under Georgia law, the proper method to challenge the asserted inadequacy would have been to appeal the decision to the Marietta City Council.\textsuperscript{1151} If the plaintiffs were still dissatisfied with the Council's determination affirming or denying the decision of the Pension Board, they could have appealed on a writ of certiorari to the Superior Court of Cobb County.\textsuperscript{1152} The \textit{Allen} court declared:

It is apparent to the court that the procedures now in place for appeal of termination decisions are sufficient to satisfy the requirements of notice and a fair opportunity to be heard. . . . Plaintiffs' complaint concerning the findings of the Pension Board and concerning the sufficiency of the evidence presented against them are more appropriately addressed to the Georgia courts.\textsuperscript{1153}

The \textit{Allen} court determined that the plaintiffs were accorded a fair opportunity to rebut the charges against them and that they failed to utilize available avenues of appeal.\textsuperscript{1154} The court ultimately held that the plaintiffs were not deprived of their jobs without due process.\textsuperscript{1155}

b. \textit{Jones v. McKenzie}

A discharged school bus attendant brought suit in \textit{Jones v. McKenzie}\textsuperscript{1156} against the District of Columbia and those individuals responsible for the School System's decision to terminate her for alleged marijuana use.\textsuperscript{1157} After determining that the termination of the plaintiff's employment based solely on an unconfirmed EMIT test was arbitrary and capricious,\textsuperscript{1158} the \textit{Jones} court observed that the question still remained whether additional procedural due process was required beyond the opportunity afforded the plaintiff and her counsel to make a written submission in the

\begin{itemize}
\item \textsuperscript{1151} \textit{Id.}
\item \textsuperscript{1152} \textit{Id.}
\item \textsuperscript{1153} \textit{Id.}
\item \textsuperscript{1154} \textit{Id.}
\item \textsuperscript{1155} In announcing its holding, the \textit{Allen} court stated, "[b]ecause the court concludes that plaintiffs have been accorded a fair opportunity to rebut the charges against them and that they have failed to utilize avenues of appeal available to them, the court holds that plaintiffs were not deprived of their jobs without due process." \textit{Id.}
\item \textsuperscript{1156} 628 F.Supp. 1500 (D.D.C. 1986). For a discussion of the operative facts in \textit{Jones}, see supra notes 150-69 and accompanying text.
\item \textsuperscript{1157} 628 F.Supp. at 1501. Named individually as defendants are Floretta Dukes McKenzie, Superintendent of District of Columbia Public Schools, and William J. Bedford, Director of the Division of Logistical Support, D.C. Public Schools. \textit{Id.} at 1501 n.1.
\item \textsuperscript{1158} \textit{Id.} at 1507. For a discussion of this part of the \textit{Jones} court's decision, see supra notes 170-80 and accompanying text.
\end{itemize}
form of an appeal after her termination.\footnote{1159} The district court in Jones instructed that the deprivation of property by terminating government employment must be "'preceded by notice and opportunity for hearing appropriate to the nature of the case.'"\footnote{1160} Noting that in the case under consideration the plaintiff was given no pre-termination hearing and her post-termination hearing was limited to a written submission,\footnote{1161} the Jones court concluded that it was sufficient to establish the plain-

\footnote{1159. Id. The Jones court considered in an earlier portion of its opinion the threshold issue of whether the plaintiff had a property interest in her employment with the school district that was cognizable by and protected under the due process requirements of the fourteenth amendment.}

On this issue, the defendants claimed that they never intended to create any property interest in "wages as earned" (WAE) employees, rather, they created the WAE category to afford managers the necessary flexibility to meet short term personnel needs without a lot of red tape. \textit{Id.} at 1504. In support of their allegations, the defendants cited Superintendent's Directive 650.4, issued June 7, 1978, which provided that "a temporary employee is not entitled to a hearing [upon termination] but may have [his] written appeal reviewed and a determination rendered in writing by the Superintendent within ten (10) days of receipt of the appeal." \textit{Id.}

The defendants also contended that WAE employees knew that their positions were intermittent and subject to sudden loss without "cause." Furthermore, urged the defendants, the defendants never anticipated from one school year to the next whether an individual WAE employee would return for the following school year. \textit{Id.}

The Jones court dismissed the defendants' arguments, instructing that the existence of a property interest accorded due process protections is not simply a question of "permanent" versus "temporary" employment in the temporal sense of those terms. The defendants' conceded that the plaintiff's employment was governed by Board of Education Rules 1401.1 and 1401.2 which permitted termination of an employee only for "cause" without distinguishing between full time employees and ones, like the plaintiff, employed in WAE status. \textit{Id.} See supra note 170 for pertinent text of Rule 1401.1 and 1401.2. The court concluded that these requirements for a termination "which [was] for cause in the sense of not being arbitrary and capricious conferred a property interest which [could not] be taken by a government employer without due process." \textit{Id.} The Jones court added:

\begin{quote}
It may well be that Rules 1401.1 and 1401.2 do not extend to every casual temporary employee of the Board of Education. Plaintiff's service to her employer, however, was not transitory. For all practical purposes, she had been employed steadily for nearly a full forty hour week for several years. Her correspondence with her employer about renewal of her service for each ensuing school year is plainly distinguishable from the offer and acceptance of employment by a new employee. The continuity of her service, when coupled with the language of Rule 1401, establish a protected property interest in her job which cannot be taken by the defendants arbitrarily and capriciously or without an appropriate hearing.
\end{quote}

\textit{Id.} at 1504-05. Thus, the Jones court was applying an implied contract analysis to the property interest issue, which is permissible under the teachings of \textit{Perry v. Sinderman}, 408 U.S. 593 (1972) and \textit{Bishop v. Wood}, 426 U.S. 341, 344 (1976); see supra note 1104.

\footnote{1160. 628 F.Supp. at 1507 (quoting \textit{Loudermill}, 470 U.S. 532 (1985)).}

\footnote{1161. The plaintiff requested oral argument and a hearing at which she could testify on her own behalf and present other evidence, but her request was denied. 628 F.Supp. at 1503.}
tiff's procedural due process claim that she was not given a pre-termination hearing.1162 "This deprivation", declared the court, "violated her right to procedural due process and affords a second ground for decision in her favor."1163

Declining to prescribe the form of pre-termination hearing which would satisfy the requirements of due process in the instant case, the Jones court did, however, suggest that at a minimum, before the plaintiff could be discharged due to a positive urinalysis for marijuana, some adversary process is required.1164 This adversary process should determine that she is, in fact, the subject of the particular positive test result and that the positive test had been appropriately confirmed.1165

Recognizing the public's vital concern for the safety of school children, the district court in Jones held that "the necessity for a hearing before termination did not preclude temporary reassignment or even suspension pending confirmation of the positive EMIT result and a hearing,"1166 provided that the hearing is held and the issues resolved promptly.1167 Additionally, if the plaintiff prevails at the hearing, then the school district would have to compensate her for any loss incurred as a result of her reassignment or suspension.1168

1162. Id. at 1507. The court determined that the post-termination hearing was inadequate to cure the absence of a pre-termination hearing under a Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980), approach. See supra note 1119 and accompanying text. Apparently the decisive factor in the court's determination was the limitation of the post-termination hearing to a written brief.
1163. Id. at 1507. See supra note 1162.
1164. Id. at 1507.
1165. Id. See supra notes 170-80 and accompanying text for a discussion of the court's holding on the confirmatory testing issue.
1166. 628 F.Supp. at 1507.
1167. Id.
1168. Id. In an earlier portion of its opinion, the Jones court discussed a second property interest held by the plaintiff which was offended by the termination of her employment on charges of drug use/abuse. Id. at 1505. Recognizing that discharge of the plaintiff on unsubstantiated charges of drug abuse could severely affect her interest in her "good name, reputation, honor, or integrity," the court pointed out that such a deprivation of her "liberty" or "property" interest in her reputation triggered constitutional procedural due process requirements. Id. The court added that while there was no evidence that defendants published their drug abuse findings, it was nevertheless a reasonable inference that, unless expunged, the reason for her termination would remain in her file for automatic publication to any prospective employers of the plaintiff. Moreover, the fact that she was required to file this lawsuit to protect her rights, thereby involuntarily publicizing the drug charges herself, would give rise to a constitutionally reviewable deprivation.

The summary discussion the court gives the "property" discussion regarding the plaintiff's interest in "her good name, . . ." is potentially misleading. Referring to the case cited by the Jones court, Paul v. David, 424 U.S. 693, 708-09 (1976), one discovers that this prop-
c. Bostic v. McClendon

In Bostic v. McClendon, the plaintiffs, a city clerk and police officer, charged that they were deprived of their government employment without being afforded their constitutional right to due process of law. The defendants, City of East Point Georgia, conceded that both plaintiffs had a protected property interest in their continued employment with the City. Stating that the Due Process Clause mandates that the right to property cannot be deprived except pursuant to constitutionally adequate procedures, the Bostic court emphasized that deprivation of property must "be preceded by notice and opportunity for a hearing appropriate to the nature of the case."

In the public employment arena, due process requires that the tenured employee be given an oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story before his employment is terminated.

The Bostic court observed that while there was some dispute in the record as to the extent of the opportunity the plaintiffs were given to explain themselves to Chief McClendon before being given their letters of termination, the plaintiffs' terminations immediately abated when the plaintiffs appealed the employment decision and were thereafter only suspended without pay. Challenging
only the absence of a pre-termination hearing, the plaintiffs did not contest that they were given adequate notice of the charges against them as of the date that the appellate hearing was to occur, nor did they contest that the hearing before the appeals board would have provided the plaintiffs with an adequate right to be heard.

Apparently finding the conversion upon appeal of the termination to a suspension without pay crucial, the court in Bostic held that "as plaintiffs continued to receive full pay pending the appeals board hearing and were given the opportunity to appear before the appeals board before their employment was terminated, they were not denied due process."

d. Shoemaker v. Handel

In the trial court proceedings, the jockeys in Shoemaker v. Handel charged that not only did the Racing Commission's drug testing program violate the fourth amendment prohibition against unreasonable searches and seizures, but also the drug testing regulations violated the Due Process Clause because they did not expressly provide a hearing at which the jockeys could challenge

between the dates they received their letters of termination and the date they elected to appeal the employment actions. Id. at 251 n.3.

1177. Id.
1178. Id.
1179. Id.
1180. Id. The lack of clarity and insight present in the Bostic court's analysis of the plaintiff's fourth amendment claims carried over into its analysis of the due process issue. The district court's opinion in Bostic offers not a hint as to what procedures are required by due process in an employment termination case based on charges of drug use/abuse. The court simply concluded that the requirements were met, without indicating what the requirements were. The lack of a description of the Department's procedural scheme for employment termination hearings does not help matters. Given, the court observed that the fundamental requisites of notice and opportunity to be heard were provided in the case, however, the court did not qualify exactly what constituted an opportunity to be heard in a drug related urinalysis discharge case. It is clear, that the opportunity to be heard in such a case must entail at least some different adversarial features than a theft-based discharge. As the district court in Jones pointed out, at a minimum, the plaintiff must be afforded the opportunity to challenge the chain-of-custody of the urine sample alleged to be hers and the ability to contest the confirmation procedures. See supra notes 1164-65 and accompanying text. See also infra text accompanying notes 1191-1202 for a similar criticism of the Shoemaker holding on the due process issue.

1182. 619 F.Supp. at 1097.
the test results and the penalties imposed.\textsuperscript{1183}

The drug testing regulations were part of a comprehensive regulatory scheme aimed at supervising the horse racing industry.\textsuperscript{1184} Although the drug testing regulations did not include an express provision for pre-termination hearing,\textsuperscript{1185} the district court pointed out that the plaintiffs were entitled to a hearing to challenge any penalty imposed under the regulations including those assessed for positive urine test results.\textsuperscript{1186} According to the master provision in the Commission's regulations, N.J.A.C. 13:70 - 13 A.1,\textsuperscript{1187} the jockeys are entitled to a hearing "[w]hen any person is disciplined by the stewards or any official representing the Commission pursuant to the laws of New Jersey or rules of the Commission."\textsuperscript{1188} Observing that the Supreme Court has consistently held that some form of hearing is required before an individual is finally deprived of his property interest,\textsuperscript{1189} the Shoemaker court added that the fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner, which will vary with the specific circumstances of each case.\textsuperscript{1190}

Apparently considering a post-termination proceeding, as opposed to a pre-termination hearing, appropriate under the circumstances,\textsuperscript{1191} the district court in Shoemaker concluded that the procedures provided under the Commission's regulations satisfied the requirements of the Due Process Clause\textsuperscript{1192} and held that the jockeys were deprived of no constitutional rights without due process

\textsuperscript{1183} Id. at 1104.
\textsuperscript{1184} Id. at 1093.
\textsuperscript{1185} Id. at 1104.
\textsuperscript{1186} Id.
\textsuperscript{1187} N.J.A.C. 13:70-13A et seq. provided for the hearing procedure. Any person disciplined by the steward of the Commission's officials for violations of the statute or regulations adopted thereunder may appeal to the commission and request a hearing. N.J.A.C. 13:70-13A.1. Hearings before the Commission and the stewards are de novo proceedings and include notice and an opportunity to be heard. N.J.A.C.13:70-13A.3. The Commission may impose directly any disciplinary actions authorized by its rules and regulations. N.J.A.C. 13:70-13A.2. The Commission must act on all appeals "in accordance with the laws of the State of New Jersey and the rules and regulations promulgated by the Commission." N.J.A.C. 13:70-13A.5.
\textsuperscript{1188} 619 F.Supp. at 1104; see also supra note 1187 for the hearing procedure as set forth in N.J.A.C. 13:70-13A. et seq.
\textsuperscript{1189} 619 F.Supp. at 1104.
\textsuperscript{1190} Id.
\textsuperscript{1191} The language of N.J.A.C. 13:70-13A.1. provides for a hearing after the fact, after the discipline has been handed down. There appears no indication in the hearing procedure as set forth in N.J.A.C. 13:70-13A. et seq., see supra note 1187 that a termination decision would be handled any differently.
\textsuperscript{1192} 619 F.Supp. at 1104-95.
of law.\textsuperscript{1193} The court's summary dismissal of the jockey's due process claim is unfortunate. The court's failure to enumerate or even describe the specific procedures pertaining to the hearing process which it found to satisfy all the requirements of due process provides the reader with no insight into what the court in Shoemaker considered as necessary measures to comport with the Due Process Clause.\textsuperscript{1194} In this respect, the Jones decision\textsuperscript{1195} is superior, for the court in Jones indicated the elements of the post-termination procedure which were responsive to the unique nature of a termination involving drug use/abuse charges based on positive urinalysis results.\textsuperscript{1196}

While this criticism may at first blush appear merely academic, upon a closer look it is evident that it is not. Drug screening is a fairly new phenomenon in the work place, and thus, while precedent dealing with due process issues generally in employment will be helpful, the uniqueness of drug screening requires a more fact-specific judicial response. As the Jones\textsuperscript{1197} case indicates, employment terminations based on drug screens present unique situations which require special treatment under the Due Process Clause.\textsuperscript{1198} For example, the Jones court indicated that at a minimum due process required that the employer establish an unbroken chain of custody\textsuperscript{1199} which links a particular employee to a specified specimen and to a specific test result and demonstrates that the initial positive test had been confirmed.\textsuperscript{1200} Procedural due process nuances such as this will not be found in a discussion of due process requirements in a case involving an employment termination for unsatisfactory performance or insubordination. While the Shoemaking

\textsuperscript{1193} Id. at 1105.

\textsuperscript{1194} The district court in Shoemaker simply concluded, without explanation, that "all of the constitutional and statutory safeguards inherent in the requirement of due process." Id. at 1104-05. The inclusion of the statutory provision creating the hearing procedure in a footnote earlier in the opinion provides little more of a clue on the issues involved than did the Bostic court's failure to even identify what procedures it was talking about. Id. at 1094. See supra note 1180. The description of the hearing procedure does little more than indicate that notice is given and an opportunity to be heard is provided. This hardly offers any insight into the peculiar nature of a drug-based discharge involving urinalysis testing. See infra notes 1195-1202 and accompanying text.

\textsuperscript{1195} 628 F.Supp. 1500 (D.D.C. 1986). For a discussion of the court's analysis of the due process issue in Jones, see supra notes 1156-68 and accompanying text.

\textsuperscript{1196} See supra notes 1164-65 and accompanying text.

\textsuperscript{1197} 628 F.Supp. 1500, see supra note 1195.

\textsuperscript{1198} See supra note 1196.

\textsuperscript{1199} 628 F.Supp. 1507, see supra note 1164 and accompanying text.

\textsuperscript{1200} 628 F.Supp. 1507, see supra note 1165 and accompanying text.
court devoted much thought and analysis to the fourth amendment issues involved in the jockeys' challenge to the Commission's drug screening policy, it quickly passed over the due process issue, thereby missing a golden opportunity to meaningfully contribute to due process analysis in this burgeoning area.

**e. Capua v. City of Plainfield**

The plaintiff fire fighters in *Capua v. City of Plainfield* included in their challenge of the City's mass urine testing program a claim that the program violated their due process rights under the Constitution.

The *Capua* court noted initially that the fire fighters, as civil servants employed by the Plainfield Fire Department, were endowed with a constitutionally protected property interest in their tenure pursuant to the New Jersey statutory scheme for municipal fire fighters. Critical to the court's conclusion was a provision within the statutory scheme which provided that no adverse employment decision could be made against a fire fighter without just

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1201. *See supra* notes 994-1042 and accompanying text.

1202. *See supra* note 1194. The district court in *Shoemaker* championed the extensive and detailed regulations of the New Jersey Racing Commission. With such an "excellent model" of administrative rule making before it, the court should have been more explicit than just stating "... the procedures as provided are attenuated [sic] by all of the constitutional and statutory safeguards inherent in the requirement of due process." 619 F.Supp. at 1105. The court should have indicated what aspects of the regulations it was considering when assessing the jockeys' due process claim. For example, the court emphasized during its fourth amendment analysis the extensive notice and explanation given the jockeys prior to actual implementation of the program; however, not one word was mentioned about it during the court's due process discussion.


1204. 643 F.Supp. at 1520.

1205. N.J.S.A. §§ 40A:14-7 et seq. Specifically, noted the *Capua* court, N.J.S.A. § 40A:14-9 conferred upon the plaintiffs, as fire department employees a reasonable expectation of continued employment unless and until "just cause" was established for their termination. 643 F.Supp. at 1520. N.J.S.A. § 40A:14-19 provided in pertinent part as follows:

Except as otherwise provided by law no permanent member or officer of the part or part-paid fire department or force shall be ... suspended, removed, fined or reduced in rank ... except for just cause as herein above provided and then only upon a written complaint, setting forth the charge or charges as against such member or officer so charged, with notice of a hearing ... which shall be not less than 10 nor more than 30 days from the date of service of the complaint. A failure to substantially comply with said provisions as to the service of the complaint shall require a dismissal of the complaint.

*Id.*
cause, thereby conferring upon the fire fighters a reasonable expectation of continued employment unless and until "just cause" was established for termination.

In addition to the fire fighter's property interest in their continued employment with the City, the court in Capua also found that the plaintiffs had a constitutionally recognized liberty and property interests in their individual reputations and in the honor and integrity of their good names. The court explained that such protected interests in reputation derive directly from the plaintiffs' employment status as fire fighters and cannot be arbitrarily or capriciously infringed upon by the government.

Finding it undisputable that discharges on charges of drug abuse could adversely affect these interests, the Capua court determined that constitutional requirements of procedural due process were triggered, which the court found to be violated in the case under consideration.

The court began its analysis of the due process issue by observing that the City's unannounced mass urinalysis testing program conducted on three separate occasions was completely lacking in procedural safeguards. Among the litany of procedural violations identified by the court as fatal in Capua were: the City's unilateral imposition of the drug screening program as a condition of employment without prior notice to the plaintiffs and without opportunity to voice objections or seek advice of counsel, the absence of standards to govern the department-wide drug raids, and the lack of provisions to protect the confidentiality of each fire fighter's test results, which contained not only information on drug use but other personal physiological information as well. The court concluded that the "[d]efendants precipitously exercised

1206. See supra note 1205 for text of statute.
1207. The Capua court declared: "This statutory scheme bestows a property interest upon plaintiffs which cannot be abrogated by their government employer without due process." 643 F.Supp. at 1520.
1208. Id. See discussion supra note 1168 pertaining to the limited nature of the due process protection of property interests in personal reputations.
1210. 643 F.Supp. at 1521 ("It is beyond argument that discharge on charges of drug abuse could severely affect these interests").
1211. Id.
1212. Id.
1213. Id.
1214. Id.
1215. Id.
1216. Id.
their unbridled discretion exhibiting a total lack of concern for the constitutional rights of their employees.”

By compelling the fire fighters to participate in the testing program under threat of immediate discharge, the City effectively coerced a waiver of any rights which the plaintiffs may have had under their collective bargaining agreement with the City, further exacerbating the due process violations in the opinion of the Capua court.

Additionally, the court in Capua admonished that the City’s actions were cause for particular concern in light of the questionable reliability and accuracy of the urinalysis tests themselves as well as procedural dangers, such as faulty chain of custody procedures. Thus, the City’s refusal to afford the fire fighters a full opportunity to evaluate and review their personal test results or to have their own specimens re-tested by an independently retained technician, also “offend[ed] traditional notions of fundamental fairness and due process.”

The post-testing procedures for dealing with employees whose urine specimens tested positive were also lacking in procedural safeguards as required by the Due Process Clause. In reaching this conclusion, the court in Capua noted the City’s drug investigation of the Fire Department began and ended with the single urinalysis test of individual fire fighters, who were subsequently terminated without pay, if the test results returned positive. Despite the punitive nature of these terminations without pay, the

1217. Id.
1218. Id.
1219. Id. The court chided the City, declaring:
   By compelling plaintiffs to participate in the urine testing under the threat of immediate discharge, defendant effectively coerced a waiver of any rights, including the right against self-incrimination, plaintiffs may have had under the collective bargaining agreement to challenge such unilateral actions. Defendants’ conduct was in flagrant violation of the due process rights that inure to plaintiffs under both the New Jersey statutory regulations and the Fourteenth Amendment of the United States Constitution.

   Id.
1220. Id. (“The procedural dangers inherent in relying on the results of such tests are well documented in both legal and medical literature”) (citing Jones, 628 F.Supp. at 1505-06 and authorities cited therein; M. K. Divoll and D. J. Greenblatt, The Admissibility of Positive EMIT Results as Scientific Evidence: Counting Facts, Not Head, 5 Journal of Clinical Pharmacology 114-116 (1985)).
1221. Id.
1222. Id.
1223. Id.
1224. Id.
City made no indication that a confirmatory test would be conducted on the specimens to confirm any initial positives, nor did the City apprise the fire fighters of any available hearing procedure to contest their terminations in the belated written complaints issued to the discharged fire fighters.

The absence of procedural protections from the inception of the program through the termination process convinced the court in Capua that the City’s drug screening program for City fire fighters violated procedural requirements of the Due Process Clause.

f. Lovvorn v. City of Chattanooga, Tennessee

In Lovvorn v. City of Chattanooga, Tennessee, the fire fighters challenged the City’s proposed drug screening program under the due process clause of the fourteenth amendment in addition to the fourth amendment challenge discussed earlier.

Without indicating whether based on contract or statute, the court determined that the plaintiff fire fighters had a property interest in their jobs as City fire fighters which activated the requirements of the Due Process Clause. Additionally, the fire fighters also had a liberty interest in their reputation and integrity which was also afforded due process protection. Citing Loudermill, the Lovvorn court declared that due process entitled the fire fighters to a hearing prior to being terminated or otherwise disciplined, to oral or written notice of the charges against them, to an explanation of the evidence against them, and to an opportunity to present his or her side of the story.

Finding that the fire fighters were given a pre-termination hearing before the Chief of the Chattanooga Fire Department as well as extensive past termination hearings before the full City Commission, and the opportunity under State law to appeal

1225. Id.
1226. Id.
1227. Id. at 1521-22.
1229. 647 F.Supp. at 883.
1230. Id. (citing Loudermill, 470 U.S. at 542; Board of Regents v. Roth, 408 U.S. 564 (1972)).
1231. Id. (citing Roth, 408 U.S. at 573).
1232. Loudermill, 470 U.S. at 545.
1233. 647 F.Supp. at 883.
1234. Id.
1235. Id.
from the City Commission's decision by writ of certiorari to the state courts,\textsuperscript{1236} the court held that the procedural framework for the review of the testing results and the administration of discipline fully satisfied the requirements of due process.\textsuperscript{1237}

\textbf{g. National Treasury Employees Union v. Von Raab*}

District Judge Collins, writing in \textit{National Treasury Employer's Union v. Von Raab},\textsuperscript{1238} observed that the drug testing plan instituted by the Customs Service to test Customs employees was "far from an infallible system,"\textsuperscript{1239} noting the affidavit of one Customs employee already tested under the program who testified that the laboratory representative mixed up his sample with another Customs worker.\textsuperscript{1240} Referencing the affidavit of an expert witness describing the dangers involved in the drug screening process,\textsuperscript{1241} the trial court found that "[t]he entire process is fraught with the danger of mishaps and false positive readings."\textsuperscript{1242}

Based on the one employee's affidavit and the testimony of one toxicologist, Judge Collins concluded, in \textit{NTEU}, that ... "the drug testing program is so fraught with dangers of false positive read-

\textsuperscript{1236} \textit{Id.}
\textsuperscript{1237} \textit{Id.} The criticisms of the \textit{Bostic} and \textit{Shoemaker} rulings are equally applicable to the district court's analysis in \textit{Lovvorn}. See supra notes 1180 and 1191-1202 and accompanying text.
\textsuperscript{1238} The Fifth Circuit recently vacated the trial court's permanent injunction in \textit{NTEU v. Von Raab}, No. 86-3833 (3rd Cir. April 22, 1987) (Hill, J. dissenting). In vacating the trial court's order, the Fifth Circuit expressly overruled the trial court's due process analysis. See supra note 932 for a discussion of this recent decision in \textit{NTEU}.
\textsuperscript{1239} 649 F.Supp. 380 (E.D. La. 1986), denying stay pending appeal, 809 F.2d 1057 (5th Cir. 1987). For a discussions of the operative facts in \textit{NTEU}, see supra notes 888-902 and accompanying text.
\textsuperscript{1240} 649 F.Supp. at 389.
\textsuperscript{1241} \textit{Id.} The court quoted the affidavit of Benito D. Juarez, who testified that the laboratory mixed up his sample with that of another Customs worker:

After I urinated, I noticed that the laboratory representative was affixing a sticker to my sample bottle. The sticker he was affixing had the wrong social security number on it. He had already filled out the labels before collecting our samples, and apparently he placed Fred Robinson's sticker on my bottle. When I alerted him to his mistake, he went back and checked his papers to determine my social security number and then corrected his error.

\textit{Id.}

\textsuperscript{1241} Among the criticisms raised by the plaintiffs' expert were the test's inability to distinguish between illicit drugs and legal drugs which mimick the chemical reactions of illicit drugs. \textit{Id.} at 389-90. The expert also cited chain-of-custody and lack of quality control as additional problems which are present in both the initial and confirmatory methodologies. \textit{Id.} at 390.
\textsuperscript{1242} \textit{Id.} at 389 (relying on the affidavit of plaintiffs' expert toxicologist — for a summary of the contents of the affidavit, see supra note 1241).
Drug Testing

ings as to deny the Customs workers due process of law when they apply for promotion into covered positions."\(^{1243}\)

The finding of a violation of the Due Process Clause was one among the many constitutional infirmities in the Commission’s drug screening plan which led the trial court to permanently enjoin the Commission from conducting urinalysis testing in the absence of probable cause and to declare the drug testing program unconstitutional.\(^{1244}\)

Although the Custom’s appeal to the Fifth Circuit, seeking a stay of the trial court’s permanent injunction pending a decision on the merits was denied due to the short period of time remaining before the scheduled hearing on the merits,\(^{1246}\) the trial court’s decision pertaining to the due process issue did not escape a few sharply critical comments by Circuit Judge Higginbotham.\(^{1246}\) Denouncing the trial court’s due process holding, Judge Higginbotham criticized:

The district court found, and it appears to have been without any suggestion by plaintiffs below, that the tests were so unreliable as to deny applicants due process of law. No court has ever held that the combination of tests used here denies due process. The conclusion is either without record basis or is directed toward the possibility of errors by the laboratories such as an error in identifying a specimen. Such risk is present in most laboratory evidence.\(^{1247}\)

Furthermore, added Judge Higginbotham, “... apart from the fact that the evidence of reliability points to the opposite conclusion, the district court overlooked the procedure in place that allows an applicant who disagrees with test results to have the sample tested by another laboratory.”\(^{1248}\)

Reviewing Judge Collins impassioned opinion in NTEU objectively, one quickly realizes that the position taken on the due process issue was unsound. Based upon the affidavit of one toxicologist, which outlined a worst-case scenario of potential evils inherent in the most popular drug testing technique,\(^{1249}\) and the affidavit of a tested employee who testified that he observed his

\(^{1243}\) Id. at 390.

\(^{1244}\) Id. at 381, 391 (“The plan put forth in the Customs Directive is so utterly repugnant to the United States Constitution, that this Court has no choice but to permanently enjoin Commission William Von Raab from further implementing it”).

\(^{1245}\) 808 F.2d 1057, 1060 (5th Cir. 1987).

\(^{1246}\) 808 F.2d 1057, 1060 (5th Cir. 1987) (Higginbotham, J., specially concurring).

\(^{1247}\) Id. at 1063.

\(^{1248}\) Id.

\(^{1249}\) Id. at 389-90.
specimen being mixed up, the trial court hastily concluded that the urinalysis tests are so unreliable that they violate the Due Process Clause. The fundamental requirements of due process are notice and an opportunity to be heard. In the government employment context these requirements translate into an oral or written notice of the charges against the government employee, an explanation of the evidence against the employee, and an opportunity to present his or her side of the story. Implicit in these fundamental requirements is the requirement that the employee be given a fair opportunity to refute the charges. It is clear that due process does not require an infallible testing system as Judge Collins seemingly suggests in NTEU from the outset of his discussion on the issue.

The trial court simply missed the point. The roster of the potential errors in the drug screening process provided by the toxicologist were exactly that, potential errors. Errors which could be substantially precluded by appropriate chain of custody and confirmation requirements. This is where due process becomes important by mandating such procedural safeguards. In fact, two courts have already indicated that chain of custody and confirmation safeguards are required by the due process clause in drug screening programs. Judge Collins' discussion of potential testing

1250. Id. at 389. See supra note 1240.
1251. Id. at 389.
1252. Loudermill, 470 U.S. at 546; see supra notes 1116, 1118 and accompanying text.
1253. Id.
1254. Id.
1255. See supra text accompanying notes 1111-15.
1257. The nature of the criticisms of urinalysis testing recognized by the trial court concern primarily issues which can be regulated through appropriate standards and regulations. See supra note 207 and accompanying text for the NIDA's efforts at eliminating these types of problems. See supra note 207 and accompanying text. Rather than saying due process rendered them invalid period, the trial court in NTEU should have said due process rendered the tests invalid as administered. Although the courts may not be experts in this area, that is not a sufficient excuse not to put forth some effort to accomodate both employer and employee interests through the establishment of certain basic due process requirements such as chain-of-custody procedures; confirmation procedures; and perhaps a stringent evidentiary foundation requirement, which requires the employer to establish that the testing firm and procedures used have adequate quality control procedures in place. Perhaps something along the lines of the pre-contract award assessment, see supra note 208 and accompanying text. Likewise, perhaps the individual conducting the actual analysis of the specimen should have to be qualified as an "expert" before the test results were admissible as evidence.
1258. Jones, 628 F.Supp. at 1507; see supra notes 1164-65 and accompanying text; Capua, 643 F.Supp. at 1521; see supra notes 1220-22 and accompanying text.
inaccuracy and unreliability adds nothing to this analysis. Rather than simply pointing to these shortcomings and concluding that due process was violated, the trial court in NTEU should have examined the nature of the procedures used by the Commission and ascertained where "fundamental fairness and due process" mandated improvements to be made.1259

2. Summary of the Requirements of Due Process and "Fundamental Fairness" in Public-Sector Employment Drug Screening Programs

Several principles regarding the requirements of procedural due process and "fundamental fairness" in public-sector employment drug screening programs can be gleaned from the foregoing decisions.1260

At the time an employer chooses to implement a drug screening program as a tool in combatting drug use and impairment in the work force, he must develop a policy statement and modify work rules to make explicit that substance abuse will not be permitted.1261 The policy and rules must delineate exactly what conduct is prohibited, so that the employees will have fair notice and warning that certain conduct invites disciplinary action.1262 For exam-

1259. See supra note 1257.
1260. See infra notes 1261-90. "Fundamental fairness" is borrowed from the court's opinion in Capua. See supra text accompanying note 1222. Most of the cases in this section discussed due process in terms of the termination decision, and did not address the due process issue in terms of the implementation of a drug screening program. Inasmuch as a program could not be "fundamentally fair" without being "reasonable," the author has included some principles which were borrowed from the courts' analysis of the "reasonableness" issue under the fourth amendment to augment the discussion of "fundamental fairness".

1261. See supra note 755, 761 (Capua) (noting the surprise nature of the drug testing procedure and the absence of any directive or company policy establishing the basis for the drug testing program) and accompanying text. See also supra text accompanying note 1214 (Capua). See also text accompanying notes 1002-04, 1027 (Shoemaker) (noting that the jockeys had ample notice of the regulations pertaining to drug use).

The requirement that the company's policies and rules prohibiting drug abuse be published and communicated to the employees is implicit in the other cases. As part of their analysis of the "reasonableness" issue, each of the courts looked to the company's statement of policy on drugs to determine whether it sufficiently warned the employees that drug use was not permitted either on-duty or off-duty, or both.

For an arbitrator's view on the absolute necessity of proper notice, that such conduct is prohibited, be given to employees, compare infra notes 1618-52 (Gem City); 1716-54 (UNOCAL) and accompanying text.

1262. See supra note 761, 1214 (Capua), 810 (Lovvorn), 1005 (Shoemaker) (employer sponsored question and answer session) and accompanying text.

For an arbitrator's view on this requirement under a "just cause" analysis, compare infra
ple, if the employer finds need to limit his employees off-duty, off-premises use of controlled substances because the employees are on-call, this must be expressly set forth. The policy statement must indicate whether compliance with the policy is a mandatory condition of continued employment. Clearly defined standards indicating under what circumstances drug screening of employers will be required and outlining penalties for non-compliance must be developed. The drug testing program must make provisions for the protection of confidentiality of the individual employee test 

notes 1499-1540 (Wierton) (off-duty conduct); 1618-52 (Gem City); 1716-54 (UNOCAL) (dismissal "unjust" where mere presence of drugs in system not forbidden) and accompanying text.

1263. See supra note 817 (Lovvorn) for an example of language in a work rule prohibiting both on-duty and off-duty use of drugs. Compare Banks, 628 F.Supp. at 1506 n.3 (off-duty clause).

See also infra notes 1499-1530 (Wierton) (especially see note 1502); 1716-54 (UNOCAL) (especially see note 1733, 42) and accompanying text for examples of work rules which were determined not to be sufficiently clear and unambiguous in proscribing off-duty use of drugs.

1264. Id.

See infra notes 1541-84 (American Standard) for an arbitrator's view on this issue.

Several commentators offer what has been characterized as "common sense" advice in this area. Robert T. Angarola, strongly suggests the following pointers on the notice issue: (1) All employees and job applicants should be informed of the company's policy regarding drug use; (2) The program should be presented in a medical and safety context. Drug screening will help improve the health of employees and help ensure a safer workplace; (3) The drug detection program should be clearly explained to all employees. It should be distributed in writing to all employees; (4) The drug policy, and the possibility of testing, should be included in all employment contracts. See Angarola, PHARMCHEM NEWSLETTER, Drug Detection Programs in Industry, supra note 214, at 4. See also Curtis, NFDA Paper, supra note 122, at 16, where the author makes the following recommendation to employer's considering implementation of a drug testing program:

1. Revise the work rules to make explicit:

(a) What behavior is expected (and what is not acceptable) in the workplace or during work hours; . . . .

Id.

1265. See supra notes 589 (McDonell); 761, 779-81, 1214-15 (Capua); 809, 839 (Lovvorn) and accompanying text.

See also Angarola, PHARMCHEM NEWSLETTER, Drug Detection Programs in Industry, supra note 214, at 4, where Angarola adds point 5 to his list of advice: "(5) Give your employees advance notice that drug testing will be a routine part of their employment." Id.

See also Curtis, NFDA Paper, supra note 122, at 16, where the author adds the following to his list of recommendations:

* * *

2(b). measures to be employed where overt infractions or suspicious conduct are thought due to substance abuse;

(c) consequences of a positive test, or of an employee's refusal to demonstrate his/her freedom from such substances.

Id.
results and related information.\textsuperscript{1266} If the drug screening program targets only certain categories or groups of employees, those targeted must be adequately identified so as to put members of the category on notice that they are subject to the policy.\textsuperscript{1267} The touchstones are notice and fundamental fairness.\textsuperscript{1268} All this information must be published and disseminated by appropriate means so as to ensure that the affected employees have knowledge of the policy and applicable work rules.\textsuperscript{1269}

Once the drug testing program is implemented, due process requires that adequate chain-of-custody procedures are in place.\textsuperscript{1270} Also, adverse employment decisions based on a single unconfirmed urinalysis will be found to violate due process.\textsuperscript{1271} The urine specimen for a given employee must be preserved if the employer plans to terminate the employee and use the positive test results in any subsequent dispute resolution proceeding.\textsuperscript{1272} The purpose of the storage requirement is to provide the employee with the opportunity to subject his specimen to an independent chemical analysis.\textsuperscript{1273} Failure to preserve the sample violates due process and will

\footnotesize{1266. See \textit{supra} notes 761, 1216 (Capua), 839 (Lovvorn), and accompanying text. See \textit{infra} notes 1360-63 (Shoemaker) (discussing the confidentiality issue under a privacy analysis) and accompanying text.}

\footnotesize{1267. This would necessarily follow from the more general requirement that the employees be afforded adequate notice that they are subject to the policy and the testing procedures. See \textit{supra} notes 1261-62 and accompanying text. Compare \textit{infra} notes 1755-1808 (Bay Rapid Transit) where the arbitrator held that the employer's drug screening policy, premised on safety concerns and direct contact with the public, could not properly be extended to cover those employees of the collective bargaining unit whose jobs did not contain either of these features.}

\footnotesize{1268. See \textit{supra} notes 1148 (Allen) (essential elements of due process are notice and fair opportunity to be heard); 1160-64 (Jones) (due process requires "some adversary process" before discharge); 1173 (Bostic) (termination must be preceded by notice and opportunity for hearing appropriate to the nature of the case); and 1190 (Shoemaker) (the fundamental requirement of due process is an opportunity to be heard at a meaningful time and a meaningful manner).}

\footnotesize{1269. See \textit{supra} notes 1261-64 and accompanying text. See also Dogoloff, \textit{Drug Abuse in the Workplace}, a pamphlet prepared for the American Council for Drug Education, at 3 (1986) ("Again, the importance of conveying the new [drug testing] policy cannot be overemphasized").}

\footnotesize{1270. See \textit{supra} notes 1165 (Jones); 1220 (Capua) and accompanying text. See also note 932 (NTEU).}

\footnotesize{1271. See \textit{supra} notes 170-80 (Jones); 1224-25 (Capua) and accompanying text. See also note 932 (NTEU).}

\footnotesize{1272. See \textit{supra} notes 140-49 (Banks) and accompanying text. See also note 932 (NTEU) (by implication).}

\footnotesize{1273. See \textit{supra} notes 140-49 (Banks); 1221-22 (Capua) and accompanying text. See also note 932 (NTEU) (by implication).}
likely result in the exclusion of the test result from evidence.\textsuperscript{1274} Similarly, each employee must be afforded the opportunity to review and evaluate their own personal test results.\textsuperscript{1275}

Generally speaking, the courts have held that in cases of public employment termination for drug use/abuse in violation of published work rules and company policy, due process requires that the employee be given oral or written notice of the charges forming the basis of his discharge, an explanation of the employer's evidence to substantiate those charges, and an opportunity to present his/her side of the story and to refute the charges.\textsuperscript{1276} An explanation of the employer's evidence includes a listing of witnesses to be called by the employer and a brief description of the nature of the testimony to be offered by each witness,\textsuperscript{1277} sufficiency of the descriptions will most likely be measured by a "fair notice" standard.\textsuperscript{1278} The opportunity to contest the chain of custody procedures,\textsuperscript{1279} cross-examine the adverse witnesses,\textsuperscript{1280} challenge the test confirmation procedures and results,\textsuperscript{1281} and present his/her own witnesses and testify on his/her own behalf must be afforded but need not be exercised.\textsuperscript{1282}

The courts have not yet squarely addressed the most troubling issue presented by employment drug screening: whether the test's

\textsuperscript{1274} See supra notes 140-49 (Banks) and accompanying text.

\textsuperscript{1275} See supra notes 1221-22 (Capua) and accompanying text. The Capua court, however, does not explain how this requirement differs from its requirement that re-testing must be afforded the employee and that chain of custody must be demonstrated. See supra notes 1270-71 and 1273. Perhaps, it is simply a requirement that the employer show that, in fact, a positive result for drugs was returned on the employee's specimen and that the charges, as well as the test result, are not being fabricated.

\textsuperscript{1276} See supra notes 1142-49 (Allen); 1174 (Bostic); 1226 (Capua); 1233 (Lovvorn) and accompanying text.

If the employer is in a critical position where safety is at stake, or the public is involved, due process permits the employee to be temporarily removed from that position. See supra text accompanying note 1166 (Jones). See also notes 1167 (Jones) and 1226 (Capua) suggesting a "promptness" requirement.

\textsuperscript{1277} See supra notes 1143-45 (Allen) and accompanying text.

\textsuperscript{1278} See supra text accompanying note 1145 (Allen).

\textsuperscript{1279} See supra notes 1165 (Jones); 1220 (Capua) and accompanying text.

\textsuperscript{1280} See supra note 1146 (Allen) (also noting that the employee was represented by counsel).

Common sense would indicate that the right to cross examine adverse witnesses and present witnesses on his/her own behalf is included in the other courts' holdings that due process includes the employee's right to tell his/her own side of the story. See supra note 1276 and accompanying text.

\textsuperscript{1281} See supra notes 1165 (Jones); 1225 (Capua) and accompanying text.

\textsuperscript{1282} See supra note 1147 (Allen) and accompanying text.
inability to demonstrate present impairment coupled with its ability to reveal traces of a controlled substance in an individual’s system long after the substance was used offends notions of “fundamental fairness” so as to violate due process. The closest that the courts have come to addressing the issue was in Jones, where the court held that termination based solely on an unconfirmed urinalysis test result violated due process. In a footnote, the Jones court acknowledged the more difficult issue of whether termination based solely on a confirmed result, which does not necessarily demonstrate impairment, would violate due process, but reserved judgment.

It is suggested that resolutions for this issue depends first and foremost upon whether the specific employer can be deemed to have the right to regulate the employee’s off-duty conduct. The courts have indicated that certain classes of employers have such a right, including employers of fire fighters and police officers - public safety and welfare employers. Second, has this employer published and circulated among the affected employees a policy statement and work rules which explicitly prohibit on-duty and off-duty use of controlled substances, offering an explanation for such a rule and outlining the discipline scheme imposed for violation of the policy and rules? If so, then it is suggested that termination based on a confirmed urinalysis test result, positive for a proscribed controlled substance, would be a legitimate and constitutionally permissible enforcement of the policy and rules, provided other due process requirements have been satisfied. If the employer is deemed to have no legitimate interest in regulating the off-duty conduct of his employees, then it is suggested that the employer must supplement the confirmed positive test result with some documented evidence of poor work performance, or other job-related dysfunction to satisfy due process in making the termi-

1283. See supra notes 33, 56-86 and accompanying text.
1284. Id.
1285. See supra notes 170-80 and accompanying text.
1286. See supra note 180.
1287. See supra text accompanying notes 81-86 for a discussion of the opposing views on this subject.
1288. See supra notes 87-90 and accompanying text. For a discussion of how arbitrators view this issue, see infra text accompanying notes 1653-1715 (Roadway Express), 1716-54 (UNOCAL).
1289. See supra note 1269; see also infra text accompanying notes 1716-54 (UNOCAL) for an arbitrator’s view of this issue in a unionized employment context. Should the courts consider borrowing some of the arbitrators’ insights?
nation decision.

While the foregoing analysis seems quite logical, as well as "fundamentally fair", it presumes that the employer's right to regulate off-duty conduct has been well defined. However, it is not. It is apparent that employers whose operations touch closely upon public safety and welfare have such a right, but is this where the line is drawn? Until the courts sort out the legitimate employer interests that justify a right to regulate off-duty conduct, the due process issue concerning the inability of drug screens to demonstrate present impairment will remain a contentious subject. Perhaps, however, the scientific and medical technology will advance quickly enough to resolve the problem for the courts.

C. Assessing the Constitutionality of Public-Sector Employment Drug Screening under the Constitutional Right of Privacy

A specific guarantee of the right to personal privacy does not exist in the United States Constitution. In a line of decisions, the Supreme Court has, however, recognized that a right of personal privacy or a guarantee of certain areas or "zones of privacy" does exist under the Constitution.

The seminal case upon which employees must necessarily lean is Griswold v. Connecticut, in which the Supreme Court for the first time expressly premised its decision on the right of privacy. The Griswold court found "zones of privacy", created by the first, fourth, fifth, and ninth amendment and their penumbras,

1290. See supra notes 87-90 and accompanying text.
1292. Id. The first academic discussion of a right to privacy dates at least to the common law arguments of Louis Brandheis and Samuel Warren in 1890. Brandheis and Warren, The Right to Privacy, 4 HARV. L. REV. 193 (1890).


1294. Id. at 484.
and gave effect to them in striking down a state criminal statute prohibiting the use of contraceptives.\textsuperscript{1295}

In subsequent rulings, the Supreme Court has not given the \textit{Griswold} holding an expansive reading; rather, the court has insisted that the government must interfere with some personal right that can be deemed "fundamental" or "implicit in the concept of ordered liberty" before there is an invasion of privacy.\textsuperscript{1296}

Although the full measure of the constitutional protection of the right of privacy has not yet been delineated by the court, the decisions demonstrate that it extends to two types of privacy interests: "One is the individual interest is avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of important decisions [autonomy]."\textsuperscript{1297} The latter decisions have encompassed such activities as marriage,\textsuperscript{1298} procreation,\textsuperscript{1299} contraception,\textsuperscript{1300} family relationships,\textsuperscript{1301} child rearing and education.\textsuperscript{1302} As to the first category, the third circuit in \textit{U.S. v. Westinghouse Electric Corporation}\textsuperscript{1303} determined that an employee's medical records, which may contain intimate facts of a personal nature, were well within the ambit of materials entitled to privacy protection.\textsuperscript{1304}

The court's decisions recognizing a right to privacy also acknowledge that some government intrusion into the right is permissible.\textsuperscript{1305} The right of privacy is not absolute but must be balanced against important state interests in regulation.\textsuperscript{1306} The regulation

\textsuperscript{1295} The Court found this right, while not expressly provided in the Constitution, to be the result of the interrelationship of express Constitutional provisions and to be necessary for the implementation of these express protections. After reviewing the specific rights enumerated in the Constitution, the Court in \textit{Griswold} concluded that these "[v]arious guarantees create zones of privacy." \textit{Id.}

The \textit{Griswold} Court applied the privacy rights to the marital bedroom when it held that (1) the petitioners (doctors) had standing to assert their patients interests, and (2) the patients had the right to seek counsel from the petitioners on the best methods of contraception, and (3) struck down the Connecticut statute which declared the use of contraceptives and the encouragement of their use to be illegal. \textit{Id.}

\textsuperscript{1296} \textit{Roe v. Wade}, 410 U.S. at 512 (quoting with approval \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937)).


\textsuperscript{1300} \textit{Griswold}, 381 U.S. 479.


\textsuperscript{1302} \textit{Meyer v. Nebraska}, 262 U.S. 390, 399 (1923).

\textsuperscript{1303} 638 F.2d 570 (3rd Cir. 1980).

\textsuperscript{1304} \textit{Id.} at 577.


\textsuperscript{1306} \textit{Id.} at 603; 410 U.S. at 154.
must be narrowly tailored to address only the legitimate state interests at stake. Such legitimate state interests recognized by the courts in the past have included the state's interest in safeguarding the public safety and welfare.

In the employment context, the interest in occupational safety and health to the employees in the particular plant, employees in other plants, future employees and the public at large has been recognized as substantial and has been ranked with other public interests which have been found to justify intrusion into individual privacy. Another important factor which figures into the balancing process includes whether the method chosen by the government to advance its legitimate interest is the least intrusive available.

To date, only two cases dealing with the drug screening issue have expressly addressed the constitutional right of privacy challenge to the public-sector employer's drug testing program. The decisions rendered in Shoemaker v. Handel analyze the disclosure of medical information aspect of the right of privacy, while the trial courts' decision in National Treasury Employees' Union v. Von Raab offers insight, albeit limited, into the personal autonomy aspect of the right of privacy.

a. Shoemaker v. Handel

In the first stage of the Shoemaker litigation, the jockeys sought
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a preliminary injunction against the New Jersey Racing Commission enjoining the enforcement of the Commission's regulation which implemented a purely random drug testing program for New Jersey licensed jockeys. As one basis for the injunction, the jockeys argued that the drug screening regulations violated their constitutional right of privacy.

The State of New Jersey forbade the plaintiff jockeys from using any controlled dangerous substances or prescription legend drugs unless obtained directly or pursuant to a valid prescription from a licensed physician. The jockeys were required to give the State Steward notice of such use by filling out a form which asked for the names of the prescribed medications, the name of the physician who prescribed them, what each prescription treated, and the date and time of the last dosage of each medication taken. The form also required disclosure of the names of all over-the-counter medications used, the conditions they treated, and the date and time of the last dosage.

The plaintiffs' argument was three-fold, contending that the drug screening regulations (1) forced the jockeys to divulge private, personal medical information without sufficient justification; (2) forced the jockeys to divulge information which could incriminate them under the laws of New Jersey; and (3) failed to provide adequate safeguards to prevent the disclosure of such information to the public and members of the jockeys' profession.

Addressing the plaintiffs' first argument, the district court observed that, while the Constitution does not explicitly state that there is a right to privacy, a constitutional doctrine has been established and expanded "variously described as recognizing a right to privacy," which included an individual's privacy interest in avoiding disclosure to government agents of personal medical


1314. Id. at 1105.


1317. Shoemaker, 608 F.Supp. at 1159 (detailing the procedure and content of the Form); see id. at 1163 (Appendix B provides a copy of the Form).

1318. Id.

This privacy interest is not absolute, however, and must be balanced against the legitimate interests of the state in securing such information. In other words, the "state must [have] use[d] the narrowest means consistent with the maintenance of its legitimate interests." Additionally, the extent of the plaintiff's privacy interest must be judged in light of the statutory safeguards against disclosure of the personal medical information.

Three decisions figured prominently in the district court's analysis of the jockeys' privacy claim. First was the Supreme Court's decision in *Whalen v. Roe* which held that disclosure of an individual's name, age, address, and use of a certain drug did not (1) unduly burden his privacy interest nor (2) differ significantly from the disclosures of private medical information requested by insurance companies and hospital personnel. Second was the decision of *In re Martin* where the New Jersey Superior Court upheld the use of a casino license form pursuant to the Casino Control Act and held that none of the challenged questions were "so personal" as to permit the assertion of a right to selective disclosure, but rather concerned "predominantly information of public record." Third was the District Court of New Jersey decision in *McKenna v. Fargo* which held that the Jersey City Fire Department's mandatory pre-employment psychological examination was constitutionally permissible despite the fact that the required medical disclosure was of a degree and character "far greater and more intrusive" than in *Whalen*.

The district court in *Shoemaker* determined that the state's disclosure form used in conjunction with the drug testing procedure, by asking jockeys to provide the nature of the illness requiring treatment by prescription drug, was more intrusive than the disclo-

1320. *Id.* (citing *Whalen*, 429 U.S. at 608-09).
1321. *Id.* (citing *McKenna*, 451 F.Supp. at 1381).
1322. *Id.*
1323. *Id.*
1324. *Id.* (citing *Whalen*, 429 U.S. at 608-09).
1326. *Id.* at 608.
1328. *Id.* at 321-22, 447 A.2d 1290.
1330. *Id.* at 1381.
sures discussed in the Whalen and Martin cases.\textsuperscript{1331} The Shoemaker court explained that if a jockey stated he was using anti-psychotic medications, he would be required to divulge, if applicable, that he suffered from certain mental illnesses or diseases.\textsuperscript{1332}

Thus, while the district court recognized the Commission’s legitimate safety interest in preventing the use of dangerous, controlled substances by jockeys\textsuperscript{1333} and found the medical information disclosure forms to facilitate that stated interest,\textsuperscript{1334} the district determined that the disclosure forms were not sufficiently narrowly tailored to avoid unnecessarily intruding into private medical matters, which were not germane to the furtherance of the state’s articulated interests.\textsuperscript{1335} The district court explained:

These medical forms require jockeys to disclose within the sections marked “For Treatment Of” the illness or conditions for which a particular drug has been prescribed or used. The regulation is designed to prevent the illicit use of drugs and to aid in the proper detection of that use. The court questions whether such disclosure will further the state’s professed goals.\textsuperscript{1336}

The Commission argued that the “For Treatment Of” section was optional and that the jockeys were permitted to leave the section blank when completing the form.\textsuperscript{1337} Although the court accepted the Commission’s argument,\textsuperscript{1338} it directed the Commission to insert the word “optional” under the “For Treatment Of” section so as to clearly indicate that the jockeys were permitted to leave the section empty if they considered it objectionable.\textsuperscript{1339}

Turning to the plaintiffs’ argument that the regulations did not clearly safeguard against the disclosure of information obtained by the testing program or the medical forms, the court observed that the regulations provided that the results of the urine tests would be treated as confidential, “except for their use with respect to a ruling issued pursuant to this rule.”\textsuperscript{1340} The court also noted that access to the results of “positive” urine tests was “limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee, and the particular jockey, except

\begin{itemize}
\item \textsuperscript{1331} 608 F.Supp. at 1160.
\item \textsuperscript{1332} Id.
\item \textsuperscript{1333} Id.
\item \textsuperscript{1334} Id.
\item \textsuperscript{1335} Id.
\item \textsuperscript{1336} Id.
\item \textsuperscript{1337} Id.
\item \textsuperscript{1338} Id.
\item \textsuperscript{1339} Id.
\item \textsuperscript{1340} Id.
\end{itemize}
in the instance of a contested matter.”

The Commission urged the court that it wished to do everything possible to preserve the confidentiality of the medical information obtained pursuant to the regulation, and to this end, the Commission resolved not to share any data with any state agency charged with enforcement of New Jersey's criminal law.

Based on these representations, the ordered modification of the medical disclosure form, and the language of the regulations, the court was not persuaded that the jockeys were likely to prevail on the merits of their privacy claim and, accordingly, denied the request for preliminary injunction and vacated the Temporary Restraining Order previously entered.

Before the district court on the merits, the jockeys asserted a modified, three fold argument. First, they asserted that the Commission did not have sufficient justification to require jockeys to disclose their use of prescription and other non-prescription medications as required by the certification form. Second, they contended that, even if the Commission could require disclosure of this information, the regulation did not adequately safeguard against public disclosure. Likewise, the plaintiffs asserted that the regulations failed to provide safe storage, timely destruction, and confidentiality of all information obtained pursuant to the drug testing rule. Third, the jockeys argued that the results of the breathalyzer tests were not protected by any confidentiality or dis-

1341. Id.
1342. Id. The defendants assured the court that the information was gathered with “rehabilitative” not “penal” purposes in mind. Id. at 1161.
1343. See supra note 1342 and accompanying text.
1344. See supra text accompanying notes 1338-39.
1345. Id. at 1159. The statutes demonstrated the State’s legitimate interest in eliminating drug use/abuse from the horse racing industry and the legitimate role the Forms played in achieving the State’s goal.
1346. 608 F.Supp. at 1161. The Temporary Restraining Order was entered on April 24, 1985. Id.
1348. Id.
closure guidelines and that testing in a non-private setting was impermissible.\textsuperscript{1349}

The district court began its analysis on the merits with the recognition that the Supreme Court recognized a right of privacy founded on the fourteenth amendment's concept of personal liberty.\textsuperscript{1350} Noting that the extent and full breath of the right to privacy had never been fully delineated, the district court instructed that the "privacy" cases involved two distinct interests.\textsuperscript{1351} First, the individual's interest in avoiding disclosure of personal matter, and second, the interest in independence in making certain kinds of important decisions.\textsuperscript{1352} Categorically, these interests were characterized as "confidentiality" and "autonomy."\textsuperscript{1353} In the instant case, instructed the district court, the Commission's drug testing regulations implicated the jockeys' privacy interest in confidentiality.\textsuperscript{1354}

The court emphasized the State of New Jersey's substantial governmental interests in the strict regulation of horse racing so as to preserve and promote its safety and integrity.\textsuperscript{1355} Additionally, the court pointed to the state's legitimate interest in preventing the use of alcohol and dangerous, controlled substances by jockeys in

\begin{itemize}
  \item \textsuperscript{1349} \textit{Id.}
  \item \textsuperscript{1350} \textit{Id.} (citing Whalen, 429 U.S. 589, 598-600).
  \item \textsuperscript{1351} \textit{Id.}
  \item \textsuperscript{1352} \textit{Id.}
  \item \textsuperscript{1353} \textit{Id.} (citing Plante v. Gunzalez, 575 F.2d 1119, 1128 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1980)).
  \item The court instructed that the "autonomy" interest encompassed such matters as marriage, procreation, contraception, family relationships, child rearing and education. \textit{Id.} at 1106.
  \item \textsuperscript{1354} \textit{Id.} Noting that the right to privacy had been held to extend to the "individual interest in avoiding disclosure of personal matters." \textit{Id.} (quoting Whalen, 429 U.S. at 599-600).
  \item The court declared, however, that the individual's right of privacy is not absolute, but rather the state has the power to compel disclosure of otherwise private information when its interest in the information outweighs the individual's interest in non-disclosure. \textit{Id.}
  \item In evaluating the competing interests of the State and the jockeys, the Shoemaker court borrowed the Third Circuit's analysis in United States v. Westinghouse Electric Corp., 638 F.2d 570 (3rd Cir. 1980), wherein the Third Circuit delineated a list of factors to be considered in the balancing process; which included the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access. \textit{Id.} at 578.
  \item \textsuperscript{1355} 619 F.Supp. at 1106. The court added that the State legislature had substantial power to regulate non-essential, dangerous, and sensitive industries to protect the public safety and welfare. \textit{Id.}
\end{itemize}
such a manner as would affect their performance in and the outcome of races.\textsuperscript{1356}

Reviewing the certification form's requirement that jockeys disclose the names of prescribed medications, the names of persons who prescribed them, the date and time of the last dosage of each medication taken, and the requirement that jockeys disclose the names of over-the-counter medications used along with the date and time of the last dosage taken,\textsuperscript{1357} the appellate court concluded that the use of the certification forms, as modified, did not violate the jockeys' right of privacy.\textsuperscript{1358} The court explained:

The disclosure of the medical information as required by the form narrowly furthers the state's legitimate interests. Only those jockeys submitting urine samples must complete the forms. They are used as a check against the results of any test which might otherwise be considered as "positive" for drug use. Further, the state treats these forms as confidential, in the same manner as the results of the urine tests.\textsuperscript{1359}

Addressing the jockeys' second argument, the district court in \textit{Shoemaker} found that the urine test regulations, as administered by the Commission, provided sufficient safeguards against disclosure for safekeeping and for timely destruction of the medical information.\textsuperscript{1360} The court observed that the Commission had proposed amendments to the regulations to cover not only the urine test results but also all the information gathered pursuant to the drug testing program.\textsuperscript{1361} Announcing its conclusion, the court pointed to several crucial provisions within the regulations providing for storage of all the information in a locked safe within the Commission's office, destruction of all such information on an annual basis, and the limited disclosure of the information to specified, select individuals who had a specific and legitimate interest in the test results.\textsuperscript{1362}

\textsuperscript{1356} \textit{Id.}
\textsuperscript{1357} \textit{Id.} \textit{See also id. at 1109} (Appendix B provides a copy of the modified medical information form, with the "optional" language as per the court's order in \textit{Shoemaker}, 608 F.Supp. 1151).
\textsuperscript{1358} \textit{Id. at} 1106.
\textsuperscript{1359} \textit{Id.}
\textsuperscript{1360} \textit{Id. at} 1107.
\textsuperscript{1361} \textit{Id. at} 1106. The proposed amendments were in response to the court's directive in its Opinion of May 23, 1985. \textit{See supra} note 1346 for the text of the directive.
\textsuperscript{1362} \textit{Id.} The court summarized the proposed amendments as follows:

All such information will be stored in a safe at the offices of the Commission. Information gathered will be routinely destroyed after one year, with an exception for data from jockeys who have tested positive. Once a jockey has tested positive for drug use, the data can be retained to record the number of violations, the result of any treat-
formally adopted by the Commission, the court was persuaded by
the Commission's uncontested assurances that it had been treating
all information gathered as if the rule governing confidentiality
procedures was in effect.\textsuperscript{1363}

Dismissing as meritless the jockeys' assertion that the regula-
tions required them to divulge potentially self-incriminating mate-
rial,\textsuperscript{1364} the district court in \textit{Shoemaker} stated:

The regulations provide for only civil administrative penalties. The State
Division of Criminal Justice will not seek to obtain information gathered
under the rule for criminal investigations or prosecutions. Use of controlled
dangerous substances with a valid prescription from a licensed physician is
not illegal. Mere use of such drugs without a prescription is not a
crime—only a disorderly persons offense.\textsuperscript{1365}

Thus, the \textit{Shoemaker} court concluded that the urine testing rule,
as administered by the Commission, did not violate the plaintiffs' privacy
rights.\textsuperscript{1366}

As part of their third argument,\textsuperscript{1367} the jockeys claimed that the
breathalyzer tests violated their privacy because they were not ad-
ministered to the jockeys in private.\textsuperscript{1368} Conceding that the
breathalyzer tests were not administered privately, the State ar-
gued that it preferred to give the tests privately and was working
toward that goal but that logistical problems currently prevented
private administration.\textsuperscript{1369} The court found the State's argument
unmitigating, declaring that:

Although the court recognizes that jockeys have diminished expectations of

\textsuperscript{1363} An illustrative copy of the proposed amendments is included as Appendix C to the
court's opinion. \textit{See id.} at 1110-11.
\textsuperscript{1364} \textit{Id.} at 1107.
\textsuperscript{1365} \textit{Id.}
\textsuperscript{1366} \textit{Id.}
\textsuperscript{1367} The plaintiff jockeys' third argument was directed at the breathalyzer tests used
by the Commission to detect alcohol intoxication in jockeys and included the following
claims of violation of their privacy rights: (1) any information obtained was not subject to
any confidentiality regime, and (2) the tests were not administered to the jockeys privately.
While the first argument added nothing to the court's thorough analysis of the confidentiality
in the urine screens, the court's resolution of the second argument has broader implications,
beyond the breathalyzer context. \textit{See infra} note 1370.
\textsuperscript{1368} \textit{Id.} at 1107; \textit{see also supra} note 1367.
\textsuperscript{1369} \textit{Id.}
privacy while in the Jockey's Room at the race track, it concludes that, as a matter of law, the state must administer these tests privately, away from the view of persons who are not required for the administration of the tests.\textsuperscript{1370}

With the exception of modifications addressed to the breathalyzer test,\textsuperscript{1371} the court in \textit{Shoemaker} dismissed the jockeys' claims asserting a deprivation of their constitutional rights of privacy and, accordingly, denied their request for an injunction.\textsuperscript{1372}

The jockeys appealed the district court's denial of declaratory and injunctive relief, alleging the trial court had abused its discretion.\textsuperscript{1373} Finding no such abuse,\textsuperscript{1374} the Fifth Circuit affirmed the district court's judgment in its entirety.\textsuperscript{1375}

\textbf{b. National Treasury Employees Union v. Von Raab*}

District Judge Collins declared in \textit{National Treasury Employees Union v. Von Raab}\textsuperscript{1376} that the Customs Commission's mandatory urinalysis program violated the Customs workers' constitutionally guaranteed penumbral rights of privacy.\textsuperscript{1377} Citing the Supreme Court's decisions in \textit{Griswold v. Connecticut}\textsuperscript{1378} and \textit{Roe v. Wade}\textsuperscript{1379} as authority for the existence of a constitutional right of

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\textsuperscript{1370} \textit{Id.} Given the stance that the district court in \textit{Shoemaker} takes on the privacy issue with respect to the breathalyzer, which assuredly is a less humiliating procedure than the urinalysis test, might the court entertain placing limits on the urinalysis procedure also? The jockeys did not challenge the urinalysis test on this basis of privacy. As the court indicated, the jockeys' privacy claims went to the confidentiality of the test information. See \textit{supra} note 1354 and accompanying text. There is no indication in any of the three opinions whether the urine samples were provided under the direct supervision of an official or whether some other procedure was utilized. Might the court be willing to circumscribe the use of direct observation to instances where tampering or altering of the urine sample is suspected? For more discussion on this issue, see \textit{infra} note 1381 and accompanying text.

\textsuperscript{1371} 619 F.Supp. at 1107.

\textsuperscript{1372} \textit{Id.}

\textsuperscript{1373} 795 F.2d 1136, 1144.

\textsuperscript{1374} \textit{Id.} ("We find no abuse of discretion. If the Commission ceases to comply with the proposed confidentiality rules, the jockeys may return to court with a new lawsuit. Their privacy contentions, in the circumstances of this case, are not ripe for adjudication").

\textsuperscript{1375} \textit{Id.}

\textsuperscript{*} The Fifth Circuit recently vacated the trial court's permanent injunction in \textit{NTEU v. Von Raab}, No. 86-3833 (3rd Cir. April 22, 1987). The Fifth Circuit did not address the trial court's privacy analysis on appeal. See \textit{supra} note 932 for a discussion of this recent ruling in \textit{NTEU}.

\textsuperscript{1376} 649 F.Supp. 380 (E.D. La. 1986), denying stay pending appeal, 809 F.2d 1057 (5th Cir. 1987). For a discussion of the operative facts in \textit{NTEU}, see \textit{supra} notes 888-902 and accompanying text.

\textsuperscript{1377} \textit{Id.} at 389.

\textsuperscript{1378} 381 U.S. 479 (1965) (contraceptives).

\textsuperscript{1379} 410 U.S. 113 (1973) (abortion).
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privacy, the trial court found that the Customs Commission’s drug testing program “detract[ed] from the dignity of each Customs worker covered under the plan and invade[d] the right of privacy such workers ha[d] under the United States Constitution.” Judge Collins stated: “[e]xcreting bodily wastes is a very personal bodily function normally done in private; it is accompanied by a legitimate expectation of privacy in both the process and the product. The Customs Directive unconstitutionally interferes with the privacy rights of the Customs workers.”

The trial court does not indicate whether it balanced the employees’ privacy interest against the government’s countervailing interest in conducting the drug screening program. In fact, the trial court does not even identify a countervailing government interest which might offset the Customs workers’ privacy interests. Thus, it appears from the two paragraph discussion on the

1380. 649 F.Supp. at 389.
1381. Id.

Justice Collins does not describe the procedure used in this portion of his opinion; however, earlier he noted that when the employee provides the specimen a tester-observer stands outside the stall and can see the employee from the shoulders up. See supra text accompanying note 898. More direct observation has been used by other programs. See, e.g., notes 835-36 (Lovvorn).

Whether observation of the urination process is necessary, and whether the observation alone is sufficient to strike down a testing program has been the subject of much debate. One court suggested that the use of observation was not dispositive of the issue whether the drug screen was “reasonable.” See supra text accompanying notes 971-74.

At least one source suggests that observation is an overly intrusive, unnecessary procedure to ensure the integrity of the urine specimen, stating that “[i]n actual practice, the overwhelming majority of corporate drug testing programs do not require observation.” EMPLOYEE TESTING & the Law, Dec., 1986, Urine Tests: Observation v. Privacy, at 5. The following four alternatives to observation were offered: (1) The policy should clearly state that failing to give a sample in reasonable time, switching a sample, or adulterating a sample is the same as giving a positive; (2) Employees should be told that the laboratory will check for adulteration. Although a number of tests can be performed, it is not necessary to be specific about what type of adulteration test is to be performed; (3) Those being tested should not be allowed to take luggage into the facility. External garments should be removed. If the test is part of a physical, it should be done last; (4) The easiest way to uncover a catheter bag is to simply feel the temperature of the urine bottle when the sample is turned in. Many companies turn off the hot water in the facility. Bona fide urine samples are 98.6 degrees, while a switched sample will be noticeably cool.

1382. See infra notes 1383-85.
1383. The trial court’s sparse two paragraph analysis does not mention once the existence of a legitimate countervailing interest of the government which it weighed against the invasion of privacy rights entailed in the urinalysis procedure. Earlier in its opinion, the trial court identified the government’s interest as one in a drug free work place and work force when performing its analysis of the fourth amendment unreasonable search issue. 649 F.Supp. at 389. This oversimplification of the Customs Services interest, see supra notes 925-26 and accompanying text, may have carried over into the trial court’s privacy
issue that the trial court may have accorded the workers' privacy interest in personal autonomy absolute status. If this is the case, the trial court's legal analysis was clearly erroneous and contrary to long standing precedent holding otherwise. The upshot

analysis. While this may explain the trial court's hasty conclusion that the Customs workers' privacy rights were violated, it certainly does not excuse it. 1384. See supra notes 1382-83 and accompanying text.

1385. The trial court's opinion in NTEU does not indicate whether the court balanced the competing interests of the employer and the employees. The bare written text of the opinion suggests that it did not, for it appears as if the trial court jumps from the recognition of a constitutionally protected privacy right in NTEU directly to the conclusion that the government had impermissibly violated the right. See supra notes 1378-81 and accompanying text.

Chief among the drug screening opponents' criticisms is that urinalysis constitutes an impermissible encroachment on the public sector employees' privacy rights. See supra note 24 and accompanying text. Meanwhile, drug screening proponents reply that the constitutionally cognizable right of privacy has been judicially limited to individual decisions such as marriage, family and child rearing, and that the courts will not be willing to extend this right of privacy to one's urine, a waste product. See Angarola, Legal Issues of a Drug Free Environment: Testing for Substance Abuse in the Workplace, at 4. See also, e.g., Turner v. Fraternal Order of Police, 500 A.2d 1005, 1011 (Nebeker, J., concurring); NTEU, 508 F.2d 1057, 1061 (Higginbotham, J., specially concurring). See also supra notes 1399-1400.

One commentator, Robert T. Angarola, expounding on the privacy issue, points to the case of Louisiana Affiliate of the National Organization for the Reform of Marijuana Laws, 380 F.Supp. 404 (E.D. La. 1974), where the district court declared: "The right to possess and use marijuana in one's home is not and cannot be classified as a fundamental right protected by a constitutional zone of privacy." Id. at 409. Angarola reasons that, insofar as the courts are unwilling to recognize a constitutionally protected right to use illegal drugs in one's own home, "a government agency's drug testing program for its employees cannot violate their constitutional right to privacy." See DOGOLOFF, Urine Testing, supra note 104, at 11 (Angarola's article, "The Legal Issues of Urine Testing," begins at page 10).

Will the courts view the privacy issue in employee drug screening as one based solely upon whether the Constitution is available to protect the use of illicit drugs in one's home, as Angarola suggests? Or will the courts look to the nature of the urine test, as opposed to the end result achieved? If the courts adopt the latter approach, what factors will they consider in the balancing process? Will the courts merely transplant the fourth amendment analysis of drug screening issues or will additional elements be considered? Assuming the courts overcome this legal obstacle, the central policy question remains: What weights should be accorded the conflicting interests of employers and employees? Critical to the employer is his interest in protecting himself against substantial economic losses from drug abuse. See supra notes 19-22 and accompanying text. Irrespective of urinalysis' scientific accuracy, it works - it reduces losses. See supra note 22 and accompanying text. A countervailing consideration to the employer is the prospect that the use of drug screening, will erode employer-employee relations.

On the other hand, the employee is concerned with the protection of his civil rights, retention of his employment status, and insulation—however lacking it may be in legal justification—of his dignity as a private human being. The use of urinalysis has been abused both in the physical application of the test and in the fallacious overstatements as to its accuracy and function. See supra notes 38-80 and accompanying text. Employees object also to employment conditioned on a scientifically unreliable criterion. Apart from the probable lack of legal protection, the salient considerations remain that the employee believes his privacy to be invaded, and that he is forced to incriminate himself.
of the trial court’s holding on the privacy issue is that the scant analysis and conclusory holding render it useless as persuasive precedent.

Circuit Judge Higginbotham, concurring in the Fifth Circuit’s denial of a stay of the trial court’s injunction in NTEU,1386 sharply criticized the trial court’s analysis of the privacy issue. Judge Higginbotham discerned that the plaintiffs’ invasion of privacy claim was rooted in the manner in which the urine samples were taken.1387 Outer garments in which a false sample might be hidden were required to be removed and a person of the same sex remained outside the stall while the applicant urinated.1388 Reasoning that, apart from the partial disrobing, persons using public toilet facilities experienced a similar lack of privacy,1389 Judge Higginbotham concluded that the invasion asserted must have been a perceived indignity in the whole process; that is, a perceived affront to personal identity by the presence in the same room of another while engaging in a private bodily function.1390

Addressing the criticism that the testing program rested on a generalized lack of trust and not on a developed individualized suspicion,1391 Judge Higginbotham preferred to characterize the program as a careful inquiry into drug use before placing an applicant into a new post.1392 The Judge opined that, given the demands of the job, the government could not afford to rely on an applicant’s truthfulness concerning drug use.1393 Finding that the drug testing program was not different from any other background

An obvious response to the financial position of employers, in general, is that their drug-related losses are passed on to customers through increased prices. This argument hardly convinces a business man who, because of abnormally large drug-related losses, is forced either to operate at a competitive disadvantage or worse, to abandon his business entirely. See supra note 19 and accompanying text. Further, it seems arguable that such cost redistribution is no less “immoral” than the unpleasantness of a urinalysis test. Yet the argument exists, that urinalysis is overly intrusive and less intrusive methods of drug detection exist, and should be used. These were just a few issues involved in the privacy claim passed over lightly by the trial court in NTEU. See also note 932. The Third Circuit did not resolve any of these issues on appeal.

1386. 808 F.2d 1057, 1060 (Higginbotham, J., specially concurring).
1387. Id. at 1061.
1388. Id.
1389. Id.
1390. Id.
1391. Id.
1392. Id.
1393. Id. ("Necessarily there is a plain implication that an applicant is part of a group that, given the demands of the job, cannot be trusted to truthful about drug use").
check or security check, the judge reasoned that the information gained in tests of urine was not different from that disclosed in medical records for which consent to examine is a routine part of applications for many sensitive government posts.

Having eliminated the distinction between drug testing and all other methods of applicant investigation, the judge reasoned that, in light of the routine practice of testing and background checks required for a large portion of government jobs, it was doubtful that the job applicants had an objectively reasonable expectation of privacy. In this regard, Judge Higginbotham quipped, "[c]ertainly, to ride with the cops one ought to expect inquiry, and by the purest means, into whether he is a robber."

In Judge Higginbotham's opinion, the trial court's "reliance upon penumbral rights of privacy add[ed] nothing" to the analysis. The Judge indicated that, amidst the uncertainty concerning the content and dimension of such rights, it was certain that "such rights of privacy [had] been largely confined to matters of family such as 'child rearing and education,' 'family relationships,' 'marriage,' 'contraception' and 'abortion,' as well as the 'right to decide whether or not to beget or bear a child.'"

While acknowledging that the Supreme Court, in Winston v. Lee, spoke in terms of an "individual's dignitary interests in personal privacy and bodily integrity," Judge Higginbotham distinguished Winston, pointing out that in Winston, the Court dealt with an intrusion into the body to surgically remove a bullet and balanced the government's need against the extent of intrusion into the body in a coercive environment. The Judge admonished, "[s]peaking of 'dignity interests' out of context is not helpful." In fact, the Judge considered it imprudent, warning that:

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1394. Id.
1395. Id. ("The difficulty is that just such distrust, or equally accurate, is behind every background check and every security check; indeed the information gained in tests of urine is not different from that disclosed in medical records, for which consent to examine is a routine part of applications for many sensitive government posts").
1396. Id.
1397. Id.
1398. Id.
1399. Id.
1400. Id.
1402. Id. at 758.
1403. 808 F.2d at 1061.
1404. Id. at 1062.
Giving the expansive reading claimed for [privacy] would implicate testing of intelligence and aptitudes. Many fitness tests would in this broad sense, disclose private matters that are potentially more destructive of "personal dignity"—inquiries, if we succumb to deciding cases by rhetoric, more justifiably called Orwellian than the testing of urine. Surely, the Constitution does not forbid such routine testing for fitness.\(^{1405}\)

Although only a concurrence in a decision not addressing the merits of the case, Judge Higginbotham's opinion should not be dismissed lightly. If proceeding on the merits the Fifth Circuit adopts his analysis, the constitutional right of privacy as a check on public employment drug screening policies, will be relegated to a position of non-importance. Perceiving urination as the subject matter of the asserted privacy, it is quite evident that it would require some conceptual maneuvering to fit it into the "family matters" category.\(^{1406}\) At least one commentator suggests that this will be an exercise in which the courts will likely refuse to engage.\(^{1407}\)

Judge Higginbotham's reasoning in his concurrence, however, is not flawless. In reaching his conclusion that the existence of an objective reasonable expectation of privacy held by the Customs workers was dubious at best,\(^{1408}\) Judge Higginbotham relied on his earlier conclusion that urinalysis was not any different than a routine examination of medical records inasmuch as the same information is obtained in each.\(^{1409}\) The Judge is clearly mistaken. Since when has the review of medical records disclosed that the individual smoked a marijuana cigarette on Friday night at a party?\(^{1410}\)

In distinguishing the \textit{Winston} ruling which spoke of personal privacy and bodily integrity interests, the Judge characterized the challenged action as intrusion \textit{into} the body in a \textit{coercive} environment.\(^{1411}\) The courts have unanimously concluded, albeit under a fourth amendment analysis, that intrusion \textit{into} the physical body is not the dispositive factor in assessing intrusiveness when they compared blood testing to urinalysis and found the tests to be equally intrusive.\(^{1412}\) Likewise, the same courts have determined that \textit{coercive} is a relative term.\(^{1413}\) In an employment environment,
when the employee is told to submit a urine specimen or lose his job or be demoted, it cannot be gainsaid that the urine specimen is rendered under coercion, even though the employee may have not been sedated or shackled to a hospital bed. There is no convincing reason why the analysis of these terms should not apply outside of a fourth amendment discussion. Thus, Judge Higginbotham's reasoning is fundamentally flawed.

It is presently uncertain how the Fifth Circuit will rule on the issue when it decides the case on its merits. The best approach for the Fifth Circuit to adopt, however, would be to recognize the existence of a constitutionally protected privacy interest in personal privacy and bodily integrity in the drug screening context which must be balanced against the public employer's need for the information on drug use. This balancing process should take into consideration the specific circumstances surrounding the test's administration and whether the methodology chosen was the least intrusive means available.

D. Assessing the Constitutionality of Public-Sector Employment Drug Screening under the Equal Protection Clause

To date, the only reported case in which an equal protection challenge to a public employer's drug screening program has been raised is Shoemaker v. Handel. In Shoemaker, the jockeys alleged that the Racing Commission's regulations mandating random urinalysis testing of jockeys discriminated against jockeys by singling them out as a group for random urinalysis without a rational basis or compelling interest to do so. First hearing the jockeys' equal protection claim on a motion for a preliminary injunction, the District Court of New Jersey summarily dismissed the claim. The district court held that the State of New Jersey had and accompanying text.

1414. Id.
1415. The Third Circuit declined to address the issue on the merits, because the jockeys did not raise the privacy issue on appeal. NTEU v. Von Raab, No. 86-3833 (3rd Cir. April 22, 1987) (Hill, J. dissenting) (Edward, J., Sixth Circuit, sitting by designation) (available on WESTLAW on April 24, 1987, in the “CTA 3” file). See supra note 932.
1417. 619 F.Supp. at 1105.
1418. 608 F.Supp. at 1161.
1419. The district court did not discuss at any length the equal protection issue during the pre-trial hearing on the jockeys' motion for a preliminary injunction. Instead, the court
"a legitimate safety interest in testing the jockeys [for drugs] in order to reduce the possibility of accident and even death while racing."\textsuperscript{1420}

Subsequently proceeding on the merits of the Shoemaker case, the district court embellished its earlier decision on the equal protection issue.\textsuperscript{1421} The substance of the jockeys’ claim was that the Commission’s drug testing regulations violated the Equal Protection Clause of the Fourteenth Amendment because only jockeys were subject to random testing.\textsuperscript{1422} At the outset of its analysis, the district court declared that an individual has no fundamental right to be a jockey reasoning that, if it so chose, New Jersey could bar horse racing within the State entirely.\textsuperscript{1423} Additionally, observed the district court, jockeys did not comprise a “suspect class” such as categorizations based upon race, national origin, religion, alienage, and gender.\textsuperscript{1424} Therefore, the Equal Protection Clause demanded only that the state’s drug testing program bear some “rational relationship” to legitimate state purposes.\textsuperscript{1425} The district court in Shoemaker indicated that perfection in classification was not constitutionally necessary,\textsuperscript{1426} stating that a regulatory classification would be “invalidated only if it manifested arbitrary discrimination between persons similarly situated.”\textsuperscript{1427}

Turning to the Horse Racing Commission’s classification scheme for the urinalysis testing program, the court found that the Commission’s requirement that only jockeys be subjected to random

summarily discounted the claim, stating:

\textsuperscript{1420} Id. See supra note 1419 and accompanying text.
\textsuperscript{1421} 619 F.Supp. at 1105.
\textsuperscript{1422} Id. The jockeys believed that the urine tests, as administered, unfairly singled them out as a group and encouraged the public to infer that they used controlled dangerous substances at the race track. They testified that all impaired persons who had access to horses—including owners, trainers, grooms, and the gate crew—posed a risk of serious injury to the participants and should be tested. The state argued that it selected only jockeys for urine testing because of the heightened chance for accidents during the running of a race. Id. at 1097.
\textsuperscript{1423} Id. at 1105.
\textsuperscript{1424} Id.
\textsuperscript{1425} Id. (citing San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), reh’g. denied, 411 U.S. 959 (1973)).
\textsuperscript{1426} Id. (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976)).
\textsuperscript{1427} Id. (citing Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 461-66 (1980)).
urinalysis was rational and clearly furthered the state's interest in maintaining the safety of the racing industry.\textsuperscript{1428} The district court in \textit{Shoemaker} explained that safety concerns were greatest during the running of the race when the most serious accidents could occur, making it only reasonable that the Commission would concentrate its limited resources on testing more frequently for controlled substance impairment in jockeys than in grooms and trainers.\textsuperscript{1429} Having discerned a rational relationship between the classification and the state's legitimate interest in maintaining safety in the horse racing industry, the district court held that the drug testing regulations, on their face and as administered, did not violate the jockeys' rights to equal protection under the law.\textsuperscript{1430}

On appeal to the Third Circuit, the jockeys argued that the district court's rationale for upholding the urinalysis testing of only jockeys was defective since the testing of the jockeys occurred \textit{after} the race, not before.\textsuperscript{1431} The Third Circuit ignored the jockeys' argument and affirmed the lower court's holding with respect to urine testing, but on a different basis.\textsuperscript{1432}

At the outset of its analysis, the Third Circuit reiterated that the intense regulation of the horse racing industry was justified because of public wagering on the outcome of the race.\textsuperscript{1433} With this as a premise, the appellate court reasoned that "[s]ubstance abuse by jockeys, who are the most visible human participants in the sport, could affect public confidence in the integrity of that sport. While the state's interest in the appearance of integrity reaches all participants, it is obviously greatest with respect to jockeys."\textsuperscript{1434} Observing that the governing equal protection principle was that the state could rationally take one step at a time, addressing the phase of the problem it perceived as most acute first,\textsuperscript{1435} the Third Circuit indicated that the Racing Commission was under no obligation to eradicate illegal drug use from all segments of the horse

\begin{itemize}
\item \textsuperscript{1428} Id. at 1105.
\item \textsuperscript{1429} Id.
\item \textsuperscript{1430} Id.
\item \textsuperscript{1431} 795 F.2d 1136, 1143 (3rd Cir. 1986) (pointing to the inconsistency between the court's reliance on the fact that safety concerns were the greatest \textit{during} the race, when the most serious accidents occur, and the fact that the tests were conducted \textit{after} the races were over).
\item \textsuperscript{1432} Id. at 1143-44 ("We prefer to rest our affirmanse with respect to urine testing, but on a different ground").
\item \textsuperscript{1433} Id. at 1144.
\item \textsuperscript{1434} Id.
\item \textsuperscript{1435} Id. (citing \textit{Williamson v. Lee Optical, Inc.}, 348 U.S. 483, 489 (1955)).
\end{itemize}
racing industry at once or at all. Thus, the Third Circuit dismissed the jockeys' equal protection claim as meritless and upheld the district court's judgment, albeit for a different reason.

Although the District Court for the District of New Jersey and the Third Circuit resolved the equal protection issue for different reasons in *Shoemaker*, it is clear that under either rationale a public employer's drug testing policy which does not discriminate by using a "suspect class" classification will seldom violate the Equal Protection Clause.

1436. *Id.* (Although the court does not expressly state this, the Third Circuit in *Shoemaker* implies such a proposition by its quote to *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all").

1437. *Id.* While the district court's analysis rested on the asserted interest of the State in maintaining the safety of the horse racing industry, which was most threatened during the running of the race, the Third Circuit's analysis centered on the State's interest in preserving the community's perception of the horse racing industry's propriety. *Compare* 619 F.Supp. at 1105 with 795 F.2d at 1144.

1438. *Id.* *See supra* note 1437.

1439. Notably, the Third Circuit does not indicate the nature of the jockeys' interest with which they were dealing under the equal protection analysis. *See* 795 F.2d at 1105. The district court identified the jockeys' interest at stake as the "right to be a jockey," which, as the trial court correctly pointed out, was not a fundamental right, and, therefore, the "rational basis" test was the appropriate standard of review. It would come as no great surprise that the district court found the testing program to withstand constitutional scrutiny under the "rational basis" test. It appears that the Third Circuit merely adopted the district court's identification of the jockeys' interest at stake and proceeded under a "rational basis" analysis and, as would be expected, also found the State's urine screening of jockeys only to satisfy equal protection requirements. *See, e.g.*, 795 F.2d at 1143-44.

The jockeys' interest at stake would have been more accurately identified as the right to privacy instead of the "right to be a jockey." However, if the courts would have denominated it as such, the State's jockey urinalysis program would have been subject to the more exacting strict scrutiny standard of review, rather than merely a rational basis test, since the right of privacy is a fundamental one. It would have been much more difficult for the New Jersey Racing Commission to justify its program, being required to demonstrate a "compelling state interest" for testing only jockeys. Then the courts would have been faced with a much more difficult task - to resolve the competing interests. *See supra* note 1385. By classifying the jockeys' interest as they did, both courts avoided this difficult choice. Should the courts be praised for their ingenuity?
V. LIMITING THE UNIONIZED EMPLOYER'S IMPLEMENTATION AND ENFORCEMENT OF EMPLOYMENT DRUG SCREENING PROGRAMS UNDER THE NATIONAL LABOR RELATIONS ACT AND COLLECTIVE BARGAINING AGREEMENTS

A. The Duty to Bargain over the Implementation of a Drug Screening Program under the National Labor Relations Act

Constitutional considerations aside, the unionized employer who decides to implement and enforce a drug screening program for its employees must comply with the requirements of the National Labor Relations Act (NLRA). Section 8(a)(5), 8(b)(3), and 8(d) of the NLRA require the employer and the union to bargain in good faith with respect to wages, hours and other terms and conditions of employment. Intending the phrase "terms and conditions of employment" to be a flexible standard subject to the changing circumstances and needs of labor and management, Congress did not attempt an exhaustive definition but purposely left the phrase obscure. This ambiguity has engaged both the National Labor Re-


1441. Section 8(a)(5) of the NLRA provides: "It shall be an unfair labor practice for an employer — . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of 159(a)." 29 U.S.C. § 158(a)(5) (1976).

Section 8(b)(3) of the NLRA provides: "It shall be an unfair labor practice for a labor organization or its agents — . . . (3) to refuse to bargain collectively with an employer provided it is the representative of his employees subject to the provision of 159(a) . . . ." 29 U.S.C. § 158(b)(3) (1976).

Section 8(d) of the NLRA defines this obligation as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract . . . ."

1442. The legislative reports recognize this flexibility:
lations Board (NLRB) and the courts of appeal in a substantial effort to ascertain the outer parameters of this otherwise amorphous phrase and those employment practices which properly fall within them. It is well settled that if the NLRB determines that

This section attempts to limit narrowly the subject matters appropriate for collective bargaining. It seems clear that the definitions are designed to include collective bargaining concerning welfare funds, vacation funds, union hiring halls, union security provisions, apprenticeship qualifications, assignment of work, check-off provisions, subcontracting of work, and a host of other matters traditionally the subject matter of collective bargaining in some industries or in certain regions of this country. The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate of the time, the needs of employers and employees, and many related factors. What are proper subject matters of collective bargaining should be left in the first instance to employers and trade-unions and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment.

H.R. REP. NO. 245, 80th Cong., 1st Sess. 71 (1947) (minority report) (emphasis added), reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 362 (Senate Committee on Labor and Public Welfare reprint 1974) [hereinafter referred to as “LMRA HISTORY”]; see also First National Maintenance Corp. v. NLRA, 456 U.S. 666, 675 (1981) (“Congress deliberately left the words ‘wages, hours and other terms and conditions of employment’ without further definition, for it did not intend to deprive the Board of the power to further define those terms in light of specific industrial practices”).

1443. Congress delegated primary responsibility to the NLRB as the agency with the expertise in industrial relations to interpret the NLRA. 29 U.S.C. §§ 153-56, 160-61 (1976 & Supp. IV 1980). The NLRB’s decisions are subject to judicial review; however, courts cannot overrule the NLRB merely because they prefer a different interpretation of the statute. NLRB v. Local Union, No. 103, Int’l. Ass’n. of Bridge, Structural & Ornamental Iron Workers, 434 U.S. 335, 350 (1978). For a more detailed discussion of the NLRB’s organization and procedure, see R. SMITH, L. MERRIFIELD, T. ST. ANTOINE & C. CRAVER, LABOR RELATIONS LAW, CASES AND MATERIALS 58-63 (7th ed. 1984); A. COS, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 104-13 (9th 3d. 1981) [hereinafter refered to as “GORMAN”].

While the NLRB was not given the authority to enumerate mandatory subjects of bargaining, since its inception the NLRB decision have defined the scope of collective bargaining. Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 HARV. L. REV. 389, 395 (1950). Today it is well settled that the NLRB has the authority to determine bargainable subject matters. Ford Motor Company v. NLRB, 441 U.S. 488, 496 (1979). Although the Board’s constructions are entitled to “considerable deference” from the courts, id. at 495; the Supreme Court remains the ultimate interpreter of the Statute. Cf. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 506-07 (1979) (The Court held the actions of the Board not within the jurisdiction of the Board as provided by the Act); NLRB v. Babcock & Wilcox Co., 351 U.S. 104, 113 (1956) (Court reversed decision due to error by the Board in determining the applicable law).

The NLRB determines what subjects should be mandatory bargaining matters by the intimacy of their relation to the phrase “wages, hours, and other terms and conditions of employment.” Bowman, An Employer’s Unilateral Action - An Unfair Labor Practice?, 9 VAND. L. REV. 487, 488 (1956). “In general terms [a mandatory subject] includes only
a certain practice falls within the purview of the phrase, it is a mandatory subject for collective bargaining.\textsuperscript{1444}

Some unions have argued that the unilateral implementation of drug and alcohol testing by employers is violative of the employer's mandatory bargaining duties under the NLRA.\textsuperscript{1445} Although the issues that settle an aspect of the relationship between the employer and employees.\textsuperscript{"Allied Chemicals & Alkalai Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971). There is, however, no set standard for making this determination. Legislative history as well as judicial precedent has recognized the need for flexibility as to labeling issues mandatory subjects. In enacting the Labor Management Relations Act of 1947, Congress rejected a proposal in the House of Representatives to limit the bargaining subjects to:

(i) [w]age rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations, and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

H.R. REP. NO. 3020, 80th Cong., 1st Sess. 11 (1947), reprinted in 1 LMRA HISTORY at 166-67. Other testimony from the House illustrates the accepted view of determining the scope of mandatory subjects of bargaining. The subjects "will inevitably depend upon the traditions of an industry, the social and political climate at any time, the needs of employers and employees, and many related factors." H.R. REP. NO. 245, 80th Cong., 1st Sess., 71 (1947) (minority report) reprinted in 2 LMRA HISTORY at 362. In Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346 (1944), the Supreme Court also sanctioned this view. In this case, Justice Jackson stated that the mandatory subjects of bargaining were intentionally left open to conform with the philosophy of bargaining as worked out in the labor movement in the United States. Id. (footnote omitted); Allied Chem., 404 U.S. at 178 ("Section 8(d) of the Act . . . does not immutably fix a list of subjects for mandatory bargaining").

1444. The Supreme Court in Wooster Div. of Borg-Warner Corp. v. NLRB, 356 U.S. 342 (1958), divided subject matters of collective bargaining into two lawful categories. The first group consists of mandatory subjects of bargaining; those subjects which fall within "terms and conditions of employment." If a subject is determined to be mandatory bargaining material, then either side can lawfully insist upon bargaining over the issue. Id. at 349. The second category is permissive bargaining subjects. These issues fall outside of the bounds of § 8(d) and are, therefore, "voluntary" subjects of bargaining. Negotiations over these matters may be proposed, but it is unlawful to insist on bargaining over permissive bargaining subject to the point of impasse. Id., e.g., Borg-Warner, 356 U.S. at 349-50 (ballot clause a permissive subject of bargaining); NLRB v. Davison, 318 F.2d 550, 555 (4th Cir. 1963) (employer's insistence on indemnity clause against retaliation by rival unions is a permissive subject of bargaining). The final delineation of bargaining subjects is illegal or non-bargainable subjects. These matters must either be included in a collective bargaining agreement or cannot be included in an agreement. McManemin, Subject Matter of Collective Bargaining, 13 Lab. L. J. 985, 1002 (1962). A party can, of course, refuse to bargain over this type of subject without violating the NLRA. For an example of the former non-bargainable classification, see Simplicity Pattern Co., 102 N.L.R.B. 1283, 1284 (1953) (refusal to recognize union violation of § 8(1)(5)), enforced, 175 F.2d 686 (2d Cir. 1949), cert. denied, 338 U.S. 954 (1950). See generally McManemin, supra; Murphy, Impasse and the Duty to Bargain in Good Faith, 39 U. PITT. L. REV. 1 (1977).

1445. See, e.g., Daily Labor Report, March 20, 1986, A-11 to A-12 (BNA) (Gene Upshaw, President of the NFL Players Association disputed NFL Commissioner Pete Rozelle's
NLRB has not decided the precise issue of whether a proposed substance abuse policy is a mandatory subject of collective bargaining under the NLRA, analogous precedent strongly suggests that inevitably the issue will be resolved in the affirmative.\textsuperscript{1446} The NLRB has consistently held that changes in work rules, particularly those which carry disciplinary measures for noncompliance, affect the terms and conditions of employment and, therefore, are mandatory subjects of bargaining.\textsuperscript{1447} The appellate courts, including the Supreme Court, have agreed with this assessment.\textsuperscript{1448}

Inasmuch as the employer decides to implement a company disciplinary policy pertaining to drug use, it seems clear that the employer will be required to bargain over the contents of such policy. Likewise, the Board has held that the decision to implement testing programs for current and prospective employees is a mandatory subject of collective bargaining.\textsuperscript{1449} The decision to institute a drug screening program for employees and applicants can be analogized to the decision to implement a polygraph testing program.\textsuperscript{1450}

\begin{footnotes}
\item[1446] See infra text accompanying notes 1447-74.
\item[1447] See, e.g., Amoco Chemicals, 211 N.L.R.B. 618, 622-23 (1974), enforced in pertinent part, 529 F.2d 427 (5th Cir. 1976) (alteration of work and disciplinary rules is a mandatory subject of bargaining); LeRoy Machine Company, 147 N.L.R.B. 1431 (1964) (physical examination of existing employees is a mandatory subject of bargaining); Medicenter, Mid-South Hospital, 211 N.L.R.B. 670 (1975) (policy change requiring employees to submit to a polygraph exam as a condition of continued employment is a mandatory bargaining subject), see infra text accompanying notes 1451-1468; and Peerless Publications, Inc., 231 N.L.R.B. 244, 255-56 (1977), remanded, 636 F.2d 550 (D.C. Cir. 1980) (enforcement through disciplinary proceedings of code of ethics is a mandatory subject of bargaining).
\item[1448] A clear example is safety rules where the courts have held that an employer may not modify such rules without first bargaining with the union. See, e.g., NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967); Miller Brewing Co., 166 N.L.R.B. 831 (1967), enfd., 408 F.2d 12 (9th Cir. 1969). See also Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 222 (1964) (Stewart, J., Concurring) ("what one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment"). Subsequent cases have relied on Justice Stewart's concurrence in Fibreboard as authority for the proposition that work rules are mandatory subjects of collective bargaining. See, e.g., Gulf Power Co., supra.
\item[1449] See supra note 1447.
\item[1450] See infra notes 1451-1468 and accompanying text.
\end{footnotes}
In Medicenter, Midsouth Hospital and Hotel Employees & Bartenders International Union, Local 847, the NLRB expressly determined that a policy change requiring employees to submit to a polygraph examination as a condition of continued employment was a mandatory subject of collective bargaining. In Medicenter, the employer, an operator of a hospital and extended care facility, was being struck by the service and maintenance workers union. Prior to the actual picketing by the union, the hospital began suffering a barrage of vandalism which inventory and other internal control procedures proved unable to arrest.

The hospital administrator consulted a police polygraph operator to devise a polygraph examination for purposes of identifying the culprits. While the hospital administrator discussed implementation of such a program with his superiors and members of the hospital administrative staff, he never mentioned the proposed plan to the Union Business Agent. However, discussions were held with the union regarding the scourge of vandalism.

The hospital administrator went forward with the polygraph procedure, drafting and posting a notice of the testing, including a statement which stated: "Your participation in the Polygraph Program is a condition of your continued employment." The Union Business Agent was not apprised of the program’s implementation until after the notices were posted and was told by a bargaining unit employee, not the hospital administrator.

A conference between the hospital administrator and the Union Business Agent failed to produce an agreement. The union representative steadfastly rejected the polygraph program and also refused, in lieu of the program, to stand responsible for any damages. The testing began on schedule, and those employees who

1452. Id. at 671.
1453. Id. at 670.
1454. Id. at 670-71. Vandalism began inside and outside the hospital 10 days before the picketing. Toilets were plugged with small objects, causing overflow and endangering patient health. Tires were slashed in the parking lots and at employee homes. An air conditioner was sabotaged during operations on patients, endangering the patients’ lives. Telephone threats were made to working employees. Id.
1455. Id. at 671.
1456. Id.
1457. Id.
1458. Id.
1459. Id.
1460. Id.
1461. Id.
refused the test were discharged.\textsuperscript{1462} The union immediately filed an unfair labor practice against the hospital but refused to confer further with the hospital administrator concerning the polygraph program or the charges filed against the hospital.\textsuperscript{1463}

Resolving the unfair labor charge, the Board declared:

\begin{quote}
The institution of polygraph testing for all employees is found to be a change in the terms and conditions of employment and is therefore a mandatory subject of bargaining. Refusal to submit to the test would automatically result in discharge. The prior method of investigating employee guilt of misconduct was human assessment by individual skill, judgment and experience, unaided by mechanical devices. A change in the quantum of proof used to support disciplinary action is of concern to the entire bargaining unit.\textsuperscript{1464}
\end{quote}

The hospital contended in defense that it was "merely exercising its inherent right to investigate, interrogate and gather facts relating to [employee] misconduct."\textsuperscript{1465} The Board found this justification to be insufficient to relieve the hospital of its duty to bargain over the implementation of the polygraph testing program, perceiving the program as "a significant alteration in the method used which may elicit evidence from employees which may 'convict' them of misconduct."\textsuperscript{1466} The Board explained:

\begin{quote}
Adopting polygraph testing is not within the prerogative area in which an employer can exercise the "core of entrepreneurial control fundamental to the basic direction of a corporate enterprise of which might impinge only indirectly upon employment security. As an employer must bargain about the discharge of employees, he also must bargain about establishment of requirements, disobedience of which result in discharge. Promulgation of a new prerequisite to continued employment is a term or condition subject to a bargaining obligation.\textsuperscript{1467}
\end{quote}

Therefore, the NLRB concluded that adoption by the hospital of a requirement that employees submit to a polygraph examination constituted a change in their conditions of employment and was, therefore, a mandatory subject of bargaining.\textsuperscript{1468}

\textsuperscript{1462} Id. Even after the hospital administrator spoke with each individually and told those who asked that they could have a friend or attorney present, thirty-eight employees refused to take the test and were discharged. Id.

\textsuperscript{1463} Id.

\textsuperscript{1464} Id.

\textsuperscript{1465} Id.

\textsuperscript{1466} Id.

\textsuperscript{1467} Id.

\textsuperscript{1468} Id. While the Board determined that the decision to implement the polygraph testing program was a mandatory subject of bargaining, it nevertheless determined that in the \textit{Medicenter} case the employer did not violate that duty. The Board reasoned that while
In *NLRB v. Laney & Duke Storage Warehouse Company*, an employer revised its employment application to include a requirement that the applicant agree to take "mental examinations or polygraph tests" at the company's request or resign upon refusal to do so. These forms were distributed to certain employees on two separate occasions. During the interim between the first and second distribution, the employees attended a union meeting at which the forms were discussed, and the Union determined that the forms were matters of collective bargaining. The employees were instructed to not complete the forms, and the employer was informed of such instruction and was also requested to hold the matter in status quo until negotiation meetings could be held. The Fifth Circuit held that:

>[S]ince the application forms affected conditions of employment they were a legitimate subject of collective bargaining. The unilateral action of the company relating thereto constituted a refusal to bargain ... [t]he duty to bargain is a continuing one, and a union may legitimately bargain over wages and conditions of employment which will affect employees who are to be hired in the future.

It requires no great leap of legal reasoning from the *Medicenter* and *Laney & Duke* decisions to conclude that a drug screening program would be a "working condition" and, therefore, a mandatory subject of bargaining. Thus, employers may not implement drug screening unilaterally without giving the union the opportunity to bargain. The union may, however, waive the right

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the hospital administrator remained open and willing to negotiate a solution to the vandalism problem, the "union did nothing but protest, expressing vehement objection to the testing, saying the union would never agree to it." Given the unyielding resistance of the union on the issue, the Board concluded that the hospital had not violated its duty to bargain under Section 8(a)(5) of the NLRA on the polygraph program issue. *Id.* at 671-72.

Thus, *Medicenter* is also instructive that the duty to bargain is a two-way street. See *supra* note 1441.

1469. 369 F.2d 859 (5th Cir. 1966).
1470. *Id.* at 865.
1471. *Id.*
1472. *Id.*
1473. *Id.* at 866.
1474. One commentator has arrived at the same conclusion, however, has referenced, as support, the district court's decision in *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad*, 117 L.R.R.M. 2739 (D. Mont. 1984) (preliminary injunction), where it was held that an employer could not even begin to use dogs to detect the presence of controlled substances at work, because such a practice constituted a unilateral change in working conditions in violation of the current collective bargaining agreement and the employer's duty to bargain under the Railroad Labor Act, 45 U.S.C. § 151, *et seq.* Rothstein, *Screening Works*, *supra* note 12, at 430.
to bargain about such a proposal by failing to request bargaining after due notice or may already have waived the right in the past.

Such a prior waiver may be effected through explicit contractual language, such as a management's rights clause or a "zipper clause," reserving to management the right to make reasonable

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The district court in the same case granted a permanent injunction for the same reason. See *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad*, 620 F.Supp. 163 (D. Mont. 1985).

Although the *Burlington Northern* cases arose under the Railway Labor Act, 45 U.S.C. § 151, et seq., they are instructive in the NLRA context because mandatory subjects for bargaining tend to be the same under the two statutes.

See also *Pathogue-Medford Congress of Teachers v. Board of Education of Pathogue-Medford Union Free School District*, Index No. 85-8759 (Suffolk Cty. Sup. Ct. June 14, 1985) (employer enjoined from requiring drug tests for teachers seeking tenure; although the collective bargaining agreement permitted school district to require physical examination by a licensed physician, the addition of a drug test of a urine sample obtained under supervisor or school nurse was an unlawful unilateral modification of the union contract) (The ruling of the Special Term on this issue was approved by the Second Department of the Supreme Court, Appellate Division in a subsequent disposition of the same case on the merits. 505 N.Y.S.2d 888, 889 (A.D. 2 Dept. 1986)).

1475. See, e.g., *NLRB v. Alva Allen Industries, Inc.*, (8th Cir. 1966) (union held to have waived its right to complain when upon being notified of the employer's intention to take "unilateral" action it neglected altogether to request bargaining on the matter).

1476. See infra notes 1478-1481 and accompanying text.

1477. A management's rights clause is express contractual language which clearly authorizes the employer to take "unilateral" action on an otherwise mandatory subject of bargaining. For example, the Board held in *LeRoy Machine Company*, 147 N.L.R.B. 1431 (1964) that the employer did not violate its duty to bargain under Section 8(a)(5) of the NLRA when it instituted a policy, without bargaining with the union, of requiring physical examinations—by the employee's doctor at company expense—of employees with serious records of absenteeism, since the management's rights clause of the contract gave to the company the specific right to determine "qualifications" of employment. See also *Ador Corporation*, 150 N.L.R.B. 1658 (1965) (no violation of duty to bargain over termination of manufacturing of a product line found where the management rights clause accorded the employer the specific right to abolish or change jobs or products and to lay-off employees for lack of work).

But the NLRB and courts construe management clauses narrowly and decline to read an express waiver on one subject to encompass waiver on another, even though closely related. See, e.g., *NLRB v. C & C Plywood Co.*, 305 U.S. 421 (1967); *Tide Water Assoc. Art Co.*, 85 N.L.R.B. 1096 (1949).

1478. A "zipper" or integration clause purports to close out bargaining during the contract term and to make the contract the exclusive statement of the parties' rights and obligations. The following is an example of such a clause:

The parties acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agree that the other shall not be obligated to bargain collectively with respect to
work rule changes. Additionally, a waiver may result from "binding past practice" between the parties and/or by the history of the negotiations between the parties. The NLRB will only honor waivers that are clear and explicit, but if a waiver can be estab-

any subject matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Jacobs Mfg. Co., 94 N.L.R.B. 1214 (1951), enf'd., 196 F.2d 680 (2d Cir. 1952). But the clause has been held not to cede clearly and unequivocally to the employer the power to make unilateral changes in the status quo, and thus possibly to modify plant practices to the detriment of the employees, without notice to and bargaining with the union. See, e.g., New York Mirror (1965); Beacon Journal Pub. Co., 164 N.L.R.B. 734 (1967), enf'd. in relevant part, 401 F.2d 366 (6th Cir. 1968).

1479. "Binding past practice" refers to terms or conditions of employment which have been traditionally handled in a certain way by the employer and union, but have never been reduced to writing and incorporated into the language of the collective bargaining agreement. These traditional arrangements between the union and the employer become part of the status quo and, as such, become mandatory subjects of bargaining. The employer is not free to inaugurate a new policy or procedure relative to these past practices without first bargaining with the union to impasse. See Central Metallic Casket Co., 91 N.L.R.B. 572 (1952); State Farm Mut. Ins. Co., 195 N.L.R.B. 871 (1972).

1480. Apart from express contract provisions which arguably cede to the employer the power to make unilateral changes in working conditions without bargaining, under rare circumstances, such a waiver has been found in concessions made by the union at the bargaining table. Both the Board and the courts find such waivers reluctantly. As the NLRB said in Press Co., 121 N.L.R.B. 976 (1958):

It is well established Board precedent that, although a subject has been discussed in precontract negotiations and has not been specifically covered in the resulting contract, the employer violates Section 8(a)(5) of the Act if during the contract term he refuses to bargain, or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and the union "consciously yielded" or clearly and unmistakably waived its interest in the matter.


1481. The traditional exacting test for union waiver of the right to bargain during the contract term was announced by the NLRB in Beacon Piece Dyeing & Finishing Co., 121 N.L.R.B. 953 (1958), wherein the Board stated:

[A]though the Board has . . . held repeatedly that statutory rights may be "waived" by collective bargaining, it has also said that such a waiver "will not readily be inferred" and that there must be "a clear and unmistakable showing" that the waiver occurred. The primary issue in this case, therefore, is whether the Union "clearly and unmistakably" waived or "bargained away" its statutory rights to bargaining on an increased workload and a general wage increase therefor.

Id. The Board's restatement of the waiver test in Press Co., 121 N.L.R.B. 976 (1958), reaffirmed the stringent standard:

It is well established Board precedent that, although a subject has been discussed in precontract negotiations and has not been specifically covered in the resulting contract, the employer violates Section 8(a)(5) of the Act if during the contract term he
lished, the employer is absolved of having to bargain about the actual content of the proposed change.\textsuperscript{4} Thus, the general duty to bargain must be analyzed in light of the individual collective bargaining relationship. Before an employer concludes that it can or cannot implement a substance abuse policy, including a urinalysis program, it must first assess the options under its collective bargaining agreement and history.\textsuperscript{4} The conventional NLRB remedy for an employer's violation of the duty to bargain is a cease-and-desist order under Section 10(c) of the Act,\textsuperscript{4} demanding that the employer discontinue implementation or administration of the unilaterally adopted policy or procedure and an affirmative order for the employer to bargain collectively. Because the Board lacks the authority to award compensatory relief under Section 8(d) for an employer's refusal to bargain,\textsuperscript{4} a challenge to the unilateral implementation of a substance abuse policy is more likely to be in the form of a grievance and/or an injunction.\textsuperscript{4} The availability of a preliminary in-

refuses to bargain, or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and the union "consciously yielded" or clearly and unmistakably waived its interest in the matter.

\textit{Id.}


1483. See infra note 1487 and accompanying text.

1484. Section 10(c) provides in pertinent part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and shall cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.


1485. See, e.g., Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970); see Section 8(d) of the NLRA, 29 U.S.C. § 158(d) ("... such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession") (this language has been interpreted by the Board and Supreme Court to be a Congressional prohibition against the Board or the courts "writing a contract," either by directly or "indirectly" (i.e., compensatory damages) compelling concessions).

1486. If an NLRB charge is filed, the NLRB is likely to defer the case to arbitration under its Collyer policy. See generally Collyer Insulated Wire, Gulf Western Systems Co., 192 N.L.R.B. 837 (1971) (in which it was claimed that the employer had made several midterm modifications in work assignments and wage rates without bargaining with the union) (the employer justified its action under a specific contract provision dealing with changes in pay rates and a management rights clause and announced its willingness to submit the dispute to arbitration) (the Board, in a split decision, maintained jurisdiction but
juncture pending completion of the arbitration process is very limited under the narrow exception to the anti-injunction policy of the Norris-LaGuardia Act\textsuperscript{1487} established by the Supreme Court in \textit{Boys Markets Incorporated v. Retail Clerks Union}.\textsuperscript{1488} In the drug screening context, the District Court for the District of Columbia in \textit{International Brotherhood of Electrical Workers Local 1900 v. Potomac Electric Power Company}\textsuperscript{1489} recently denied a request for a preliminary injunction against enforcement of the utility's new drug and alcohol screening policies, pending arbitration of the validity of the program, based on the policy of limited injunctive relief.\textsuperscript{1490}

... stayed its exercise pending submission of the dispute to the arbitrator) ("... disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute").

Whether the dispute reaches arbitration through the grievance-arbitration procedure, or is deferred to arbitration by the NLRB, the arbitrator will examine both the reasonableness of the substance abuse testing policy and whether its unilateral implementation was permissible under the collective bargaining agreement. In determining whether the unilateral implementation was permissible under the contract, the arbitrator will look to the explicit contract language (such as a zipper clause, or a management rights clause reserving to management the right to make reasonable work rule changes), the history of negotiations between the parties, and the past practice in which the union has permitted changes in work rules to have been made unilaterally. See, e.g., \textit{Gem City Chemicals}, 87 Lab. Arb. 1023 (1986) (Warns, Arb.) (employer cannot add drug tests to annual physical exam without negotiating with the union) discussed infra text accompanying notes 1618-52.

\textit{Southern Pacific Transportation Co.}, 79 Lab. Arb. (BNA) 618 (1982 (O'Brien, Arb.) (employer did not have the right unilaterally to require all employees going on or while on duty to take a blood-alcohol test when the parties had acquiesced for 50 years in the visual observation of employees as the method of determining whether they were under the influence of alcohol; the prior well-established practice had become binding condition of employment even though it was not specifically expressed in the collective bargaining agreement).

\textit{American Standard}, 77 Lab. Arb. (BNA) 1085 (1981 (Katz, Arb.) (employer properly discharged an employee that refused to submit to a drug screen test where the contract contained a broad management rights clause and a provision that specifically gave the employer the right to require a medical examination of any employee "at any time during his employment for the purpose of determining whether or not he is fit for employment") discussed infra text accompanying notes 1541-84.

\textsuperscript{1487} 29 U.S.C. § 101-15 et seq.

\textsuperscript{1488} 398 U.S. 235 (1970) (when the parties have agreed to arbitrate a dispute, a court may issue an injunction, if, in addition to the usual equitable concerns, the integrity of the arbitration process would be threatened absent interim relief).


\textsuperscript{1490} \textit{Id.} at 645.
B. Employee Drug Screening Issues Currently Being Litigated in Arbitration under a "Just Cause" Standard of Collective Bargaining Agreements

This section will consider recent arbitration awards in employee drug screening cases decided under the "just cause" standard of collective bargaining agreements. Specifically, it will examine the "just cause" inquiry in terms of the requirement of notice, the appropriate standard for conducting the test on employees, the appropriate disciplinary action for refusals to take the drug screen, the conclusivity of a positive urine screen result, the impairment-exposure issue, and the appropriate standard of proof to sustain a finding of "just cause." The standards discernible from the arbitration decisions serve a broader utility than resolving disputes arising under collective bargaining agreements, for they are a good barometer of jurors' and judges' reactions to common law claims such as invasion of privacy or wrongful discharge and are, therefore, also important in a non-union context to evaluate the legality of an employer's drug screening policies.

1. Recent Arbitration Decisions

   a. Weirton Steel Division National Steel Corporation v. Independent Steel Workers Union

1491. It is beyond the scope of this article to exhaust the concept of "just cause;" rather, this article will focus on issues under the "just cause" standard unique to the narrow topic of employee drug screening, which are currently being resolved in arbitration or litigation. See infra text accompanying notes 1499-1871.


1492. See infra text accompanying notes 1499-1540 (Weirton); 1618-52 (Gem City); 1653-1715 (Roadway Express); 1716-54 (UNOCAL); 1755-1806 (Bay Rapid Transit).

1493. See infra text accompanying notes 1541-84 (American Standard); 1618-52 (Gem City); 1653-1715 (Roadway Express); 1716-54 (UNOCAL); 1756-1806 (Bay Rapid Transit).

1494. See infra text accompanying notes 1541-84 (American Standard); 1585-1617 (Pacific Gas); 1618-52 (Gem City); 1653-1715 (Roadway Express); 1756-1806 (Bay Rapid Transit).

1495. See infra text accompanying notes 1499-1540 (Weirton); 1653-1715 (Roadway Express); 1716-54 (UNOCAL) (by implication); 1756-1806 (Bay Rapid Transit).

1496. See infra text accompanying notes 1499-1540 (Weirton) (by implication); 1653-1715 (Roadway Express); 1716-54 (UNOCAL); 1756-1806 (Bay Rapid Transit).

1497. See infra text accompanying notes 1864-71.
In *Weirton Steel Division*, Arbitrator Samuel S. Kates found the admissions of three steelworkers that they had used marijuana away from the plant on the previous night and the presentation of urinalysis results showing traces of marijuana and cocaine in the employees' bodies were insufficient evidence of being under the influence of prohibited drugs or possessing and using prohibited drugs at the plant in violation of shop rules.

The Weirton Steel Division had plant rules on the books which prohibited employees from reporting to work while under the influence of alcohol or illicit drugs (Rule No. 3) or attempting to bring such items on to company property and further prohibited the employees from bringing or attempting to bring drug or narcotic paraphernalia onto the plant premises (Rule No. 7). The three employees, denominated "R," "H," and "W," were seen alone by a supervisor on August 29, 1979, in an employee locker room immediately after the start of their 8:00 a.m. daylight turn. Upon the supervisor's arrival, the three employees left the locker room, apparently to report to their assigned positions. Once the employees left the locker room, the supervisor detected what he believed to be the odor of lingering marijuana smoke in the room. The supervisor did not see, however, any of the three employees smok-

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1498. 81-1 ARB. (CCH) ¶ 8215 3931 (1980) (Kates, Arb.).
1499. *Id.* at 3983. Only one of the three employees, W, tested positive for cocaine use, but all three tested positive for marijuana. *Id.*
1500. *Id.* at 3935.
1501. The rules alleged by the Company to have been violated by the employees provided as follows:

For the well being of all employees and to ensure safe and efficient conduct of operations, various rules and regulations governing your conduct as an employee are in effect. Violation of any of these rules will not be tolerated and will be cause for appropriate disciplinary action. The severity of disciplinary action may vary from a personal warning and recording of the offense in your personnel file up to and including, discharge, depending upon the gravity of the offense and the surrounding circumstances. A repetition of minor offenses may be grounds for severe disciplinary action.

* * *

3. Reporting or attempting to report for work under the influence of liquor, narcotics or controlled substances, or attempting or bringing these items on company property.

* * *

7. Bringing or attempting to bring onto company property or having in your possession or control on company property: weapons, cameras, gambling devices or equipment, drug or narcotic paraphernalia.

* * *

*Id.* at 3932.
1502. *Id.*
1503. *Id.*
1504. *Id.*
Drug Testing

ing or in possession of smoking material. A search of the locker room and adjoining shower also uncovered no cigarette ashes or stubs.

Suspicious that the three employees smoked marijuana in the locker room, the supervisor summoned a member of Plant Protection and a Labor Relations representative as well as the three employees to the locker room to conduct a search of the employees' lockers. The lockers were searched with each employee's consent, uncovering nothing suspicious except a package of cigarette wrapping papers in H's locker.

The employees were then escorted to the Company's Medical Department where they were questioned and tested without protest. As part of the testing, each employee submitted a urine sample for urinalysis, for which they signed consent forms. At the conclusion of the physical exam, each employee was determined to be in satisfactory condition with respect to orderliness, understanding, breath, speech, balance, walking, turning and finger-to-nose and coin tests. Nothing unusual was observed concerning any of the three employees, and the Company's Medical Department physician specifically found that the employees were suitable for work and authorized their release to return to their positions. During the rest of their shifts, each employee performed his work in a normal manner, demonstrating no unusual behavior.

One laboratory reported that the chromatography tests for R and H returned negative results while W's report indicated that his urine tested positive for cocaine. Another testing laboratory reported that each employee's urine sample tested positive for "more

1505. Id.
1506. Id. at 3932-33.
1507. Id. at 3933.
1508. Id. The kind of papers which are used to "roll your own cigarettes," but also useable for marijuana cigarettes. The arbitrator noted that the evidence presented failed to show that any papers from this package had ever been used to roll a marijuana cigarette, and that the package had been used for anything but rolling ordinary tobacco cigarettes. Id.
1509. Id.
1510. Id.
1511. Id.
1512. Id.
1513. Id. The Chromatography Laboratory of Flushing, N.Y., reported all chromatography tests negative except for W, whose report returned positive for cocaine. Id.
1514. Id. The Consolidated Medical Laboratories of Wichita, Kansas, reported the presence of "more than 250" nanograms of THC, the active ingredient in marijuana, in each employee's urine sample. Id.
than 250” nanograms of THC, but the reports also indicated that the test results were not conclusive on the presence of THC in any of the samples.1515

At the arbitration hearings, employees R and H admitted to smoking marijuana outside the plant on the night preceding the August 29, 1979, incident.1516 W admitted at arbitration that on the evening of August 28, 1979, beginning at approximately 11:30 p.m. and lasting until approximately 3:30 a.m. on August 29, 1979, he attended a party at which he took turns smoking marijuana cigarettes laced with cocaine.1517

Based on the supervisor’s statements that he smelled marijuana smoke in the employee locker room when the grievants had been there, management initially suspended the employees subject to possible further discipline.1518 Several days later after the Company received the urine test results, a hearing was held for all three employees following which the employees were discharged.1519 Each discharge was based on the Company's conclusion, despite the denials of each employee, that the employees smoked marijuana at the plant on August 29, 1979, or were under the influence of drugs at the plant on that date.1520 The employees were discharged on September 21, 1979, by letter.1521 Each employee filed a grievance protesting their discharge.1522

Focusing on the “under the influence” language of Rule 3, the arbitrator found that the evidence presented by the Company; namely, that each employee had used illegal drugs the night before or a number of hours before reporting for work, failed to prove that any of the three employees was “under the influence” of such drugs while “reporting or attempting to report” to work for their shift on August 29, 1979 in violation of Rule 3.1523 Observing that the evidence presented by the grievants demonstrated that the effect of drugs varied based on the physical and emotional makeup

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1515. *Id.* The reports contained the following disclaimer:

There is a compound(s) in the sample submitted that reacts with an antisera made to [THC]. Since unknown cross-reacting compounds may do this, this assay may not truly indicate the presence of [THC] in the sample.

*Id.*

1516. *Id.*

1517. *Id.*

1518. *Id.*

1519. *Id.*

1520. *Id.*

1521. *Id.*

1522. *Id.*

1523. *Id.*
Drug Testing

of the individual as well as the quantity and quality of the drug used, the arbitrator found that two individuals could use the same quantity and quality of drug and manifest very different results. Arbitrator Kates then declared:

In my opinion, the phrase "under the influence," as used in Plant Rule 3, requires evidence of an adverse effect of the drug upon the employee. None was shown in this case as to any of the three grievants. They were permitted by the plant doctor to work their scheduled turn on August 29th, without evidence of abnormality, fault or deficiency of any kind then or thereafter while at work.

Even assuming that the foreman did smell marijuana in the employee locker room, the arbitrator determined that the Company's evidence failed to establish that the grievants, and not someone else, were responsible for the odor. The arbitrator refused to adopt the Company's expert view that any measurable amount of a drug in an individual's system indicated that the individual was "in one way or another" under the influence of the drug, characterizing the expert's opinion as "eloquent" but "manifestly hedged by stated uncertainties." Moreover, added Arbitrator Kates, the opinion of the Company's expert paled in the face of the testimony of the Union's expert and the documentary evidence presented by the Union, thereby rendering the statement of the Company's expert of little significance in judging whether, in fact, the grieving employees were "under the influence" of drugs on August 29, 1979.

The umpire emphasized that the plant rules did not proscribe reporting for work within a specified period of time after using an illicit drug or at a time when previous use could be detected by a

1524. Id. at 3933-34. The arbitrator explained:
The evidence indicates that the effect of drugs varies, not only with time of use and with the quantity and quality of that drug, but also with the physical and emotional attributes of each individual involved. What may create risk from one individual's use of a drug at a certain time may create no risk with respect to another's use of the same quantity and quality of that drug at the same time.

Id.

1525. Id.

1526. Id.

1527. Id. The arbitrator quoted the Company’s expert as follows:
... So far as I am concerned, if there is a measurable amount of any exogenous substance which may cause psychoactive effects in an individual’s system, I would say they are, one way or another, under the influence of that drug. [Emphasis added by arbitrator.]

Id. (quoting Company’s outside expert, Dr. “S.”).

1528. Id.
laboratory test of urine or other samples obtained.\textsuperscript{1529} Additionally, the plant rules did not assert a rebuttable presumption of being "under the influence" within any particular time after use of a particular drug or drugs or if a laboratory test result indicated the presence of a drug in an employee's system.\textsuperscript{1530}

Declining to construe the latter phrase of Rule 3, "attempting or bringing these items on company property," to include the "mere existence of a vestige of a drug" in the employee's body as a result of some prior use, the arbitrator rejected the Company's argument that the employees violated that portion of the rule.\textsuperscript{1531} As to Rule 7, the umpire also found the evidence insufficient to establish a violation by any of the three employees.\textsuperscript{1532} Arbitrator Kates explained that grievant H's mere possession of cigarette papers which could be used for rolling tobacco cigarettes as well as for rolling marijuana cigarettes was, standing alone, insufficient to show a violation of Rule 7.\textsuperscript{1533}

Rejecting the argument by the Company in its post-hearing brief which emphasized the difficulty of proving that an employee was "under the influence" of a prohibited drug while at work, the arbitrator admonished, "[d]ifficulty of proof . . . does not substitute for actual proof, and does not in itself warrant discharge of a suspected employee."\textsuperscript{1534} The arbitrator dismissed as meritless the Company's argument that the circumstantial evidence presented was sufficient to create a reasonable suspicion that the employees were "under the influence" of drugs while on duty, and it was upon this reasonable suspicion that the Company acted. The arbitrator declared:

\begin{quote}
[To] justify discipline of an employee and especially discharge, more than a reasonable suspicion is necessary. Actual proof must establish guilt. In some cases circumstantial evidence alone may constitute sufficient proof; but it must be strong enough to establish the employee's commission of the offense. If the evidence presented, circumstantial and otherwise, is consistent with innocence, even though also consistent with guilt, it does not suffice to establish guilt.\textsuperscript{1535}
\end{quote}

The Company also argued that the rules against being under the

\begin{footnotes}
\item 1529. \textit{Id.} See \textit{supra} note 1502 for text of plant rules in question in the case.
\item 1530. \textit{Id.}
\item 1531. \textit{Id.} at 3934.
\item 1532. \textit{Id.}
\item 1533. \textit{Id.}
\item 1534. \textit{Id.}
\item 1535. \textit{Id.}
\end{footnotes}
influence of drugs on Company property and against possessing drugs on Company property contained a prohibition against having residues of previous drug use in an employee's system while at work.\textsuperscript{1536} However, the umpire found the argument to be based on "mere assumptions" and determined that Rule 3 could not logically or properly be construed by "mere inference or assumption" to cover such circumstances.\textsuperscript{1537}

Based on the testimony of the experts, the disclaimer on both the results returned by the laboratory reporting the presence of marijuana in the employees' urine specimens and the chromatography result indicating the positive result for cocaine in H's urine, Arbitrator Kates found that the Company failed to produce sufficient evidence to show employees R, H and W guilty of the drug charges for which they were discharged.\textsuperscript{1538} Thus, the employees were entitled to reinstatement to their previous jobs without loss or interruption of seniority.\textsuperscript{1539}

b. \textit{American Standard}

Arbitrator Jonas B. Katz, in \textit{American Standard},\textsuperscript{1540} held that an employer properly discharged an employee for repeatedly refusing a request to submit to a urine screen under a work rule prohibiting employees from being under the influence of drugs while on duty\textsuperscript{1541} after she was observed to be unsteady, staggering, swaying, disoriented, and to have glassy eyes and slurred speech.

American Standard manufactured hydraulic and pneumatic fluid power control devices, primarily cylinders and valves, which the arbitrator acknowledged involved the use of hazardous machinery and materials.\textsuperscript{1542} The grievant was hired by the company in 1974, but her employment history was marked by several extended leaves of absence as a result of medical problems complicated by the use of barbituates and other prescription medicines.\textsuperscript{1543} Following her most recent leave of absence, June 17, 1980, through March 30, 1981, the grievant returned to work on March 23, 1981,
under the Company doctor's authorization.\textsuperscript{1544}

On the first day of her return to work, the grievant experienced difficulty parking her automobile and asked the Union Steward to park the car for her.\textsuperscript{1545} Although this was shown at the hearing not to be unusual for the grievant, who was not a skilled driver, the Union Steward who parked her car noticed the grievant's disoriented and confused condition and became concerned.\textsuperscript{1546} The Union Steward reported the grievant's condition to his superior and requested to meet with the Chief Union Steward.\textsuperscript{1547}

The grievant continued into the plant, clocked in and went to the cafeteria for a cup of coffee before going to her work station.\textsuperscript{1548} As she was going to her work station, the grievant was observed wobbling and staggering down the aisle by several individuals.\textsuperscript{1549} Based upon these observations by Company personnel plus the reported concern of the Union Steward, the grievant was removed from her work station and taken to the nurse's station.\textsuperscript{1550}

The grievant, along with two union stewards and a foreman, waited at the first-aid station for nearly an hour until the Manager of Industrial Relations, Warren Roost, arrived.\textsuperscript{1551} During this period, the grievant's speech was observed as slow and slurred.\textsuperscript{1552} Roost, after conferring with the union stewards and the foreman, asked the grievant about her medical condition.\textsuperscript{1553} Stating she was not ill, the grievant denied taking any medication except aspirin for headaches.\textsuperscript{1554} At that point, the grievant was advised that, based upon the observation of her condition by several witnesses, she had been removed from her position for being suspected of being under the influence of drugs.\textsuperscript{1555}

The Company believed that her condition appeared similar to

\textsuperscript{1544} Id. The Company doctor expressed concern over the grievant's use and dependence upon barbituate drugs to relieve her medical problems. Finally, she was authorized to return to work on March 23, 1981. Id.

\textsuperscript{1545} Id. She received help from Union Steward Cole.

\textsuperscript{1546} Id.

\textsuperscript{1547} Id.

\textsuperscript{1548} Id. at 1087.

\textsuperscript{1549} Id.

\textsuperscript{1550} Id. Among the observers of the grievant's condition on her way to the work station were Foreman Owens and Supervisor Gaines.

\textsuperscript{1551} Id. The grievant, Union Stewards Cole and Wardle, and Foreman Owens were present at the first aid station. Id.

\textsuperscript{1552} Id.

\textsuperscript{1553} Id.

\textsuperscript{1554} Id.

\textsuperscript{1555} Id.
previous incidents in which she had been placed on a medical leave of absence.\textsuperscript{1556} This belief, along with the Company doctor’s prior warning that the grievant might experience a recurring drug problem, led the Manager of Industrial Relations to request the grievant to take a urinalysis test for drugs.\textsuperscript{1557} Despite repeated requests and warnings that her refusal could result in disciplinary action including her discharge, the grievant adamantly refused to submit to the test; she was subsequently suspended pending further investigation.\textsuperscript{1558} After further investigation, the Company decided to discharge the grievant on March 25, 1981 based upon her past drug problems, her condition on March 24, 1981, and her refusal to take the drug screen test.\textsuperscript{1559}

At the arbitration hearing, the Union’s argument was three fold. First, the Union argued that the grievant was not aware that her refusal to take the drug screen would subject her to discharge.\textsuperscript{1560} Second, the Union argued that there was no evidence that she was intoxicated or under the influence of drugs.\textsuperscript{1561} Finally, the Union argued that the company had not previously applied its insubordination rule in similar circumstances and that doing so in the instant case constituted harassment.\textsuperscript{1562}

The Company countered that the work rules and the collective bargaining agreement between the Company and the Union authorized it to discharge any employee reasonably suspected of being under the influence of drugs when accused thereof refused to undergo a drug screen test.\textsuperscript{1563} In support of its position, the Com-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1556} Id.; see also supra note 1545.
\item \textsuperscript{1557} Id.
\item \textsuperscript{1558} Id.
\item \textsuperscript{1559} Id.
\item \textsuperscript{1560} Id. at 1086.
\item \textsuperscript{1561} Id.
\item \textsuperscript{1562} Id.
\item \textsuperscript{1563} Id. The Management’s Rights Clause of the collective bargaining agreement was set forth in Article 5 as follows:
\begin{quote}
ARTICLE 5 MANAGEMENT PREROGATIVES
a. The operation and management of the plant covered by this Agreement and the supervision and direction of the working forces therein are, and shall continue to be, solely and exclusively the functions and prerogatives of the management of the Company. . . . The Company shall also have the right from time to time to make such reasonable shop rules and change, abolish or modify existing shop rules as it may from time to time deem necessary or advisable, unless expressly prohibited from doing so by some explicit provision of this Agreement, and the right to suspend, discharge or otherwise discipline an employee for violation of such rules or for proper and just cause.
\end{quote}
\end{enumerate}
\end{footnotesize}
pany pointed to Work Rule 2, which prohibited employees from being under the influence of drugs while at work, Article 14, Section 2 of the agreement which permitted discharge without warning for insubordination or the use of drugs and Article 18, Section 1c, which permitted the Company to require a medical examination to determine whether an employee was fit for employment.

After receiving all of the evidence offered, the arbitrator concluded that on March 24, 1981, the grievant's demeanor was sufficiently unusual to warrant an inference that she was under the influence of drugs.\(^{1566}\) Arbitrator Katz then turned to a consideration of the Union's arguments.\(^{1569}\) Addressing the Union's contention that the grievant did not consume any narcotics or intoxicating liquors or hallucinatory drugs, the arbitrator pointed out that Work

\(^{1564}\) Id. The introduction to the Work Rules including Work Rule 2 provided:

The following company rules apply to all employees and will be enforced throughout the plant. Violation of any one of these rules will subject an employee to discipline up to and including discharge, dependent on the circumstances of the action by the employee.

* * *

2. Consume or in any respect be under the influence of or have in his possession narcotics, intoxicating liquors or hallucinatory drugs while at work or on Company property.

* * *

Id.

\(^{1565}\) Id. Article 14, Section 2a of the collective bargaining agreement provided:

ARTICLE 14 DISCIPLINE

Section 2 — Warnings Required

a. The Company shall not discipline an employee without just cause and shall give adequate warning notice before an employee is suspended or discharged, except that no warning notice need be given to any employee before he is discharged or suspended if the cause of such discharge or suspension is dishonesty, drunkenness, drinking on Company premises, insubordination or refusal to obey reasonable orders, recklessness which might result in serious accident while on the job, assault and battery on any employee, or the use of hallucinatory drugs.

Id. [Emphasis added.] Note, isn't it curious that the rule has used the word "hallucinatory." Might this be a source of trouble for the employer later, faced with an arbitrator who wants to interpret the section narrowly. See infra text accompanying notes 1844-47.

\(^{1566}\) Id. Article 18, Section 1c of the collective bargaining agreement provided:

ARTICLE 18 HEALTH, SAFETY AND SANITATION

Section 1 — Physical Examinations

c. The Company may require a medical examination of an employee at the time of his recall from layoff or return from any type of leave of absence or at any time during his employment for the purpose of determining whether or not he is fit for his employment.

Id.

\(^{1567}\) See supra note 1567.

\(^{1568}\) 77 Lab. Arb. (BNA) at 1087.

\(^{1569}\) See infra notes 1571-83 and accompanying text.
Rule 2 prohibited employees from being under the influence of drugs, and, given the grievant’s work history and the observations of the witnesses, the arbitrator concluded that it was reasonable for the Company to believe that the grievant was under the influence of drugs on March 24, 1981. In support of his conclusion, Arbitrator Katz cited the words of Arbitrator Donald B. Leach in *Structural Plastics Corporation*:

> It is not necessary for the ordinary observer to see someone in the act of drinking before he can deduce drunkenness, for example. By the same token, a similar conclusion can be reached respecting drug symptoms whether or not an individual is observed in the act of ingesting them in some manner.

Based upon its observations and prior experience, the Company believed the grievant was under the influence of drugs and requested that she take the drug screen test.

The Union then urged that, insofar as the grievant had just had a complete physical examination by the Company doctor one week prior to the March 24th incident, it was unfair to ask her to submit to another one. This contention, stated the arbitrator, was belied by the observations of the grievant on the day of the incident. Pointing to the language of Article 18, Section 1C, the arbitrator found that the agreement language gave the Company the right to require a physical exam of any employee, at any time, to determine the employee’s fitness for work, provided the Company had a reasonable basis for making the request. Finding the test request justified, Arbitrator Katz observed that an exam one week earlier would not have been conclusive of whether the grievant was under the influence of drugs on March 24th.

Turning to the Union’s third contention that the grievant was not aware that her refusal to take the test would result in her dis-

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1570. 77 Lab. Arb. (BNA) at 1087.
1571. Id.
1572. Id. at 1087.
1573. Id.
1574. Id. See supra notes 1547-53 and accompanying text.
1575. Id. at 1087. See supra note 1567 for text of Article 18, Section 1c.
1576. Id. Arbitrator Katz added:

> Further, since the purpose of the drug screen test is to confirm whether or not an employee is under the influence, it can work to the benefit of an employee who is, in fact, not under the influence. In effect, then, the grievant would have had an opportunity to be cleared if she were actually not under the influence. Clearly, all parties are better served by obtaining medical verification of a suspected condition.

*Id.* at 1087-88.
charge, the arbitrator found it meritless for several reasons.\footnote{1577} First, the Company produced evidence of at least three prior occasions when employees were discharged for being under the influence of alcohol or drugs and/or refusing to take the medical test.\footnote{1578} Second, the work rules were posted throughout the plant and each employee was given a personal copy. Finally, at the time of her refusal to take the test, the grievant was repeatedly warned of the potential circumstances.\footnote{1579} Thus, concluded the arbitrator, the grievant's refusal to take the test was direct insubordination, which under all of the circumstances, warranted dismissal under Work Rule 4 and Article 14, Section 2a of the collective bargaining agreement.\footnote{1580}

Arbitrator Katz dismissed the Union's argument that the grievant never consumed alcohol and took only prescription medication, holding that in light of the grievant's unsteady, staggering, swaying and disoriented condition on March 24th, accompanied by her glassy eyes and slurred speech, it was reasonable for the Company to conclude that she was under the influence of drugs, whether prescriptive or not.\footnote{1581}

The arbitrator rejected the Union's final argument that the Company was harassing the grievant as not supported by the evi-
dence, pointing to the extensive and numerous leaves of absence granted the grievant by the Company in order for her to resolve her problems: "[t]he Company demonstrated its willingness to cooperate with the grievant to the limits of reasonableness."\footnote{1582} Based upon the condition of the grievant on March 24, 1981, and her repeated refusals to undergo the drug screen test, the arbitrator held that the Company was fully justified for discharging the grievant and denied the grievance.\footnote{1583}

c. Pacific Gas and Electric Company

In another discharge grievance for refusal to take a urinalysis test, Arbitrator Adolph M. Koven held in \textit{Pacific Gas and Electric Company}\footnote{1584} that the employee was improperly discharged.\footnote{1585} The grievant was a general construction field garage mechanic who was employed by the Company for fourteen years at the time he was fired in November, 1984 for failing to follow instructions to submit to a urinalysis test to determine whether he was under the influence of drugs or intoxicants.\footnote{1586}

As a field mechanic, the grievant repaired heavy construction equipment; he worked in the field prior to 1984 and inside thereafter.\footnote{1587} He was discharged, however, in 1980 for cocaine use.\footnote{1588} The grievant filed a grievance which was subsequently settled by reinstatement of the grievant and the reduction of the termination to a five-day suspension.\footnote{1589} This settlement was conditioned on, among other things, the grievant agreeing to "provide acceptable medical evidence in the form of an examination by a qualified professional at Company expense, that he had discontinued his admitted past use of intoxicating drugs"\footnote{1590} and to cooperate in the future with counselors of the Employee Assistance Program to ensure that he was maintaining a "drug free" program.\footnote{1591} After demonstrating that he had maintained a drug-free environment for a one-year period, the grievant was to be released with the remain-
ing requirement of attending with the EAP.\textsuperscript{1592} The settlement agreement provided further that:

Following grievant’s return to work with the Company, the grievant will be required to perform satisfactorily as an Equipment Mechanic without any drug-related employment problem. It is understood that a future discipline or discharge action for the use of an illegal narcotic or prescription drug, except as prescribed by a licensed physician on the job because of its effect on job performance, will not be grievable, except as to whether the future drug-related incident occurred.\textsuperscript{1593}

In October, 1984, the grievant was experiencing personal problems which were placing him under considerable stress.\textsuperscript{1594} As a result, the grievant requested and was given a two-week medical leave of absence.\textsuperscript{1595} The grievant was also granted his request to be transferred from field duty to a position inside the garage.\textsuperscript{1596} He was due in to work at 7 a.m. on November 5, 1984, but he called the Company, said he was ill and that he was going to see a doctor and would be in at 10 a.m.\textsuperscript{1597} The grievant did not appear at work later that day and did not call off.\textsuperscript{1598} He later explained that he had fallen asleep and did not awake until 8 p.m. that night.\textsuperscript{1599}

When the grievant reported for work on November 8th, the Assistant Superintendent drove to the garage where the grievant worked after being informed that the grievant had not appeared for work on the previous work day.\textsuperscript{1600} The Assistant Superintendent claimed that the grievant’s speech was slurred, his eye movement was slow, his balance was unstable, and he was answering questions in an abnormal manner.\textsuperscript{1601} The Assistant Superintendent also observed that while the grievant was normally neat and clean shaven, he was not on that day.\textsuperscript{1602} Conflicting testimony on grievant’s behalf by a working foreman indicated that, although the grievant looked ill, he was not unstable and his speech was not

\begin{flushleft}
1592. \textit{Id.}
1593. \textit{Id.} at 195.
1594. \textit{Id.}
1595. \textit{Id.}
1596. \textit{Id.}
1597. \textit{Id.}
1598. \textit{Id.}
1599. \textit{Id.}
1600. \textit{Id.}
1601. \textit{Id.}
1602. \textit{Id.} The Assistant Superintendent’s testimony was corroborated by two other supervisors present at the meeting on November 8th. \textit{Id.}
\end{flushleft}
slurred.\textsuperscript{1603}

The Assistant Superintendent determined that the grievant might have been under the influence of drugs and was unable to perform his duties, whereupon he instructed the grievant to report to the Company doctor's office for tests to ascertain whether the grievant had taken drugs.\textsuperscript{1604} The grievant inquired as to the nature of the tests to be administered, expressing concern over the use of urinalysis,\textsuperscript{1605} to which the Assistant Superintendent gave no definitive response.\textsuperscript{1606} When he was ordered to submit to the medical tests by November 9th, he was also warned that failure to take the test would result in his termination.\textsuperscript{1607} The grievant failed to report for the tests and was subsequently terminated.\textsuperscript{1608}

The central question before the arbitrator in this grievance was whether the grievant agreed as a condition of his reinstatement in 1980 to submit to drug tests requested by Company personnel.\textsuperscript{1609} In justifying such a requirement, the Company not only relied on the settlement agreement but also the grievant's testimony at the hearing that a condition of his return to work in 1980 was “seeing a doctor on Company request.”\textsuperscript{1610} The arbitrator found that “[t]his statement [was] obviously too general to justify a conclusion that the grievant understood the settlement agreement as requiring that he submit to examinations for drugs at Company request for an indefinite period.”\textsuperscript{1611}

Construing the language of the text of the settlement agreement, the arbitrator concluded that, in fact, no such requirement was

\textsuperscript{1603} Id.
\textsuperscript{1604} Id.
\textsuperscript{1605} Id. The grievant said there were several types of tests, and that he wanted to know what type would be administered before he agreed to take it, and that he wanted to receive the results of the tests at the same time as the Company received them. The grievant testified that he was sick with the flu on November 5th and 8th. He refused to submit to the test for drugs except under the conditions he listed at the November 8th meeting because he wanted to assure that the tests would not be “manipulated” as they had been in 1980, when they at first were negative for drugs and later returned a positive result. Id.
\textsuperscript{1606} Id.
\textsuperscript{1607} Id.
\textsuperscript{1608} Id.
\textsuperscript{1609} Id. The Company attempted to introduce evidence that the grievant was arrested for drug possession in December 1984. However, the arbitrator admitted the evidence conditionally, pending the resolution of the more fundamental question of whether the Company had the right to require the grievant to submit to the medical tests. Id. See infra note 1616.
\textsuperscript{1610} Id. at 196.
\textsuperscript{1611} Id.
contained in the settlement agreement.\textsuperscript{1612} The agreement provided that before the grievant returned to work he would be required to submit to a medical exam.\textsuperscript{1613} It did not, held Arbitrator Koven, require the grievant to submit to drug testing at the request of the Company in perpetuity.\textsuperscript{1614} Moreover, the Company's claim that maintaining "a drug-free lifestyle" following reinstatement was a condition of the grievant's reinstatement and continued employment had no basis in the settlement agreement.\textsuperscript{1615} Arbitrator Koven concluded:

[i]n short, since the grievant was discharged for his refusal to take a test to determine if he was under the influence of drugs, he did not agree to take such a test in the 1980 settlement agreement, and the Company does not claim that it was entitled to compel him to take such a test aside from his alleged agreement to do so, the discharge cannot be upheld.\textsuperscript{1616}

d. Gem City Chemicals, Incorporated

Arbitrator Marian K. Warn's decision in \textit{Gem City Chemicals, Incorporated}\textsuperscript{1617} demonstrates the need to have a clearly defined drug testing policy and the reluctance of arbitrators to permit em-

\begin{itemize}
\item \textsuperscript{1612} \textit{Id.}\n\item \textsuperscript{1613} \textit{Id.}\n\item \textsuperscript{1614} \textit{Id.}\n\item \textsuperscript{1615} \textit{Id.} Based on his determination that the settlement agreement did not provide the Company with the right to require the medical tests, the arbitrator did not admit the evidence of the grievant's arrest in December, 1984, despite several arguments by the Company. \textit{Id.} at 196-97.
\item \textsuperscript{1616} \textit{Id.} at 197. As a remedy, however, the arbitrator held that the grievant was entitled to reinstatement but without back pay or other benefits.
\item Arbitrator Koven explained:
\begin{quote}
Clearly, he bears considerable responsibility for the events which led to his discharge. He failed to report to work at the beginning of his shift at 7 a.m. on November 5 and also failed to report at 10 a.m. after he promised to come in at that hour following a visit to a doctor. His statement that he fell asleep and did not awaken until 8 p.m. on that day did not justify his failure to appear any more than it would have justified an employee who was late for work. The grievant's appearance and demeanor on November 8, when viewed in the light of his prior history of drug use, justified the Company in concluding that he might be under the influence of drugs and in requesting that he submit to a test to determine whether he had been taking drugs. Although his refuse of the request did not justify the discharge, the grievant's conduct in failing to report to work as promised on November 5 generated the events which led to his discharge.
\end{quote}
\item \textsuperscript{1617} 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.).
\end{itemize}
Employers to screen their employees for drugs under the auspices of a more general health and safety program and discharge employees who refuse to submit to such testing.

The Company unilaterally implemented a drug screening policy for its employees under Article 18 of the collective bargaining agreement between the Company and the Union which concerned physical exams for industrial-related disease. Prior to the scheduled medical exams, the Union Steward was informed that the examinations would include a drug screen. The grievant confronted his supervisor the evening before the test and indicated that he would refuse to take the drug screen the following morning, despite warnings that his refusal to follow the order would be insubordination subject to discipline. Refusing several opportunities to take the test the following day, the grievant was subsequently discharged; he then filed a grievance.

After dismissing the Company's initial argument that the grievance was not arbitrable because the provisions of the grievance procedure had not been complied with, the arbitrator turned to the seminal issue of whether the grievant had been discharged for

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1618. Article 18, Section 12.02 provided:

Article XVIII Safety.

18.02. The Employer agrees to pay the cost for each employee to have an industrial physical examination and chest x-rays every eighteen (18) months. The examination will be conducted by a physician chosen by the Employer.

Id.

The applicable contractual provisions relating to discharge of bargaining unit employees identified by the arbitrator were:

Article XII Discharge.

12.01. The Employer shall not discharge or suspend any employee without just cause. No employee shall be discharged without first having a hearing at which a Union Steward shall be present. No employee shall be suspended or discharged for absenteeism or other misconduct of similar degree of seriousness unless he has received two (2) written warning notices within the previous nine (9) month period. A copy of all warning notices shall be given to the employee involved and a copy thereof mailed to the Local Union.

12.03. Any disciplinary action must be taken within ten (10) days of the date the Company becomes aware of a violation.

Id.

1619. Id. at 1024.

1620. Id.

1621. Id.

1622. Id. The arbitrator found that the testimony indicated that the grievant confronted his supervisor with his intended refusal the evening before the scheduled test, at which time attempts were made to resolve the situation to no avail. Although the grievant did not contact the Union Steward, he did contact the Business Agent to discuss his position. The grievance was timely filed. This course of conduct substantially complied with the established grievance procedure, rendering the grievance procedure arbitrable. Id.
"just cause." At the outset of his decision, Arbitrator Warns noted that the Company was engaged in the business of repackaging and distributing chemicals, many of which were hazardous and produced hazardous waste. Employees were exposed to the toxic chemicals which were capable of causing serious physical effects and injury. The current collective bargaining agreement between the Company and the Union included, for the first time, a contractual clause providing for the physical examination of employees, at Company expense, for purposes of detecting any harmful effects due to handling the hazardous chemical products. The provision was requested by the Union as a safety measure for the employees.

The Union argued that the grievant's discharge for insubordination was unsound because the grievant was not required to follow an order relating to working conditions or general safety that added a drug testing procedure which had not been duly bargained for. The decision to test this grievant or any of the employees, observed Arbitrator Warns, was not based on any unfavorable observations of performance or probable cause, or any cause, to assume that the grievant was taking drugs. Arbitrator Warns pointed to the testimony of the General Manager, who characterized the decision to test for drugs as a measure which was influenced by the need for careful and safe performance on the part of the employees handling toxic chemicals as support for his observation. Thus, the drug testing procedure as implemented was not based on any individualized suspicion or cause to believe that an employee was under the influence of illegal or intoxicating substances.

The arbitrator next noted that, although a contractual provision existed prohibiting employees from possessing or being under the influence of intoxicating substances, there was no published rule that employees would be tested, as a group or randomly, for probable cause or otherwise pursuant to the provision of the contract.
Moreover, the Company produced no evidence that deteriorated situations at the plant led Management to the conclusion that accidents or poor performance were attributable to the use of drugs on or off the job. Despite the Company's proffer of the grievant's prior disciplinary infractions, including several warnings for absenteeism and verbal abuse, the arbitrator found that the Company did not demonstrate that the grievant's behavior was unusual, unsafe, uncoordinated, or in any way indicative of possible drug addiction.

At the hearing, the Company stressed that the grievant was insubordinate by failing to follow the order to take the drug screen along with the rest of the physical exam. Arbisor Warns instructed, however, that "insubordination is the unwarranted refusal to follow a reasonable work order or," in other words, "a challenge to Management which results in disruption on the work floor, or demunition of Management status." Thus, a discharge for insubordination must necessarily have been based on the issuance of a reasonable work order or violation of a posted work rule. The arbitrator framed the issue, in the grievance under consideration, as whether the contractual provision in Section 18.02 reflected the expectation that Management could add a drug screen to the usual physical examination under the umbrella of that language or, in the alternative, whether Management could unilaterally, and without prior notice, establish a rule requiring such a drug screen.

Examining the language of Section 18.02, the arbitrator held that "the clear meaning of the examination was to determine if there were any deleterious effects on any employee as a result of handling toxic chemicals." Arbisor Warns observed that the provision pertaining to the examination and its purpose were the result of negotiations driven by a clear concern for the welfare of the employees working with the hazardous toxic chemicals.

Even assuming arguendo that Management's characterization of the drug test as a safety measure was valid, stated the arbitrator, it was precluded from unilaterally implementing such a test since

1633. Id.
1634. Id. at 1024-25.
1635. Id. at 1625.
1636. Id.
1637. Id.
1638. Id.
1639. Id.
1640. Id.
mutual negotiations on safety measures were closed, and bargaining was required for additional measures to be implemented.\textsuperscript{1641} Thus, notice to the Union and subsequent negotiations should have occurred prior to the addition of the drug screen to the employee exam regimen, not after.\textsuperscript{1642} Therefore, the unilateral decision to order the drug screen as a safety measure along with the regular examination was improper and the employee could not be disciplined for refusing to follow such an order.\textsuperscript{1643}

The Company argued in the alternative that it was merely exercising its management prerogative under the agreement’s Management Rights Clause to implement such a program, pointing to the contractual work rule which prohibited “intoxication . . . or use of illegal drugs on the job.”\textsuperscript{1644} Arbitrator Warns pointed out that, under this rule, probable cause was a prerequisite to Management’s right to request employees to submit to a urinalysis for suspected drug use.\textsuperscript{1645} Arbitrator Warns explained:

> Normally, employees are notified that if their performance is suspect, then a drug screen may be required. No such notice is given here, nor has there been a practice of administering drug screens. The requirement of such a test then is normally unequivocally related to performance on the job. Even under these circumstances, however, if used in connection with a provision such as 12.02, notice must be given ahead of time to employees that such a test will be required. Absent such notice, penalties for refusal could not be administered.\textsuperscript{1646}

With no express language in Section 12.02 that enabled Management to utilize drug tests, the arbitrator questioned Management’s inference of such a right, declaring:

> The difficulty involved in requiring all employees involuntarily to take a drug screen is that this is requiring employees to submit to a test and place their medical situation on record with the consequent possibility of incriminating themselves in terms of illegal drugs without probable cause on the job to suspect that any of the individuals are in fact taking drugs. Lacking such probable cause to suspect a particular individual, forcing them to take such a test is an invasion of privacy and an unwarranted requirement to furnish confidential medical information.\textsuperscript{1647}

\textsuperscript{1641} Id.
\textsuperscript{1642} Id.
\textsuperscript{1643} Id.
\textsuperscript{1644} Id.
\textsuperscript{1645} Id.
\textsuperscript{1646} Id.
\textsuperscript{1647} Id. The arbitrator drew an analogy to the decision in O’Brien v. Papa Gino’s of America, 121 L.R.R.M. 2321 (1986), where the employer assumed its right under a broad provision in an employment manual to test for employee drug use by using a polygraph test.
Arbitrator Warns added, "In essence, it is requiring the employee to incriminate himself without probable cause. It is also requiring the test as a condition of continued employment when no reason exists in the performance of the individual to place such a condition upon him." Under either characterization, advance notice that the test would be required and sound reasons for requiring individual employees to submit was necessary. Finding neither of these present, the arbitrator held that the order to take the test was unreasonable, and, therefore, the grievant could not be discharged for refusing to take the test since it "was a reasonable protest against an invasion of privacy." Arbitrator Warns awarded the grievant reinstatement to his former position with back pay and accrued benefits lost for the period of the discharge.

Roadway Express, Incorporated v. Teamsters, Local 705, AAA

In Roadway Express, Incorporated v. Teamsters Local 705, AAA Arbitrator Christine G. Cooper was faced with the issue of whether an employer could properly discharge an employee for "being under the influence of intoxicating drugs while on duty" based on observed disoriented behavior and a urine test positive for marijuana, in spite of the contention that the test did not demonstrate actual impairment of the truck driver. When the grievant, a tractor-trailer truck driver, appeared for work one Tuesday morning, his superintendent and the terminal manager observed his behavior, found it suspicious, and ordered the griev-
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ant to undergo a drug test. The test results were positive for marijuana and resulted in the truck driver's discharge. The parties were unable to resolve the discharge grievance and arbitration was invoked by the Union.

In support of its action, the Company made several arguments. First, the labor agreement allowed the Company to require its employees to undergo a test for drug usage, whenever there is probable cause to believe the employee is under the influence of drugs. Second, the drug test was reliable; the grievant was, according to the results of the test, under the influence of marijuana. Therefore, the grievant was discharged for just cause under the contract. This notwithstanding, the Company contended initially that the demand for arbitration was untimely, depriving the arbitrator of jurisdiction to resolve the drug issue.

The Union contended that the Company acted arbitrarily in requiring the test, that the test was unreliable, that the grievant was fit for work (i.e., not under the influence), and that the grievant should not have been discharged. Furthermore, insisted the Union, the issues were properly before the arbitrator. After resolving the issue of arbitrability in the Union's favor, the arbitrator proceeded to a consideration of the propriety of the grievant's discharge.

The grievant was a seasoned truck driver for the company who recently returned from several day's funeral leave for the unexpected death of his brother. The day after his return from the leave, the grievant reported to work at which time he was observed by his superintendent, who perceived the grievant to be uncoordinated and displaying uncharacteristic traits. The superinten-

1654. 87 Lab. Arb. at 225. See infra notes 1667-68, 71.
1655. Id.
1656. Id.
1657. Id.
1658. Id.
1659. Id.
1660. Id.
1661. Id.
1662. Id.
1663. Id.
1664. Id. The arbitrator's discussion of the arbitrability issue is found at 77 Lab. Arb. (BNA) at 225-27.
1665. Id. at 227.
1666. Id. (The grievant "had brushed up against a door").
1667. Id. (The grievant "was sullen and withdrawn rather than his normal gregarious self").
dent reported his observations to the assistant terminal manager, Ketch, who also observed the grievant and insisted that the superintendent continue to observe the truck driver. The superintendent next observed the grievant perform the pre-trip inspection, a safety routine that preceded each day’s drive. The superintendent considered the grievant to be disoriented, confused and “in slow motion” and suspected that he was under the influence of drugs or alcohol. These observations were relayed to the assistant terminal manager, who then decided to demand a drug test of the grievant.

The grievant was ordered to report to the office, requiring him to negotiate his truck the equivalent of a city block which the grievant did without incident. In the office, grievant was told by Ketch that there was reasonable cause to believe that grievant was under the influence of drugs or alcohol and that he was being ordered to submit to a drug screening test. In particular, Ketch mentioned that grievant had been acting confused and disoriented.

Expressing concern that the test might be unauthorized, the grievant telephoned his Union representative who informed him that the test could be required. The grievant signed the consent forms, expressing reluctance, and was then driven to a local hospital for urinalysis. The grievant was instructed not to report to work, pending the test results. The test results, confirmed by an independent hospital and signed by the toxicologist, indicated the presence of marijuana. Based upon this report, the grievant was notified of his discharge on July 17, 1985, effective July 16, for “being under the influence of intoxicating drugs while on duty. . . .” At the grievance hearing, grievant admitted to smoking two marijuana cigarettes over the weekend, but denied more recent use and vigorously insisted that his fitness for work was

1668. Id.
1669. Id.
1670. Id.
1671. Id.
1672. Id. at 228.
1673. Id.
1674. Id.
1675. Id.
1676. Id.
1677. Id.
1678. Id.
1679. Id.
1680. Id.
unimpaired.\footnote{1681}

Arbitrator Cooper began her discussion of the propriety of the grievant’s discharge by emphasizing that the case under consideration was not a case where the employer unilaterally instituted a drug testing program.\footnote{1682} Rather, this was a case in which the freely negotiated collective bargaining agreement provided for drug testing.\footnote{1683} Since this was not a case involving criminal proceedings, Arbitrator Cooper found that the case was inappropriate for borrowing criminal law concepts developed to protect against deprivations of liberty through the state criminal process,\footnote{1684} and; therefore, the Company was not required to prove that the grievant was under the influence of drugs beyond a reasonable doubt.\footnote{1685} Similarly, since the case did not involve acts of moral turpitude, the arbitrator found the arbitral doctrines designed to protect employee reputations from accusations of heinous offenses, such as child molesting, to be irrelevant.\footnote{1686}

The Company was merely required to prove by a preponderance of the evidence that the grievant was discharged for “just cause.”\footnote{1687} Acknowledging that the “clear and convincing” standard of proof was usually applied in discharge grievances, Arbitra-

\begin{footnotes}
\footnotetext{1681}{Id.}
\footnotetext{1682}{Id.}
\footnotetext{1683}{Id.}
\footnotetext{1684}{Id. at 228-29.}
\footnotetext{1685}{Id. at 229.}
\footnotetext{1686}{Id. at 229 (The recreational use of drugs is not considered deviant or immoral in modern American society).}
\footnotetext{1687}{Id.}
\footnotetext{But see U.S. Borax & Chemical Corp., 84 Lab. Arb. 32 (1984) (Richman, Arb.). Although U.S. Borax was a grievance involving a discharge for alleged sale of marijuana while on company premises, and not directly related to a drug testing related discharge, it demonstrates a different view of the competing values when determining the appropriate standard of proof. In U.S. Borax, Arbitrator Frederic N. Richman, declared:}
\footnotetext{As noted in the Company brief, this Arbitrator has previously held that, in a drug discharge case, the appropriate standard of proof is that of clear and convincing evidence. No lesser standard adequately serves where the effects of the discharge impact the grievant’s employability in the future. This, then, is the standard on which the issues hereunder shall be examined and weighed.}
\footnotetext{There is no question concerning the seriousness of the nature of the offense in this Arbitrator’s mind, and the Arbitrator is in complete sympathy with the Company’s diligent efforts to rid the plant of a dangerous practice which apparently had become rampant among employees. However, the extent of seriousness of the offense does not lessen or alter the individual employee’s contractual rights of job preservation of the Company’s burden of proving that this particular employee was in fact guilty of the violation of which he was charged, and was not merely swept up along with others in a broad stroke cleanup of the plant.}
\footnotetext{Id. at 35.}
\end{footnotes}
tor Cooper determined that public safety considerations demanded a lighter standard in the instant case. The arbitrator explained: "Where the consequences of retaining an impaired driver pose serious threats to human life, the employer bears a correspondingly lighter burden to show that the discharge was for just cause."

According to Arbitrator Cooper, the issue in the Roadway Express grievance was two-fold. First, what contractual standard was required for demanding employee submission to drug/alcohol testing? Second, what use did the contract permit to be made of positive drug test results? The Union advocated further that the issue was one of impairment and that there was no proof to a reasonable degree of certainty that the grievant was impaired on the day of the accident.

Turning to the first issue, the arbitrator observed that the contract between the Union and the Company contained no express standard that the employer was required to meet before demanding a drug test of an employee. Noting that the purpose of the drug testing clause was to provide for the public safety, to minimize employer liability for drug-related accidents, and to safeguard the legitimate interests of the employees, the arbitrator concluded that "it [was] beyond doubt that the demand for testing cannot be arbitrary, capricious, malicious, or discriminatory." At the other extreme, she observed,

\[\text{\ldots} \text{it cannot be seriously suggested that supervisors who suspect drug use be held to specialized knowledge on the effects of drugs, alcohol, and other mind-altering events. A driver superintendent or terminal manager is not a}\]

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1688. Id.
1689. Id.
1690. Id.
1691. Id. See infra notes 1694-1701 and accompanying text.
1692. 87 Lab. Arb. (BNA) at 229.
As part of its argument, the Union contended that the grievant had been denied "industrial due process," contending that the supervisor who demanded the test failed to detail for the grievant the behavioral predicates of the suspicion of drug use. Id. at 227. Dismissing this contention as meritless, the arbitrator declared:

The Union's claim of deprivation of industrial due process is simply without merit. Grievant knew why the test was being required, knew its purpose, and consulted with the Union. Since neither party has consulted with the Union. Since neither party has argued Weingarten rights, it is assumed that they were accorded Grievant.

Id. at 229 n.2.
See discussion of the second issue infra notes 1702-15 and accompanying text.
1693. Id.
1694. Id. at 228. The arbitrator expressly refrained from the issue of random drug testing on the apparent concession by the Company that it would not engage in such a testing program. Id. at 228 n.3.
forensic toxicologist. Thus, the contract cannot be read to allow drug testing only upon a showing of a reasonable scientific probability of drug impairment.\textsuperscript{1695}

Instead, the arbitrator held, the contract permitted the Company to demand an employee to undergo a drug/alcohol screening test whenever a responsible supervisor had an honest and reasonable suspicion that the employee was under the influence of alcohol or drugs.\textsuperscript{1696} Indeed, added Arbitrator Cooper, "any more stringent standard would obviate testing: If the supervisor must know that the employee is under the influence in order for testing to be required, there is little point in the testing."\textsuperscript{1697}

In the case under consideration, the arbitrator found that both the supervisor and the assistant terminal manager honestly believed that the grievant's behavior suggested possible drug impairment.\textsuperscript{1698} Furthermore, their subjective assessments of the grievant's disorientation, confusion, and personality change, notwithstanding his recent grief, and conclusion that the grievant was possibly drug impaired were reasonable along with the demand that the truck driver submit to a drug test.\textsuperscript{1699} Thus, concluded Arbitrator Cooper, "[i]n order to protect the Company, the public, and even the grievant, the assistant terminal manager required the grievant to submit to the drug screening test — all in accordance with the contractual provision on Discharge, Discipline and Medical Tests."\textsuperscript{1700}

Arbitrator Cooper next turned to a consideration of the contractually permissible uses to which the positive urinalysis results could be put.\textsuperscript{1701} Initially, the Arbitrator observed that the Union and the Company agreed in the labor contract that the Company had the right to demand drug testing and that the Company could discharge an employee for being "under the influence of drugs;" the contract, however, did not mandate a system of progressive discipline.\textsuperscript{1702} Therefore, whether the labor agreement permitted the Company to discharge the employee whose urine test returned positive for the presence of marijuana could be resolved only by

\textsuperscript{1695} 77 Lab. Arb. (BNA) at 228.
\textsuperscript{1696} Id.
\textsuperscript{1697} Id. Compare Thomas Steel Corp., 87 Lab. Arb. (BNA) 994 (1986) (Feldman, Arb.).
\textsuperscript{1698} Id.
\textsuperscript{1699} Id.
\textsuperscript{1700} Id.
\textsuperscript{1701} Id.
\textsuperscript{1702} Id.
interpretation of the contract.\textsuperscript{1703}

The Union urged that it was a scientific fact that the positive marijuana results in the case did not conclusively prove impairment or unfitness of the grievant to drive his truck.\textsuperscript{1704} Acknowledging the correctness of the Union’s statements concerning scientific certainty,\textsuperscript{1705} the arbitrator nevertheless rejected the Union’s contention that the controlling issue concerned impairment.\textsuperscript{1706} Pointing to Article 23, Section 15 of the collective bargaining agreement where it was said: “An Employee may be discharged for . . . being under the influence of drugs . . . . The Employer may request an Employee to take a medical test to determine whether he was under the influence of . . . drugs,”\textsuperscript{1707} Arbitrator Cooper held that the plain language of the clause stated that the sole purpose of the drug test was to determine whether the employee was under the influence of drugs.\textsuperscript{1708} Furthermore, if the medical testing determined that the employee was under the influence of drugs, the contract permitted discharge of the employee.\textsuperscript{1709}

Dismissing as untenable the Union’s argument that the inability of the urine screen results to prove with any scientific reliability drug impairment precluded their use to discharge the grievant for being under the influence of drugs, Arbitrator Cooper declared:

\textit{The contract} says the test results can be used to conclude that an employee is under the influence of drugs. . . . \textit{The Union is arguing that the Company can discharge an employee who tests positive for marijuana only upon further proof of impairment. But the Union’s expert has insisted that no such proof exists. . . . I cannot interpret the contract to authorize discharge only upon a type of proof that exceeds present scientific capabilities. Nor can I interpret the contract to require the Employer to hire a forensic

\textsuperscript{1703} Id. at 229-30.
\textsuperscript{1704} Id. at 230.
\textsuperscript{1705} Id.
\textsuperscript{1706} Id.
\textsuperscript{1707} Id. Article 23, Section 15 provided in its entirety:

\textbf{Article 23}

\textbf{Discharge, Discipline and Medical Tests}

Section 15. An Employee may be discharged for just cause which includes, but is not limited to, dishonesty, under the influence of intoxicating liquor or of drugs, carrying unauthorized passengers, or failure to report an accident. The Employer may request an Employee to take a medical test to determine whether he was under the influence of intoxicating liquor or drugs, and an Employee’s refusal to submit to such a test may be considered as a presumption that the Employee was under the influence.

\textit{Id.} at 228.

\textsuperscript{1708} Id. at 230.
\textsuperscript{1709} See supra note 1708 for text of the contractual provision.
Rather, explained the arbitrator, the intent of the parties to the labor agreement was more practical. Arbitrator Cooper found that the contract interpreted the phrase "under the influence of drugs" in the context of the trucking industry by stating that medical tests would determine whether the employee was "under the influence of drugs." Arbitrator Cooper proclaimed:

Indeed, the parties contracted wisely, inasmuch as there is a respectable, albeit not conclusive, body of scientific literature and medical opinion that marijuana use impairs driving ability. It appears that the parties to this collective bargaining agreement knew full well what they were bargaining about, struck a clear bargain, and the Company has acted accordingly.

Arbitrator Cooper denied the grievance, reaffirming the Company's authority under the collective bargaining agreement to demand a drug test whenever a responsible supervisor had an honest and reasonable suspicion that an employee was "under the influence of drugs or alcohol," and the Company's right to discharge an employee for being "under the influence of drugs" whenever scientifically acceptable test results indicated the presence of marijuana in the tested employee's system.

f. Union Oil Company of California v. International Union of Petroleum & Industrial Workers

In Union Oil Company of California v. International Union of Petroleum & Industrial Workers (UNOCAL) Arbitrator Leo Weiss, writing for the Board of Arbitration, held that the Company did not have "just cause" for suspending four employees who tested positive for illegal drug use as a result of off-duty use absent a published rule prohibiting mere presence of illegal drugs in an employee's system while on duty.

Union Oil of California produced and distributed petroleum...
products in the Southern California area. Some of its employees, including the grievant, were members of the collective bargaining unit represented by the named Union. The grievants were employees of the Company’s Field Department for the Southern District of California and served as field operators, utility men, and “roustabouts.” As part of their employment, they would operate trucks, pumps and radios, climb tanks to heights of twenty-four feet and perform various other tasks associated with the production and distribution of oil and gas. Additionally, the grievants often worked in remote areas which required the grievants to respond to a panoply of emergencies including fires, oil spills, mud slides and vehicular accidents and sometimes required them to administer first aid to injured fellow employees because professional medical care was not readily available.

During 1984 and 1985 several drug-related incidents occurred in the Field Department of the Southern District which resulted in the Company’s decision to conduct a general drug test of all persons found at two of its locations on a specific day including bargaining unit employees, supervisory employees and contractors. Approximately fifty-five people were tested on November 20, 1985. Ten individuals tested positive for drug use, which constituted eighteen percent of those tested. Two were independent contractors whose services were subsequently terminated, one was a non-bargaining unit employee who was discharged, and the remaining seven were bargaining-unit employees. The latter union employees were suspended without pay until such time as they demonstrated by a subsequent medical test that they were...

1718. Id. at 91.
1719. Id.
1720. Id. The Board did not define “roustabout.”
1721. Id.
1722. Id.
1723. In one instance, the Company discovered that a portion of its property was being used to grow a patch of marijuana plants. No person was identified as responsible, but Company officials destroyed the marijuana crop. On another occasion, the Company conducted a search of employees, their lockers and vehicles. No drugs were found, but drug paraphernalia was found. One employee was tested, with positive results for cocaine. Another employee was discharged after his bizarre behavior resulted in a positive cocaine test and admissions of longstanding drug and alcohol abuse. An employee, returning from medical leave, tested positive to a drug screen which was part of a routine medical examination. Another employee, likewise taking a routine medical examination, tested positive for marijuana. Id. at 91-92.
1724. Id. at 92.
1725. Id.
1726. Id.
All the employees were subsequently reinstated to their jobs under the condition that they were to remain drug-free. Four of those seven bargaining-unit employees, the grievants in the instant case, were suspended for approximately one week until a re-test proved negative, at which time they were reinstated. They asked to have the disciplinary actions removed from their personnel files and to be made whole for the losses of pay and benefits they suffered.

Arguing at the hearing that employee drug use posed an inherent safety risk in the work place, the Company contended that it was Company policy to create a drug-free work environment. In support of its position, the Company cited work rules, General Safety Regulations and Local Regulations, all of which spoke in terms of proscribing on-duty use or possession of drugs or reporting to work under the influence of drugs. The Company argued that on the date of the test the grievants were not qualified to perform their normal duties because of the presence of drugs in their system, which the tests demonstrated and which the grievants did not deny having ingested at some time prior to the tests.

In the suspension letters sent to each of the grievants, the Company declared: “The presence of illegal drugs in your system, while at work, is a violation of Unocal’s Drug Abuse Policy.” The Company further argued that the grievants violated provisions of

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1727. Id.
1728. Id.
1729. Id. Three of the grievants tested positive for marijuana, two of them in the range of 100 to 400 nanograms per milliliter, while the third tested “greater than 400” nanograms per milliliter. The fourth grievant tested positive for the presence of cocaine. Id. The Board gave no indication as to the qualitative difference between the three lower marijuana results and the higher fourth result.
1730. Id.
1731. Id.
1732. Id. The Company pointed out that the “Safety Rules” in the Employee Handbook, Rule 4, Section d, prohibited “Possession or consumption of alcoholic beverages or illegal drugs . . . on the job at all times.” Rule 4 likewise stated that each employee was required to “maintain maximum control of his mental and physical abilities.” The same rule mandated that an employee who was taking a drug, “under a doctor’s direction,” which might cause him to lose maximum control of his mental and physical abilities to so advise his supervisor. Finally, the Company cited to the language in Rule 4 which prohibited “Reporting to work under the influence of alcohol or illegal drugs.” Id.
1733. Id.
1734. Id. at 92-93.
the Employee Handbook Safety Rules which also prohibited reporting to work under the influence of drugs.\textsuperscript{1735} As justification for instituting the testing program, the Company relied on the series of drug-related incidents in 1984 and 1985, urging that these events created a "reasonable suspicion that drug abuse existed among the Field Department's employees that posed a safety risk" and warranted the Company's non-discriminatory testing of all persons present at both sites.\textsuperscript{1736}

The Union countered that the rules which the grievants allegedly violated were never communicated to the employees and, furthermore, were ambiguous as to whether they were designed "to regulate off-duty drug use."\textsuperscript{1737} The Union did not contest the existence of clear rules which were communicated to employees and prohibited only the use of marijuana or cocaine while on duty and/or which might reasonably be found to result in impairment of the employee's ability to work safely, but emphasized that discipline, to be supported by just cause, required consistent application and enforcement of reasonable rules and standards which were widely disseminated.\textsuperscript{1738}

The Union asserted that, at the time the testing was conducted, the Company had only two valid rules dealing with drugs which met the criteria advocated by the Union. One prohibited possession or consumption of illegal drugs on Company property; which offense was not charged against the grievants.\textsuperscript{1739} The other rule prohibited reporting to work "under the influence" of illegal and dangerous drugs.\textsuperscript{1740} The Union denied that this language could be applied to the grievants in the UNOCAL case, arguing that "under the influence" as used in the rule could only reasonably be interpreted to mean "functionally impaired."\textsuperscript{1741} Thus, asserted the

\begin{itemize}
\item \textsuperscript{1735} Id. at 93.
\item \textsuperscript{1736} Id. See supra note 1724 and accompanying text.
\item \textsuperscript{1737} Id.
\item \textsuperscript{1738} Id.
\item \textsuperscript{1739} Id. The Union was apparently referring to Work Rule 4. See supra note 1733 for a summary of the relevant portions of the rule.
\item \textsuperscript{1740} Id.
\item \textsuperscript{1741} Id. at 93. The Union advanced the following argument in its brief:
\end{itemize}

The only reasonable interpretation of the phrase being "under the influence" as it appears in a rule such as this, is being functionally impaired. Certainly, the average person such as a Company employee, who is accustomed to hearing the phrase in connection with alcohol consumption, understands it to have this practical connotation, and not some theoretical notion relating to chemical presence in the body regardless of external effect. To suggest that the "under the influence" as used in the rule informed Company employees of the latter interpretation is frivolous. The word
Union, "fundamental notions of notice and fairness" precluded the Company from using a "functional impairment" rule to discipline an employee based solely on a positive drug screen result.\textsuperscript{1742} Furthermore, argued the Union, the Company had no probable cause to subject the grievants to the drug tests.\textsuperscript{1743}

The arbitrator discerned one central issue, the resolution of which would resolve all of the questions raised by the Company and Union: whether the Company did indeed have a policy prohibiting the presence of illegal drugs in an employee's system while at work.\textsuperscript{1744} Arbitrator Weiss observed that there was no dispute as to whether the Company had a policy against "reporting to work under the influence of alcohol or illegal drugs," nor was there a dispute about whether the Company had a policy against the "possession or consumption of alcoholic beverages or illegal drugs on Company property, for these rules were well publicized.\textsuperscript{1745} Nevertheless, noted the arbitrator, no similar language appeared in a plant rule or regulation which dealt with an employee who consumed an illegal drug at home and then appeared at work without an observable impairment of his faculties.\textsuperscript{1746} Rather, declared Arbitrator Weiss, what the Company attempted to do here was to attach such a prohibition to regulations designed to deal with other problems, an attempt which the arbitrator refused to condone:

It is difficult to see, however, how a rule which is designed to keep off the job those employees who are unable to properly perform their work can be applied to an employee who may have smoked a marijuana cigarette a week earlier and may still have residues of it in his system. The express "under the influence" language first arose in relation to alcoholism and has always meant a physical or mental inability to perform required work.\textsuperscript{1747}

Arbitrator Weiss continued, pointing out that, in the under consideration, the Company had no reason to keep the grievants off their jobs and, in fact, did not remove the grievants until several days later when the positive urine results were returned.\textsuperscript{1748}

Reasoning that "there [was] no more important an allegation in

\textsuperscript{1742} Id.
\textsuperscript{1743} Id.
\textsuperscript{1744} Id. at 94.
\textsuperscript{1745} Id.
\textsuperscript{1746} Id.
\textsuperscript{1747} Id.
\textsuperscript{1748} Id. The Board pointed out that by this time, another urinalysis test might have returned negative. Id.
a 'just cause' argument than the one which states that the accused employee knew what he was doing was a breach of the rules," the arbitrator concluded that an employee who reported to work "under the influence of drugs" or consumed or possessed illegal drugs on Company property understood that he might be subject to discipline; however, the same could not be said of an employee who did what the grievants did in the case under consideration. The arbitrator Weiss declared that notice to employees that they might be subjected to a drug test which might result in discipline, despite the fact that their ingestion of illegal drugs occurred away from the work site while off-duty, was essential to satisfy the requirements of just cause. The arbitrator was unable to find such notice in the facts of UNOCAL, and concluded:

[T]he Company had no published policy on November 20, 1985, prohibiting the presence of illegal drugs in an employee's system while at work. Nor did it have a published policy declaring that employees could be subjected to drug tests without advance notice and that those employees coming out with positive results could be suspended and then reinstated only upon their acceptance of certain conditions. If the Company management internally established such procedures without notifying their employees, they were not binding on the employees. . .

Having no policy or rule prohibiting the grievants' conduct, the Company violated the collective bargaining agreement by disciplining the grievants without just cause. The grievance was sustained, the grievants were awarded back pay and benefits lost during their suspension and the Company was directed to remove from each employee's personnel file any disciplinary letter or other reference to the matter.

1749. Id.
1750. Id. The Board cited the decision in Gem City Chemicals, 86 Lab. Arb. (BNA) 1023 ( Warns, Arb.). See supra notes 1618-1653 and accompanying text.
1751. 88 Lab. Arb. (BNA) at 95. In reaching this conclusion the Board reasoned:

The facts in our case do not constitute one of those situations in which an employee may be expected to know that his conduct is forbidden merely by virtue of his membership in American society. An employer need not promulgate a rule prohibiting the shooting of a fellow-employee, stealing money from a cash register, or deliberately burning down the plant. Such conduct cannot be defended by a grievant on the theory that, having failed to receive adequate notice, he did not know what was expected of him and thought that these acts would not result in discipline. Our case is different.

Id.
1752. Id.
1753. Id.
Arbitrator David A. Concepcion concluded in *Bay Rapid Transit District v. Amalgamated Transit Union Division 1555* that the transit district's unilaterally implemented drug testing procedure was unreasonable and directed the district to devise an alternative one.

In April, 1984, desiring to insure the safety of its passengers and employees Bay Rapid Transit District began the development of a procedure for handling District field service employees, in the Union bargaining unit, who appeared to be under the influence of drugs or alcohol while on duty. Initially, the District discussed the proposed testing program and procedures with the Union and promulgated a procedure, dated January 15, 1985. Dissatisfied with the testing program, the Union filed a grievance on January 30, 1985, challenging the propriety of the procedure on several grounds.

Subsequently, the District revised the procedure and reissued it, dated March 8, 1985, to be retroactive to February 1, 1985. The revised testing program was actually implemented in April, 1985. The Union maintained its grievance, charging that the District's testing procedure violated the collective bargaining agreement's requirement that the District treat all of its employees fairly and equitably. The grievance proceeded to arbitration.

The first issue before Arbitrator Concepcion was whether the District was permitted, under the terms of the collective bargaining agreement it had with the Union, to unilaterally implement its Drug and Alcohol Procedure, dated March 8, 1985, without first bargaining to impasse with the Union. While the Union acknowledged that the Management of the District had the contractual right, pursuant to the management's right clause of the collective bargaining agreement, to promulgate and implement
reasonable rules and regulations, it argued that another section of the agreement entitled "Beneficial Practices" restrained Management from changing rules or regulations or practices which were beneficial to employees unless there was mutual agreement between the Union and the District over the changes.

Since the members of the bargaining unit had never before been requested or required to submit to any form of chemical testing when suspected of being under the influence of drugs or alcohol, the Union contended that this constituted a beneficial practice which the management could not unilaterally change. The District countered that although there was no past practice regarding chemical testing of employees, that fact alone did not preclude it from ever doing so without Union permission. Moreover, argued the District, it never bargained away its right to use chemical testing for suspected intoxication or drug use.

The arbitrator found the District's argument more persuasive, declaring that:

[t]he thrust of the Union's position is that doing nothing can be beneficial
to its bargaining unit members. The latter may be true but where nothing is being done no practice can be construed. That is, where chemical testing is not being done there is no practice that attaches. The Union cannot claim a beneficial practice where no practice exists. On the other hand, the District can introduce new procedures covering areas not previously regulated as a matter of management rights. 1770

The District had a long-standing work rule, General Rule 107, which provided that:

The use of alcoholic beverages, intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited. Employees shall not report for duty under the influence of any drug, medication or other substance, including those prescribed by a doctor or dentist, that will in any way adversely affect their alterness, coordination, reaction, response or safety; nor shall such drug, medication, or other substance be used by employees while on duty. 1771

Arbitrator Concepcion found Rule 107 to be reasonable, but explained that the methods and procedures necessary to effectuate the rule were also required to be reasonable. 1772 While noting that Section 1.5 of the contract precluded Management from changing a beneficial past practice without Union consent, the arbitrator found that in the grievance under consideration, no beneficial past practice existed to be construed, and, therefore, Section 1.5 did not prohibit development of a drug testing program. 1773 Thus, concluded the arbitrator, the District was free to introduce methods and procedures, including chemical testing, where such methods did not exist previously, provided that the methods and procedures were promulgated pursuant to a reasonable rule and were reasonable themselves. 1774

Thus, proceeding to an examination of the "reasonableness" of the rules and testing procedures, Arbitrator Concepcion noted that, under Section 1.1, the management of the District had the responsibility to treat employees fairly and equitably, which duty necessarily required the methods and procedures embodied in the District's drug testing program to be reasonable. 1775 Examining the District's program, the arbitrator observed that its purpose was to

1770. Id.
1771. Id.
1772. Id.
1773. Id. at 3-4. For the text of Section 1.5, see supra note 1766.
1774. Id. at 4.
1775. Id. The arbitrator explained that "[n]o procedure that is unreasonable could be held to be fair and equitable; thus, the reasonableness test subsumes the question of fair and equitable treatment." Id.
establish a procedure for dealing with District Field Service employees who appeared to be under the influence of drugs or alcohol while on duty.1776

The evidence proffered at the hearing established that the District's decision to establish such a program was based on the concern that members of the bargaining unit performed work which directly impacted on safety, including the performance of critical duties in the event of an emergency and/or which directly effected the public.1777 Breaking down the composition of the bargaining unit by job classification, the District pointed out that 95% of the employees, performed work bearing upon safety or dealing with the public, or both.1778 The Union did not refute the District's categorization of the bargaining unit, but argued that the procedure arbitrarily extended to the 5% of the employees whose jobs had nothing to do with either safety or the public.1779 The Union charged that these 5% were improperly included under the testing

1776. Id. Arbitrator Concepcion referred to the preamble of the District's Drug and Alcohol Procedure which stated:

It is the policy of the San Francisco Bay Area Rapid Transit District to operate and maintain its transportation system in a safe and efficient manner for its passengers and to provide a safe work environment for its employees.

Being under the influence of alcohol, illegal substance or narcotics, including prescription drugs or other drugs which can inhibit perception or reaction time while on duty is prohibited. (See Section S40.1 of the Collective Bargaining Agreement and Operations Rules and Procedures Manual, General Rule 107).

The following procedure sets forth methods of dealing with employees who appear to have violated the foregoing.

Id.

1777. Id.

1778. Id. The classification of the bargaining unit was as follows:

<table>
<thead>
<tr>
<th>Classification</th>
<th>Number in Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Train Operator</td>
<td>233</td>
</tr>
<tr>
<td>Station Agent</td>
<td>180</td>
</tr>
<tr>
<td>Foreworker</td>
<td>53</td>
</tr>
<tr>
<td>Power &amp; Support Foreworker</td>
<td>9</td>
</tr>
<tr>
<td>Communication Specialist</td>
<td>5</td>
</tr>
<tr>
<td>TTA Scheduler</td>
<td>3</td>
</tr>
<tr>
<td>Training Clerk</td>
<td>1</td>
</tr>
<tr>
<td>Yard Clerk</td>
<td>3</td>
</tr>
<tr>
<td>Crew Office Clerk</td>
<td>10</td>
</tr>
<tr>
<td>EDS</td>
<td>3</td>
</tr>
<tr>
<td>Fiscal Clerk</td>
<td>1</td>
</tr>
<tr>
<td>Administrative Assistant</td>
<td>1</td>
</tr>
<tr>
<td>Secretary</td>
<td>3</td>
</tr>
<tr>
<td>TOTAL</td>
<td>505</td>
</tr>
</tbody>
</table>

Id.

1779. Id.
program solely because they were members of the bargaining unit.\textsuperscript{1780}

Arbitrator Concepcion held that if safety and dealing with the public were the justifications for adopting the drug testing program, then bargaining unit membership was an improper basis for determining which employees were within the purview of the procedure.\textsuperscript{1781} The arbitrator declared:

When the workforce, including management, is viewed as a whole it is clear that there are jobs involving safety that deserve greater scrutiny as far as actual or possible drug or alcohol abuse are concerned. Moreover, in such instances those workers dealing with safety have less expectation to privacy than the ordinary worker which has no such job duties. The point is that procedures leading to testing should be directed at distinguishing factors which cut across all bargaining units as well as management.\textsuperscript{1782}

However, compulsory testing was not permissible where the job did not effect safety or did not involve law enforcement, since the employee had a greater expectation of privacy if no outward signs of drug abuse were present.\textsuperscript{1783}

The District argued that, under their program, an employee was requested to submit to a test only if there was "reasonable belief" that the employee was under the influence and, therefore, the procedure did not involve random or mandatory testing of employees.\textsuperscript{1784} While, finding the evidence to clearly indicate that the District's drug testing procedure was not random, the arbitrator nevertheless noted that the issue of compulsion required further examination.\textsuperscript{1785}

The Union argued first that the District's drug testing program was unreasonable because the District could draw an adverse inference from an employee's refusal to submit to the drug test.\textsuperscript{1786} The

\textsuperscript{1780} \textit{Id.}

\textsuperscript{1781} \textit{Id.} The point is that procedures leading to testing should be directed at distinguishing factors which cut across all bargaining units as well as management.

\textsuperscript{1782} \textit{Id.}

"The point is," added the arbitrator, "that procedures leading to testing should be directed at distinguishing factors which cut across all bargaining units as well as management." \textit{Id.}

\textsuperscript{1783} \textit{Id. at 4-5.}

\textsuperscript{1784} \textit{Id. at 5.}

\textsuperscript{1785} \textit{Id.}

\textsuperscript{1786} \textit{Id.} The following nine instructions were set forth in the District's Procedure:

Instruction 1:

1. When a reasonable belief exists that an employee is using or under the influence of alcohol, drugs or other substances while on duty, the employee should immediately be ordered to stop work and be removed from the work location. The employee shall
be retained in a pay status until he or she is sent home from work as set forth below.

Instruction 1 establishes that a person in authority must exercise judgment as to the condition of the employee and if he or she believes the employee is under the influence, then, the preliminary steps are prescribed.

Instruction 2 provided as follows:

2. Indications of possible intoxication may include the following:
   a. Slurred speech.
   b. Disorientation. Job impairment (inability to perform employee's job in a routine manner).
   c. Odor of alcohol on breath.
   d. Unsteady gait or balance.
   e. Glassy eyes.
   f. Drowsiness.
   g. Euphoria.
   h. Mood Swings.
   i. Inattentiveness.
   j. Excitement or confusion.
   k. Irritability.
   l. Aggressiveness.
   m. Intoxicated behavior without odor of alcohol. (drugs).

Instruction 2, observed Arbitrator Concepcion, establishes some symptoms which might indicate possible intoxication. Nevertheless, these objective criteria must be subjectively applied. That is, the person in authority must ultimately decide whether it is reasonable to believe that the employee is under the influence. The inclusion of symptoms in th Procedure is logical and reasonable. The footnote to Instruction 2 gives further guidance to the supervisor.

The footnote provided as follows:

NOTE: Isolated indications of possible intoxication (e.g., euphoria or irritability) may not be sufficient grounds for taking action. In general, 'reasonable belief' of intoxication or being under the influence would exist when the employee displays characteristics of intoxication through words or actions, coupled with impaired job performance.

Instruction 3 deals with steps preliminary to seeking testing and those steps are reasonable. Instruction 3 provided as follows:

3. If an employee appears intoxicated, or under the influence, the Supervisor shall: a.) stabilize the situation, b.) contact his/her immediate Supervisor or Central if the immediate Supervisor is unavailable, and report the situation, and c.) obtain a second Supervisor to act as a witness. (Only use Police Officers as a last alternative). If the employee requests Union representation, the Supervisor shall attempt to arrange for such representation, to be present within a reasonable time (maximum one hour and fifteen minutes). If Union representation can be provided within a reasonable time, the procedure shall be suspended until he/she arrives.

Instructions 4 through 9 are interactive and shall be considered both separately and collectively. Instructions 4 through 9 were as follows:

4. The Supervisor shall inform the employee that the behavior that he/she is exhibiting appear to adversely affect his/her job performance and that the Supervisor is giving the employee the opportunity to prove otherwise by explaining the reason for the behavior and by submitting to a test. DO NOT ACCUSE THE EMPLOYEE OF BEING UNDER THE INFLUENCE OF DRUGS OR ALCOHOL.

5. In the presence of a second Supervisor, the Supervisor shall request the employee to submit to a test to determine whether the employee is intoxicated, or under the influence. If this request is made by a Foreworker, it shall be stated as follows: 'Supervisor has directed me to order you to submit to a chemical test.'
arbitrator disagreed. The arbitrator observed that it was apparent that testing could be used to prove or disprove intoxication, the arbitrator acknowledged that if a suspected employee declines to submit to the test and disprove any allegations of intoxication, then an assumption that the employee is seeking to hide the truth of an intoxicated condition arises. Nothing disallows such a conclusion. However, qualified Arbitrator Concepcion:

a refusal to submit to testing in itself cannot stand alone as proof of being under the influence. Moreover, insubordination cannot be construed where the employee has the right to refuse testing. Thus, if the Procedure is not mandatory or otherwise compulsory, then a right of refusal exists. Accordingly, where an employee agrees to testing but refuses to sign the consent form it is unreasonable that he or she be charged with insubordination.

The Union next argued that the District's drug testing program was unreasonable because it selected the most intrusive available method as the only method of disproving allegations of intoxication which was made available to the employee. The arbitrator

If the employee refuses to submit to a test, the Supervisor shall proceed as follows:

a. In the presence of a second Supervisor, order the employee to submit to a test.

b. Inform the employee that: 'I am giving you an order to submit to a chemical test. Failure to do so may be considered valid evidence of being intoxicated. Do you understand?'

Refusal to cooperate with the Supervisor may be considered insubordination (see Section S40.1 of the Collective Bargaining Agreement and Operations Rules and Procedures Manual, General Rule 131). In such case, the employee may be disciplined.

6. In the event the employee is belligerent, uncooperative, and his/her actions present a safety problem, BART Police shall be called to handle the employee in the same manner as they would any individual under similar circumstances.

7. If the employee cooperates, the Supervisor shall notify the nearest medical facility (see attached list) that an employee is being transported for testing. Both Supervisors are responsible for transporting the employee to the medical facility in the same vehicle.

8. Upon arrival at the medical facility the employee will be requested to sign a Consent Form. This form memorializes the employee's consent to have the test administered and the results released to the District. The results will be mailed to the Employee Relations Department.

9. Upon completion of the test(s) by the medical facility, the Supervisor will advise the employee that he/she should go home and report to work when directed to do so. The Supervisor should assist the employee in returning to his/her work location. In those instances where it is obvious that the employee is in no condition to care for him/herself, the employee should be transported to his/her residence. If the employee refuses, BART Police will be called to take standard police action.

Id. at 5-6.

1787. Id. at 6.

1788. Id.

1789. Id.

1790. Id.

1791. Id. The arbitrator summarized the Union's argument on this point as follows:
found that the availability of a full range of choices was desirable, but it was not necessary for the testing procedure to be reasonable.1792 “However, where a variety of testing is available,” stated the arbitrator, “dictating the method to be used was unreasonable.”1793

Agreeing with the Union, Arbitrator Concepcion next found that the failure of the District’s drug testing program to provide for an employee to have access to a portion of his or her sample for independent testing made the test unreasonable.1794

Suggesting that the urinalysis tests were inaccurate due to potential human error, the Union next argued that this also made the tests unreasonable.1795 The arbitrator disagreed, stating that in spite of its weaknesses, the testing procedure would prevail, so long as the initial urinalysis results were verified by alternative techniques whenever possible.1796 To be reasonable, concluded the arbitrator, the testing procedure should have included verification testing.1797

The Union also argued that the use of a Foreworker, a fellow union member and employee, to make the initial request to the employee to submit to urinalysis rendered the procedure unreasonable.1798 Arbitrator Concepcion found, however, that the Foreworker was not making the decision to request testing, but was merely executing orders from a person in authority to issue

The Union’s objections extended to the fact that where there are several means of testing, but only certain methods immediately available, the suspected employee can be faulted for not submitted to that test which is available when the employee would submit to another test which is not available. Further, if several types of tests are available, the suspected employee can be faulted if he or she refuses the test designated by the District. The Union believes the first intensive test should be used. For example, in matters dealing with alcohol abuse where blood testing, urinalysis, and breathalyzer were available then the breathalyzer would be preferred.

1792. Id.
1793. Id.
1794. Id.
1795. Id.
1796. Id.
1797. Id.
1798. Id.
such orders.\textsuperscript{1799} Thus, it was not, as the Union suggested, a case of one union member applying discipline to another.\textsuperscript{1800}

In the final analysis, the arbitrator concluded that the testing procedure established by the District was unreasonable.\textsuperscript{1801} While acknowledging the transit district's legitimate right to demand drug screening under appropriate circumstances, Arbitrator Concepcion explained that:

The failure of the Procedure is that the District does not distinguish its legitimate needs from the generally intrusive nature of the Procedure. Put another way, there should be one Procedure for the District which uses appropriate job characteristics, such as safety, as the criteria by which testing will be demanded as well as the criteria by which the seriousness of refusal to be tested will be judged.\textsuperscript{1802}

Furthermore, instructed the arbitrator,

[i]n cases where no duties critical to safety are involved, the District has other means of dealing with the problem. That is, where an employee is not performing properly or not coming to work or other such results of drug or alcohol abuse, then, the District can deal with that outcome through established procedures.\textsuperscript{1803}

\begin{itemize}
  \item 1799. \textit{Id.}
  \item 1800. \textit{Id.}
  \item In its final argument, the Union referenced the last section of the District's procedure which was entitled “Documentation” and provided as follows:
    \begin{quote}
      The Supervisor shall completely fill-out a copy of the attached form and direct it to the appropriate Division Manager. The form should set forth with specific details the facts which gave rise to the Supervisor’s suspicions that the employee was intoxicated or under the influence (physical manifestation of intoxication) and indicate whether safety of persons or property was threatened.
      
      The names of witnesses and a written statement from each of them should be obtained.
      
      The results of the test for intoxication, or under the influence, must be received by the District before a “Notice of Intent to Issue Discipline” is delivered to the employee. (Note: The Notice of Intent must be delivered to the employee and the Union within twelve (12) calendar days of the incident.)
    \end{quote}

\textit{Id.}

Pointing to the language stating that the supervisor was required to document “‘whether safety of persons or property was threatened,’” the Union argued that the program, along with its testing, was not limited to employees, who if under the influence, would pose a clear and present danger to themselves, fellow workers and/or the public. The Union noted that the San Francisco Ordinance established the latter criteria as necessary before testing could be utilized. [Apparently referencing the recently promulgated municipal ordinance in San Francisco, which limits employer drug testing of employees to a narrow set of circumstances. \textit{See infra} note 2020.] Moreover, the Union advanced the notion that such criteria form the basis of the compelling reason for which testing could be applied over the right of privacy. The arbitrator did not expressly address this last argument. \textit{Id.} at 7.
  \item 1801. \textit{Id.}
  \item 1802. \textit{Id.}
  \item 1803. \textit{Id.}
\end{itemize}
These shortcomings along with the absence of verification procedures and provisions for making available an employee's sample for independent analysis served as the basis for the arbitrator's conclusion. In his award, Arbitrator Concepcion directed the District to rescind its present program, leaving open the possibility that the District could develop an appropriate procedure.

h. Association of Western Pulp & Paper Workers Local 180 and Boise Cascade Corporation.

In 1986 Boise Cascade Corporation, prompted by safety concerns, instituted a drug and alcohol testing program at its pulp and paper plants in Oregon and Washington. The drug testing program was implemented at some plants but met with protest in others, including the instant case, Association of Western Pulp & Paper Workers Local 180 and Boise Cascade Corporation. The AWPPW, having 17,000 union members, represents 1,200 Boise Cascade employees at five paper plants along the West Coast. In Tacoma, Washington the Boise Cascade employees of Local 180 of the AWPPW challenged the Company's drug testing program, urging Arbitrator Sam Kagel that the program violated the collective bargaining agreement between the Union and Boise Cascade insofar as it required a discharge or a suspension to be based on "just cause."

Under Boise Cascade's program, three groups of workers were subject to testing for drugs and alcohol. First, those employees whose supervisors had reason to believe that they were under the influence of alcohol or drugs; second, those employees who suffered on the job injuries which required medical attention beyond first-aid; and third, all other employees involved in the accident. The testing procedure was mandatory and any employee who refused to submit to the drug test was subject to immediate suspension and possible discharge. Those employees who returned test results positive for the presence of drugs above a specified level were also

1804. Id. See also supra note 1800.
1805. Id. at 7.
1808. Id. Arbitrator Sam Kagel is a veteran pulp and paper industry arbitrator. Id.
1809. Id.
1810. Id.
1811. Id.
subject to discipline including possible discharge. The Union claimed that the program was not reasonable and violated the "just cause" provision of the collective bargaining agreement which stipulated that "discharge or a suspension of an employee shall be based upon just and sufficient cause."

Arbitrator Kagel agreed with the Union, finding several aspects of the Company's drug testing program violative of the collective bargaining agreement. While the supervisors were instructed to monitor employees for a number of specific signs associated with particular types of substance abuse as an aid in identifying employees suspected of using drugs or alcohol, the arbitrator advised that the employees should also have been given notice of these objective criteria so that at subsequent grievance procedures the union would be able to challenge the "reasonableness of some of those 'signs.'"

The arbitrator also found the program defective because it treated the occurrence of an accident as a sufficient basis for requiring an employee to submit to a drug test, reasoning that accidents occur for many reasons that have nothing to do with the injured worker and cannot, without some additional corroborative facts, give rise to suspected drug use. The proper standard for conducting such tests, explained Arbitrator Kagel, is job impairment which is established only by "observing overt behavior or conduct of the employee relative to his job that establishes reasonable cause that the employee is under the influence of alcohol or drugs."

The program implemented by Boise Cascade was also unreasonable because it required an employee to take a drug test under threat of discharge or suspension, thereby asking the employee "to prove his innocence before the employer decides to assess a penalty." "Such a requirement," admonished Arbitrator Kagel, "reverses the burden of establishing 'just cause,' which at its inception is on the employer, not the employee." This requirement also violated the collective bargaining agreement.

1812. Id.
1813. Id.
1814. Id. at A-4, A-5.
1815. Id. at A-5.
1816. Id.
1817. Id.
1818. Id. at A-4.
1819. Id. at A-4, A-5.
1820. Id. at A-5.
Arbitrator Kagel concluded that while Boise Cascade could propose a drug test of a particular employee, it could not compel the employee to submit to the test under penalty of potential discharge unless it had been agreed upon by both the employer and the union representing the employees.\textsuperscript{1821} The arbitrator added that if the employee refused to take the test after the supervisor established reasonable cause and suggested submission to the test, then the Company would be justified in drawing an "adverse inference against the employee in favor of the supervisor."\textsuperscript{1822} "This adverse inference," cautioned the arbitrator, however, "would not be irrebuttable, for the employee would still be free to challenge the supervisor's basis for concluding that he was impaired by drugs or alcohol."\textsuperscript{1823}

2. Discerning Minimal Standards for Employers in Structuring A Drug Testing Program from the Divergence of Arbitral Opinion

As might have been expected, many of the same issues which were subject to debate in the public-sector employment cases have arisen in the arbitration cases as well.\textsuperscript{1824} It is apparent from a review of the selected arbitration awards discussed in the previous section that the decisions vary widely on certain important issues surrounding the anti-drug use and drug testing policies of employers, demonstrating a lack of consensus among the arbitrators.\textsuperscript{1825} Several commentators suggest that these inconsistencies reflect the conscious or unconscious interplay of individual arbitrator perceptions, biases, and prejudices concerning drug use.\textsuperscript{1826} Despite this

\begin{itemize}
\item \textsuperscript{1821} Id.
\item \textsuperscript{1822} Id.
\item \textsuperscript{1823} Id.
\item \textsuperscript{1824} In fact, the arbitrators have addressed and resolved, whether for better or worse, some issues which the federal courts have gingerly avoided such as the conclusivity of the urinalysis results and the impairment/exposure controversy. See, e.g., Roadway Express, supra text accompanying notes 1653-1715; and Weirton, supra text accompanying notes 1499-1540.
\item \textsuperscript{1825} See discussion beginning at text infra accompanying notes 1828-1871.
\item \textsuperscript{1826} See Angarola, Legal Issues of a Drug Free Environment: Testing for Substance Abuse in the Workplace, at 21; Dufek, Underhill, LEGAL TIMES, Mar. 18, 1985, Arbitration Can Thwart Employer No-Drug Policy, at 21 (The arbitrators often find some alleged "due process" problem with the discharge in terms of notice, investigatory interviews, or severity of the discipline. Fundamentally, however, the problem is often an unwillingness to impose a discharge — as opposed to a lesser penalty — for "soft" drug use, particularly when drug use has become so prevalent in society at large) (These arbitrators point to the decriminalization of marijuana in some states as a reason for treating it similarly to alcohol,
divergence of opinion among arbitrators on several basic points, a set of minimal standards for structuring a drug testing program that will satisfy most "just cause" challenges can be discerned.

a. Notice Generally

All of the arbitrators agree that "industrial due process" requires some form of notice regarding the employer's no-drug and drug testing policy to support a "just cause" dismissal, but they do not necessarily agree on the details of such notice.

Arbitrator Katz permitted the employer in American Standard to claim a contractual basis for its demand that an employee submit to a drug test under the language of the collective bargaining agreement between the parties. The language relied upon gave the Company the right to demand a physical exam of any employee, at any time, to determine the employee's fitness for work provided that the Company had a reasonable basis for its demand.

Meanwhile, Arbitrator Koven refused in Pacific Gas to construe agreement language requiring an employee to submit to a medical exam upon return to work from a drug-related termination to include drug testing through urinalysis. Likewise, Arbitrator Warns, in Gem City Chemicals, refused to construe a contractual clause providing for physical exams to detect industrial-related tobacco, or other addictive substances that are not prohibited by federal or state law). See, e.g., Pacific Motor Trucking, 86 Lab. Arb. (BNA) 497, 498 (1986) (D'Spain, Arb) (discharge of admitted alcohol is too extreme a punishment where employer failed to follow agreed-upon chain of custody protocol for blood test).

The varying arbitral perception of drug use is easily demonstrated by the diversity of rulings in the area of the appropriate level of severity of workplace discipline for drug-related conduct as compared to alcohol-related conduct. Compare, e.g., Combustion Engineering, 70 Lab. Arb. (BNA) 318, 320 (1978) (Jewett, Arb.) (recognition by arbitration of different applications of same standard for drugs versus alcohol); Ethyl Corp., 74 Lab. Arb. (BNA) 953 (1980) (Hart, Arb.) (different penalties for marijuana and alcohol use not justified because safety concern relating to both substances is identical); Mississippi River Grain Elevator, 62 Lab. Arb. (BNA) 200 (1974) (Marcus, Arb.) (criminal status of marijuana justified harsher treatment than for alcohol intoxication); Hooker Chemical Co., 80-2 Lab. Arb. Awards (CCH) ¶ 8466 (1980) (Grant, Arb.) (because the dangers are the same, alcohol and marijuana use should be treated similarly); with Issacson Structural Co., 72 Lab. Arb. (BNA) 1075 (1979) (Peck, Arb.) (harsher rules may be applied to marijuana users than those who abuse alcohol); Howmet Corp., 60 Lab. Arb. (BNA) 1160 (1973) (Sembower, Arb.) (because loss in productivity is same for alcohol and marijuana use, penalties should be the same); National Steel Corp., 60 Lab. Arb. (BNA) 613 (1973) (McDermott, Arb.) (sale of marijuana may be punished more harshly than mere recreational possession).

1827. See text supra accompanying note 1576.
1828. Id.
1829. See text supra accompanying notes 1611-17.
disease resulting from exposure to hazardous materials to be broad enough to encompass drug testing of employees. This contractual clause alone was insufficient notice to the employees that drug testing, on any basis, might be required by the employer as a condition of continued employment.

Collectively, apart from the American Standard award, these decisions indicate that it is essential for an employer to expressly delineate a drug screening policy rather than trying to implement it under a general physical examination policy. Furthermore, a just cause dismissal requires that the existence of the employer’s drug testing policy be well publicized and made commonly known among the employees, for sub rosa drug testing policies will likely be found to be unreasonable and any discipline for non-compliance with such policies will be overturned.

b. **Notice Requirements for Intoxication vs. Mere Presence of Drugs in an Employee’s System**

Beyond this rudimentary rule of thumb on proper notice, a more complex issue remains largely unresolved. Since urinalysis is incapable of demonstrating present drug impairment, is the prohibition against on-duty intoxication from drugs sufficient to warn employees of potential discipline for a urinalysis result positive for drugs? Does prohibiting being “under the influence” of drugs while on duty clarify any of the ambiguity in the term “intoxication”? Or must the work rule spell out that the “mere presence” of a drug in an employee’s system, as detectable by use of a urinalysis test, is prohibited, in order to properly discipline an employee on the basis of a positive drug screen?

As the decisions discussed in Section 1 indicate, arbitrators do not agree on this issue. The fairest approach from an em-
ployee's view and the most prudent approach from an employer's standpoint is that if the employer intends to prohibit the off-duty use of drugs and, thus, the presence of any detectable amount of drugs in the employee's system while on duty, then the employer should clearly and explicitly state such a policy in a widely disseminated work rule. However, the employer must be ready to jus-

able”). See also Roadway Express, supra notes 1707-15 and accompanying text (the arbitrator found the term “under the influence” to be the equivalent, for purposes of the trucking industry’s collective bargaining agreement, of presence of marijuana in the tested employee’s system); UNOCAL, supra notes 1746-53 and accompanying text, (the arbitrator would require explicit notice that the mere presence of traces of a drug in an employee’s system would result in discipline); and Bay Rapid Transit, supra notes 1750-52 and accompanying text, (the arbitrator insisted that “just cause” required the employer to give employees notice that they might be subjected to a drug test which might result in discipline for the mere presence of drugs in their system despite the fact that at the time of testing they were not functionally impaired).

One commentator suggests that

[an employer may avoid having an arbitrator decide whether the amount of a drug in an employee’s . . . urine is sufficient to render him “intoxicated” or “under the influence” by specifying a discrete . . . urine level for a particular drug above which discharge will result. A lower level could be specified above which discipline short of discharge will result.

Although these levels would not constitute irrebuttable evidence of “intoxication” or “under the influence” with respect to each employee, an employer might be able to uphold the reasonableness of the work rule assuming that the specified levels are not demonstrably “unreasonable” in light of available medical evidence. When an employer and its union can agree on the drug levels that will irrebuttable evidence “intoxication” or “under the influence,” it is more likely that an arbitrator will uphold the discharge of an employee whose blood or urine test reveals the presence of drugs above the agreed upon level.

Dufik, Underhill, Arbitration Can Thwart Employer No-Drug Policy, supra note 1827, at 28.

However, is this approach really reasonable when medical science has not been able to establish impairment levels for specific drugs? See supra text accompanying notes 64-67. One award, Roadway Express, supra text accompanying notes 1711-14, suggests that “levels of intoxication” giving rise to particular disciplinary measures will be considered reasonable by arbitrators, so long as they were freely and fully bargained for.

1834. Unfortunately, many of the policy statements being issued by employers lack this specificity. Below are a few examples of “faulty” anti-drug/drug testing policies which utilize the ambiguous terminology of “intoxication” or “under the influence:”

(1) TIMES MIRROR, Policy No. 28, Draft db:

August 1, 1985

The mental, physical and emotional health of employees and their families continues to be of utmost concern to The Times Mirror Company. The company and its employees also have an obligation to conduct themselves in a manner which is in the best interests of the company and which is consistent with the public’s trust. In its commitment to maintain a healthy and safe work environment for all employees, the company affirms its practice in publishing this Alcohol and Drug Abuse Policy.

ALCOHOL
AND DRUG ABUSE

The Company prohibits the unauthorized use or abuse, sale, transfer, or possession
of alcohol or drugs on property under Company control or in Company vehicles or during working hours. It is also a violation of this Policy for an employee to report to work or to work while under the influence of alcohol or unauthorized drugs. The abuse of alcohol or drugs at any time during the course or scope of employment which jeopardizes the safety of other employees or the public, or impairs the Company's reputation, may be considered a violation of this Policy. (Emphasis added).

(2) NEWS & SUN SENTINEL COMPANY, Use of Drugs and Alcohol Policy:

The News and Sun-Sentinel Company provides a safe work environment and encourages personal health. In regard to this, the Company considers the misuse of drugs or alcohol on the job to be an unsafe and counterproductive work practice. It is, therefore, Company policy that an employee found under the influence of, in possession of, using, selling, trading, or offering for sale, drugs or alcohol during working hours may be subject to disciplinary action up to and including discharge.

B. Procedural Guidelines

* * *

If a blood or urinalysis exam indicates the employee is under the influence of drugs, the employee will be sent home for a week without pay. (Emphasis added).

(3) MIAMI HERALD PUBLISHING COMPANY, Substance Abuse Policy Statement:

The Miami Herald Publishing Company is committed to dealing firmly and fairly with substance abuse during working hours, or on the premises of the Herald. Employees who report to work under the influence of alcohol or drugs, or who violate this policy in other ways, are subject to immediate disciplinary action which may include termination. . . .

What is Substance Abuse?

Substance Abuse includes possession, use, purchase or sale of drugs or alcohol on company premises, including the parking lots. It also includes reporting to work under the influence of drugs or alcohol. (Emphasis added).

* * *

Prescription drugs prescribed by the employee's physician may be taken during working hours. The employee should notify the supervisor if the use of properly prescribed prescription drugs will affect the employee's work performance. Abuse of prescription drugs will not be tolerated.

A slightly better policy statement has been issued by ARIZONA REPUBLIC/THE PHOENIX GAZETTE:

SUBSTANCE ABUSE
POLICY STATEMENT

Drug abuse has become one of the most serious problems of the 1980s, reducing productivity, increasing accident and illness rates, causing theft loss to employers and increasing medical and hospitalization insurance rates. The Arizona Republic/The Phoenix Gazette is no exception.

Therefore, we have made the decision to announce a clear, comprehensive and fair policy for dealing with drug and alcohol abuse.

1. The use, possession or sale of controlled substances known as illegal drugs, is unlawful, dangerous and unacceptable.
2. Use of alcohol either in the work place or prior to coming to the work place, so that the employee's performance is impaired, is dangerous to the employee and to fellow employees and also is unacceptable.

Violation of these policies will not be tolerated, and will subject the employee to discipline up to and including termination.

But see text accompanying note 1772 (Bay Rapid Transit) for an example of a well drafted substance abuse policy which clarifies the ambiguity of prescriptive medicines, expressly
tify its proscription of off-duty drug use. 1835

c. Appropriate standard for requiring the drug test

There does appear to be a consensus among arbitrators that an employer may not arbitrarily demand an employee to submit to a urinalysis test for drug use, 1836 but instead is required to demonstrate something closely akin to the "reasonable suspicion" standard adopted by the federal district courts in the public-sector cases. 1837 Arbitrator Warns intimated in Gem City Chemicals that

prohibiting their abuse also.

1835. This will necessarily not be easy for it is a widely accepted principal of arbitral law that what employees do on their own time is their own business and is not an appropriate subject of disciplinary action. See supra notes 81-86 and accompanying text. This notwithstanding, a work rule which prohibits the off-duty use of drugs may be upheld when an employee's job requires him to be directly responsible for the safety of co-workers, the general public, or very expensive property.

For example, an arbitrator might conclude that the necessity of having unimpaired airplane pilots, bus drivers, or power plant operators justifies an off-duty prohibition against drug use as a safeguard against drugs ever being used on the job, or in recognition that off-duty use potentially may have adverse consequences for on-duty performance. Additional factors which militate in favor of an employer's off-duty, off-premises prohibition against drug use include an employer's business or an employee's job whose particular nature is such that it is necessary to project a clean-cut, drug-free image to the public or is necessary in an employer's work force that has a drug problem. See Gem City Chemicals, supra text accompanying note 1634; University of Missouri-Kansas City, 82 Lab. Arb. (BNA) 112 (1983) (Thornell, Arb.) (campus police officer properly discharged for off-campus possession of marijuana); State University of New York, 74 Lab. Arb. (BNA) 299 (1980) (Babiskin, Arb.) (state university has special responsibility to see that "its campuses are not sanctuaries for the drug trade"); cf. Renaissance Center Partnership, 76 Lab. Arb. (BNA) 379 (1981) (Daniel, Arb.) (security officer who smoked marijuana while off the employer's premises in a company vehicle had an obligation to hold himself above ordinary standards). But see, Intalco Aluminum Corp., 68 Lab. Arb. (BNA) (1977) (LaCugna, Arb.) (the arbitrator reinstated the grievant even though he had been convicted of unlawful delivery of marijuana because the employer failed to demonstrate that the conviction adversely affected the employer); see also Vulcan Asphalt Refining Co., 78n Lab. Arb. (BNA) 1311 (1982) (Welch, Arb.); Nugent Sand Co. 81 Lab. Arb. (BNA) 991 (1983) (Daniel, Arb.).

The employer has an additional source of support for his argument by drawing from the public sector cases which have recognized the employer's right in certain circumstances to prohibit off-duty drug use as well as on-duty use. See supra notes 87-90 and accompanying text.

1836. Unless perhaps such a right was fully and fairly bargained for and agreed upon by the union. See Roadway Express, supra text accompanying notes 1711-14.

1837. For the classic formulation of the reasonable suspicion standard, see text supra accompanying note 593.

See American Standard, supra text accompanying notes 1569-72 (reasonable belief); Gem City Chemicals, supra text accompanying notes 1632-34, 49 (reasonable belief, individualized suspicion) (but later in his opinion Arbitrator Warns uses "probable cause" terminology); Roadway Express, supra text accompanying notes 1695-98 (absent a contrary contractual provision, the appropriate standard for demanding a drug screen is whether a "responsible supervisor had an honest and reasonable suspicion that the employee was
random or blanket testing might be permissible if conducted pursuant to a provision of a validly negotiated collective bargaining agreement.\textsuperscript{1838} A similar suggestion can be inferred from the reasoning of Arbitrator Cooper in \textit{Roadway Express}.\textsuperscript{1839}

Several arbitrators have underscored the requirement that the decision to require testing of an employee must be job or performance related.\textsuperscript{1840} For example, Arbitrator Warns emphasized this requirement in \textit{Gem City Chemicals} when he found the Company's testing procedure to be unreasonable because the decision to test had no foundation in substandard, or atypical job performance.\textsuperscript{1841} This same point was emphasized by Arbitrator Concepcion in \textit{Bay Rapid Transit} when he stressed that if the Company sought to justify its testing program on the basis of employee and public safety concerns, then application of the testing policy must be extended to include all, but only those employees, salaried and hourly, whose jobs bear on those essential concerns.\textsuperscript{1842}
d. Overly broad prohibitory language may be construed narrowly

Even if the employer's drug testing policy is widely distributed in a work rule or collective bargaining provision, clearly states that drug screening may be requested, and expressly sets forth whether or not mere presence of drugs in an employee's system is prohibited, the language of the work rule or contract provision may nevertheless be found to be too narrow or imprecise to properly warn the employee that his/her conduct is within the purview of the rule. For example, while the employer may fully intend a prohibition against "illegal drug use" or "controlled substance abuse" to be all-inclusive, arbitrators have read such proscriptive language literally not to include the abuse of lawfully obtained prescriptions, or over-the-counter drugs, the abuse of chemicals such as glue which have no medicinal purpose, or the use of substances that have not been criminalized.\textsuperscript{1843} Therefore a well-drafted no-drug rule should be carefully worded to include abuse of all those drugs and chemicals that the employer intends to limit or prohibit.\textsuperscript{1844}

Along these same lines, one commentator suggests that an employer should strongly consider adopting a work rule or negotiating a collective bargaining agreement provision that requires employees using prescriptive medication or certain over-the-counter medications to report this fact to management prior to commencing work.\textsuperscript{1845} However, such a policy should be approached with an abundance of caution, for privacy issues are necessarily raised and

\textsuperscript{1843} Dufik, Underhill, \textit{Arbitration Can Thwart Employer No-Drug Policy}, \textit{supra} note 1827, at 25. But see American Standard, \textit{supra} text accompanying note 1582 (holding that the propriety of the Company's decision to test was not changed whether the drugs were prescriptive or not).

\textsuperscript{1844} Dufik, Underhill, \textit{Arbitration Can Thwart Employer No-Drug Policy}, \textit{supra} note 1827, at 25. Drug policies rarely explicitly delineate the various drugs prohibited under the rule but rather speak in the more general terminology. See, e.g., the substance abuse policy statements of Times Mirror, News & Sun Sentinel Company, the Miami Herald (although abuse of prescription drugs is prohibited) and the Arizona Republic/The Phoenix Gazette, \textit{supra} note 1835.

\textsuperscript{1845} Dufik, Underhill, \textit{Arbitration Can Thwart Employer No-Drug Policy}, \textit{supra} note 1827, at 25. For an example of such a provision, see the substance abuse policy statement of the Miami Herald, \textit{supra} note 1835.
cannot be ignored.\textsuperscript{1846}

e. Permissible discipline for refusal to take the test

Several generalizations can be made from the arbitration decisions regarding permissible levels of discipline for an employee's refusal to submit to a drug screen which was otherwise legitimately requested by the employer. Although ultimately reaching opposite conclusions, both the \textit{Gem City Chemical} and the \textit{American Standard} decisions teach that proper notice of the requirement to submit are absolute prerequisites to any discipline administered subject to a "just cause" standard.\textsuperscript{1847} Arbitrator Cooper's decision in

\textsuperscript{1846}. In this respect the Union could be expected to raise arguments similar to those discussed in the previous section dealing with claims of public-sector employees, alleging that their right to privacy had been violated by requiring the disclosure of otherwise highly personal and confidential medical information on the consent forms. \textit{See supra} text accompanying notes 1313-75. At least one arbitrator, in \textit{Gem City Chemicals}, indicated that unnecessarily invasive and compelled disclosure of confidential medical information may serve as an independent basis for finding "just cause" lacking in a disciplinary action related to drug-screening. \textit{See supra} text accompanying notes 1648-51.

\textsuperscript{1847}. In \textit{Gem City Chemicals}, Arbitrator Warns found that absent notice of the requirement to take the drug screen test under penalty of discipline, no penalty was permitted. \textit{See supra} text accompanying note 1647.

In affirming the employer’s dismissal of the employee who refused to submit to the drug screen demanded by the employer in \textit{American Standard}, Arbitrator Katz carefully emphasized that the grievant was well informed of the drug testing rules and was warned several times that she faced potential discharge for refusing to take the test. \textit{See supra} text accompanying notes 1578-84. See also \textit{Crown Zellerbach and United Paperworkers, Local 752}, FMCX Case 86 K/09162, \textit{reported in EMPLOYEE TESTING & the Law}, Apr. 1987, at 7.

In \textit{Crown Zellerbach}, the arbitrator held that the Company had the right to request an employee who showed up for work demonstrating aberrant behavior to take a drug screen test but, when the employee refused, suspension, not job termination, was the proper disciplinary action. The employee worked as a utility operator of paper machines in a Crown Zellerbach plant. When she arrived at the plant site apparently in a condition unfit for work, a description supported by other workers, her supervisor did not allow her to work and instead asked her for an explanation. First she said she was under the influence of prescription drugs and then later claimed that she was not incapacitated. She agreed to go to the hospital for a drug screen test, then changed her mind and asked to be taken to a private physician. Finally the employee said she would not submit to any drug test. Her private doctor told the Company that it was unlikely that her prescription drugs, taken alone or together, could have caused the described aberrant behavior.

The Company concluded two days later that the employee had been under the influence of something other than prescription drugs, that she had been given the opportunity to rebut that inference and had refused, and that her behavior was just cause for termination. The employee's union argued that since the Company had requested, not ordered, the drug test and since the employee was not fully informed of the consequences of refusal, the Company's disciplinary action was "harsh and extreme" and that discharge was unjust.

The arbitrator ruled that since the Company alleged drug use, it had the burden of proof and it did not conclusively prove drug use. Although it had the right to request or require a drug test, since it only requested one and did not advise her that refusal would be used
Roadway Express suggests that where the employer exercises the right to discharge an employee for refusal to submit to a drug screen as part of a substance abuse policy which is based on a freely and fairly negotiated, and adopted, contractual provision, the propriety of the dismissal is unassailable on this basis.\textsuperscript{1848}

While Arbitrator Kagel in Boise Cascade calls the demand on an employee to submit to a drug screen under penalty of discharge a reversal of the burden of establishing "just cause" and a violation of "just cause" dismissal requirements under the collective bargaining agreement, the decision is not necessarily inconsistent with the Roadway Express decision.\textsuperscript{1849} The arbitrator's approval in Roadway Express of the drug testing policy in general, including the potential right to discharge for refusal to submit to a urine test, rested upon the fact that the entire drug testing program was part and parcel of a freely and fairly negotiated contract between the parties.\textsuperscript{1850} The dismissal in Boise Cascade, however, was pursuant to a unilaterally implemented managerial policy against drug abuse which involved no input from the Union, let alone agreement on its terms.\textsuperscript{1851} In fact, Arbitrator Kagel indicated that his position on this aspect of the grievance would have been different had the penalty of discharge been bargained for and mutually agreed upon by the parties.\textsuperscript{1852}

The lesson to be learned from Roadway Express and Boise Cascade is simple: dismissal for refusal to submit to the employer's otherwise legitimate demand for a drug test pursuant to an explicit contractual provision will survive a "just cause" challenge, but where the dismissal is not founded on an express contract clause, the viability of the decision under a just cause standard is less than

against her, her refusal could not be the basis for termination. Accordingly, recognizing that "a strong measure of discipline is warranted," the arbitrator modified the termination to disciplinary suspension with reinstatement starting with the next full payroll period. Back pay and benefits were denied.

\textit{Id.}

\textsuperscript{1848} The thrust of Arbitrator Cooper's decision is that by virtue of the freely and fully negotiated provisions incorporated into the collective bargaining agreement, the employer had the right to demand an employee to submit to a drug screen provided the demand was based upon an "honest and reasonable belief" that the employee was under the influence of drugs. The applicable work rule provided that a refusal to submit was subject to a presumption of being under the influence, which in turn was subject to discharge. See \textit{supra} note 1708.

\textsuperscript{1849} See Boise Cascade, \textit{supra} text accompanying notes 1819-21.

\textsuperscript{1850} See, e.g., \textit{supra} text accompanying notes 1683, 84, 1714.

\textsuperscript{1851} See \textit{supra} text accompanying notes 1822-24.

\textsuperscript{1852} \textit{Id.}
certain. Factors which may weigh heavily against the propriety of the latter decision may include a commendable past work history or an unblemished prior disciplinary record.\textsuperscript{1853}

If the employer is not able to discharge the employee for refusal to submit to the test, what use can it make of the refusal? The arbitrator in \textit{Bay Rapid Transit} instructed that while an adverse inference arises from an employee's refusal to submit to the test that the employee is attempting to hide drug abuse, that inference alone may not be used as conclusive proof of being under the influence and cannot serve as the basis for disciplinary action for violation of the no-drug policy.\textsuperscript{1854} Taking a weaker stand on this issue, the arbitrator in \textit{Boise Cascade} indicated that an employee's refusal to submit to the drug screen gives rise to a rebuttable inference that the employee is hiding drug use/abuse. The arbitrator, however, did not explain whether the employee was under an affirmative duty to rebut the inference, nor did he state whether the inference standing alone could justify disciplinary action.\textsuperscript{1855}


The decision in \textit{American Standard} also suggests that perhaps the arbitrator will consider how cooperative the employer had been in the past to accommodate the employee's problem when ruling upon the propriety of a later dismissal. See supra text accompanying note 1583. Cf. \textit{Chicago Transit Authority}, 80 Lab. Arb. (BNA) 663 (1983) (Meyers, Arb.) (discharge of transit worker set aside; employee drove subway train in wrong direction while under influence of drugs, causing massive damage in head-on collision with another train; discharge deemed too harsh when other employees normally permitted to enter drug rehabilitation program in lieu of termination); \textit{Washington Metro. Area Transit Authority}, 82 Lab. Arb. (BNA) 150 (1983) (Bernhardt, Arb.) (employer was ordered to renew its earlier offer to discharged bus driver who used drugs while driving a bus that she be permitted to continue employment while undergoing a rehabilitation program).

Several commentators suggest that arbitrators favor rehabilitation over dismissal, viewing dismissal as "industrial capital punishment." Geidt, \textit{Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights}, supra note 84, at 193-4, 196-7; Dufek, Underhill, \textit{Arbitration Can Thwart Employer No-Drug Policy}, supra note 1827, at 24. Where dismissal results after a first incident suggesting drug use and a refusal to submit to the test, absent a specific contractual right granted the employer, the arbitrator may consider the discharge too harsh and convert it to some lesser penalty.

\textsuperscript{1854} See supra text accompanying note 1791.

\textsuperscript{1855} See supra text accompanying notes 1823-24.
f. Conclusivity of drug screening results as the sole basis for discipline

Using the positive results of a drug screen as the basis for a termination for violation of the company’s substance abuse policy has caused mixed arbitral reactions. These mixed reactions are largely due to the acknowledged inability of the tests to demonstrate current impairment at the time of the test and their potential for inaccuracy. The successful use of positive drug screen results seems to depend upon the employer’s ability to proffer evidence of observed behavioral or performance abnormalities to corroborate a charge for impairment. For example, Arbitrator Kates, in Weirton Steel Division, observing that impairment levels for a particular drug vary, based on several factors, and current drug testing technology is unable to pinpoint those individualized levels, held that the positive test result, without evidence indicating that the employee’s behavior or job performance on the date of the test was deficient or otherwise abnormal, could not serve as the basis for discharge under a work rule prohibiting employee’s from being “under the influence” of drugs.

Arbitrator Cooper in Roadway Express held that where drug testing as the means of enforcing the company substance abuse program was part of the collective bargaining agreement and there was no provision for a progressive discipline scheme, dismissal based solely upon a positive drug test for violation of the Company’s no-drug rule was proper. Arbitrator Cooper’s decision hinged upon the fact that the provision was fully and freely negotiated by the parties and mutually agreed upon, and also turned upon the notion that medical technology was presently unable to delineate specific percentages conclusively establishing intoxication for a specific drug.

The result in Roadway Express is consistent with the ruling in Weirton Steel Division, for it merely more clearly states the rationale behind the arbitral acceptance of positive drug test results

1856. See generally supra text accompanying notes 64-67. See also Weirton Steel Division, supra text accompanying notes 1525-29; Roadway Express, supra text accompanying notes 1702-14; Bay Rapid Transit, supra text accompanying notes 1796-97. Compare Hayes-Albion Corp., 76 Lab. Arb. (BNA) 1005, 1007 (1981 (Kahn, Arb.).
1857. Id.
1858. See supra text accompanying notes 1525-36.
1859. See supra text accompanying notes 1702-15.
1860. Id.
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as evidence of a violation of an employer's no-drug rule. The arbitrator's decision in Bay Rapid Transit qualifies this acceptance by placing additional requirements on the employer that the test results must be verified by alternative testing and a portion of the sample must be retained in order to afford the employee the opportunity to contest the results through an independent analysis.

A final related issue is the degree of proof required of the employer to support a just cause dismissal for violation of the employer's substance abuse policy. Because of the stigma associated with a drug-related discharge, the potential difficulty of finding future employment with such a discharge on the employee's permanent record, and the fact that many drug-related activities are also criminal offenses, some arbitrators have held that the employer is required to demonstrate the existence of "just cause" by "clear and convincing evidence" rather than by a "preponderance of the evidence."1863

Viewing the issue from a different perspective, Arbitrator Cooper in Roadway Express declared that, "[w]here the consequences of retaining an impaired [truck] driver pose serious threats to human life, the employer bears a correspondingly lighter burden to show that the discharge was for just cause."1864 Thus, depending upon whether the arbitrator views the issue from an employee's perspective or the employer's view affects the burden of proof to be applied in determining whether a given dismissal was based on just cause. Several commentators report that, by-and-large, arbitrators tend to apply the stricter standard of proof in drug cases.1865

1861. It must be pointed out that the decision to test in Roadway Express was based upon the mutually corroborated observations of two supervisory personnel that the employee was behaving abnormally, which led to the reasonable belief that the employee might have been under the influence of drugs. See supra text accompanying notes 1666-74. Thus, the positive drug test in Roadway Express was corroborated by facts of impaired condition, as Arbitrator Katz, in Weirton Steel Division, declared must be shown. In all fairness, however, it must be acknowledged that Arbitrator Cooper's discussion in Roadway Express is susceptible to a reading that perhaps such corroborative evidence would not be required to support a finding of "just cause" under the terms of the contract.

1862. See supra text accompanying notes 1795-98, 1805.

1863. See Geidt, Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights, supra note 84, at 793-4.

1864. See General Telephone Co. of Cal., 73 Lab. Arb. (BNA) 531 (1979) (Richman, Arb.) (employer had to prove both the underlying offense and just cause by a "clear and convincing evidence" standard, rather than the more normal "preponderance of the evidence"); Kroger Co., 25 Lab. Arb. (BNA) 906, 908 (1955) (Smith, Arb.) (because the offense carries a high level of stigma, the employer should be held to a higher standard of proof).

1865. See supra text accompanying notes 1688-90.
g. Overall Employer Success Rates in Defending Drug-related Discharges under a "Just Cause" Standard

A review of the recent arbitrations reported in BNA's Labor Arbitration Reports, according to one expert, reveals the anomalous fact that despite the growing public disapproval and distaste for drug use generally and the escalating concern over drug use in the workplace, arbitrators have overturned more drug-related discharges than they have sustained. Thus, out of forty-six such cases reported for the period of March, 1980 through January, 1985, only in twenty-one cases (excluding those involving the sale of drugs) were the discharges sustained. Arbitrator Seidman in Mallinckrodt, Incorporated noted that in an independently-conducted survey he had discovered that approximately two-thirds of all the discharges involving employee use or possession of drugs on company premises were overturned by the arbitrator hearing the grievance. It will be interesting to see whether the current up-scaled national anti-drug campaign will initiate a reversal in arbitral attitudes.


1867. Geidt, Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights, supra note 84, at 193.

1868. Id. (listing the grievances in which the discharges were set aside and also those drug-related discharges that were sustained for the time frame mentioned).

1869. 80 Lab. Arb. (BNA) 1261 (1983) (Seidman, Arb.).

1870. Id. at 1265.

Although this may appear alarming, one must keep in mind that the arbitrator's ruling is not necessarily final on the issue. Indeed, the dissatisfied party is able to appeal to the judicial system and courts have demonstrated, under certain circumstances, an unwillingness to uphold an arbitrator's finding of an unjust dismissal, and have denied enforcement of the arbitrator's award. See, e.g., Misco, Inc. v. United Paperworkers International Union, 768 F.2d 739 (5th Cir. 1985) and Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983) (courts refused to enforce arbitration awards overturning discharges for drug or alcohol intoxication. In both instances, the employee in question was a vehicle or "dangerous equipment" operator. The Court noted the existence of a well-defined public policy against the operation of dangerous machinery (or vehicles) by persons under the influence of alcohol or drugs, and determined that the individual's rights should not outweigh those interests in the circumstances. Because the arbitrators in question effectively had struck the "wrong" balance, the Court refused to enforce the awards as contrary to public policy).
VI. LIMITED PROTECTION AFFORDED THE NON-UNION PRIVATE-SECTOR EMPLOYEE

Without the protections of the federal constitution or a collective bargaining agreement, the non-unionized, private-sector employee is the most vulnerable target for an employer's drug testing program.

A. Luck v. Southern Pacific Transportation Company: Is It a Prototype for Private-Sector Employee Redress Against Employer Drug Testing Policies?

Southern Pacific Transportation Company in San Francisco, California, implemented a drug testing policy in August 1984 and on July 11, 1985, Barbara Luck, a 34 year-old computer programmer, along with 488 other Southern Pacific employees were demanded to sign a toxicological test consent form and produce a urine sample for the purpose of testing for drug use.1871 Luck, who says she had been keeping her recent pregnancy secret because she was concerned about how the news would affect her career, refused to submit to the test on privacy grounds.1872 Despite the Company's admission that Luck was an exemplary employee and was not suspected of abusing drugs or alcohol, Luck was terminated the following day for failure "to comply with instructions of proper authority."1873 One week later, Luck sued the Company in Luck v. Southern Pacific Transportation Company.1874

Among the allegations of her complaint Luck is suing for wrongful termination, retaliation, invasion of privacy, and intentional infliction of emotional distress.1875 Luck charges in her complaint

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1871. The facts surrounding the litigation in Luck v. Southern Pacific Transportation Company, SF Super. Ct. No. C843-230 (Super. Ct. Cal. 1986) were reported in the following sources: Bishop, Drug Testing, supra note 10, at 31; Allen, Side Effects, supra note 21, at 21; NLJ, Drug Testing, supra note 16, at 27; BNA Special Report, supra note 8, at 34, 76. 1872. NLJ, Drug Testing, supra note 16, at 27 ("Ms. Luck had particular reason to be sensitive about her privacy. 'She was three months pregnant,' says Ms. Lucas-Wallace, Luck's attorney, 'and she hadn't told anyone at the company.' Ms. Luck was nervous about how the news might affect her career."). 1873. Bishop, Drug Testing, supra note 10, at 31. See also NLJ, Drug Testing, supra note 16, at 27; Allen, Side Effects, supra NOTE 21, at 21. 1874. Allen, Side Effects, supra note 21, at 21. See also NLJ, Drug Testing, supra note 16, at 27. ("The Luck suit does not challenge Southern Pacific right to ever test anyone under any circumstances, says San Francisco sole practitioner, Kathleen Lucas-Wallace, attorney for Ms. Luck. 'The case will try to define what an employer can do and under what conditions'"). 1875. See Bishop, Drug Testing, supra note 10, at 31; Allen, Side Effects, supra note 21, at 21; NLJ, Drug Testing, supra note 16, at 27.
that the test was conducted on a surprise basis and done at random, singling her out from the other employees in her area without any reason to suspect her of using drugs, and as a result, was illegal because of the lack of notice.\textsuperscript{1876}

While acknowledging that Southern Pacific may have a legitimate work-related reason for testing some employees for drug use, such as railroad workers whose jobs affect public safety, Luck points out that her job as computer programmer does not implicate safety concerns.\textsuperscript{1877} Thus, Luck charges in her complaint that Southern Pacific has an insufficient business justification for requiring her to submit to the test and, therefore, its drug testing policy constitutes an unwarranted invasion of her privacy.\textsuperscript{1878} Southern Pacific demurred to Luck’s complaint, which was filed on October 2, 1985, and the case is currently still pending in the local court.\textsuperscript{1879}

Luck bases her charge of invasion of privacy, at least in part, on a provision of the California Constitution which declares that an individual possesses an inalienable right of privacy\textsuperscript{1880} which has been held to apply to actions of both public-sector and private-sector employers in \textit{White v. Davis}.\textsuperscript{1881} Resolution of Luck’s constitutional privacy claim hinges on how her case fits within the guidelines enunciated by the court in \textit{Davis}, which is considered the seminal case interpreting the privacy provision of the California Constitution.\textsuperscript{1882}

Writing for a unanimous court in \textit{Davis}, Justice Matthew Tobriner instructed that the “moving force” behind the 1972 constitutional amendment on privacy was “the accelerating encroachment

\textsuperscript{1876} See Bishop, \textit{Drug Testing}, supra note 10, at 31; NLJ, \textit{Drug Testing}, supra note 16, at 27 ("‘Barbara asked her supervisor if there were any problems with her work, [and] he said, ‘No’, ‘Ms. Lucas relates, ‘She asked him if they suspected her of using drugs. They again said, ‘No’ ’’"); Allen, \textit{Side Effects}, supra note 21, at 21 ("‘The critical part here is the lack of notice,’ Lucas-Wallace says, ‘and the unwarranted invasion of privacy.’ ").

\textsuperscript{1877} NLJ, \textit{Drug Testing}, supra note 16, at 27 ("‘Barbara’s job is totally unrelated to safety,’ " says Lucas-Wallace). Interestingly, Taggart, spokesman for Southern Pacific, told BNA Reporters that originally the drug testing policy was implemented only for rail workers, but the Union representing the Southern Pacific rail workers protested that the company policy discriminated against them, so the scope of coverage of the policy was expanded. BNA Special Report, supra note 8, at 34.


\textsuperscript{1879} \textit{Id}.

\textsuperscript{1880} Bishop, \textit{Drug Testing}, supra note 10, at 31.

\textsuperscript{1881} 120 Cal. Rptr. 94, 13 Cal.3d 757, 533 P.2d 222 (1975) (Supreme Court of California en banc).

\textsuperscript{1882} Bishop, \textit{Drug Testing}, supra note 10, at 31.
in personal freedom and security caused by increased surveillance and data collection activity in contemporary society,” and was adopted “to afford individuals some measure of protection against the most modern threat to personal privacy.”\(^1\)

Included among the “mischiefs” identified by the court as targets of the privacy provision was the “overbroad collection and retention of unnecessary personal information by government and business interests.”\(^2\) Incursions into individual privacy, Tobriner declared, “must be justified by a compelling interest.”\(^3\)

Luck urges that because of the nature of her job, Southern Pacific’s business interest in drug testing was not compelling in her case.\(^4\) Meanwhile, Southern Pacific counters that the testing program represents a legitimate business interest and is consistent with public policy that prohibits the use of illegal drugs and encourages rehabilitation.\(^5\)

Advocates on both sides of the controversy between employer and employee rights anxiously anticipate an eventual ruling in \(\textit{Luck}\), considering this litigation a test case for establishing guideposts in defining the forms and scope of legal redress available to the non-union, private-sector employee in the drug screening context.\(^6\) The following subsections are devoted to an examination of the legal issues raised by the causes of action alleged in the \(\textit{Luck}\) case.

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\(^1\) Bishop, \(\textit{Drug Testing}\), supra note 10, at 31.

\(^2\) Id. See also NLJ, \(\textit{Drug Testing}\), supra note 16, at 27 (“The company, naturally, sees things differently. ‘It’s a minor intrusion . . . like going through a metal detector at the airport,’ ” says Robert W. Taggart, spokesperson for Southern Pacific) (This kind of random testing is claimed to have reaped substantial benefits for Southern Pacific: “We have reduced our accident rate by 67 percent and we have reduced lost time by 25 percent,” says Taggart).

Although Southern Pacific believes in the drug testing program, BNA correspondents report that Taggart acknowledged the strain that such a policy places on employer-employee relations, and also indicated that while the Company’s testing policy remains in force, “[Southern Pacific doesn’t] like getting sue[d],” and the policy might change. BNA Special Report, supra note 8, at 34.

\(^3\) Bishop, \(\textit{Drug Testing}\), supra note 10, at 31 (“With the right to privacy guaranteed in the state constitution . . . it was inevitable that an important case would surface in California”); BNA Special Report, supra note 8, at 76 (referring to \(\textit{Luck}\) as being closely watched by the legal community); Allen, \(\textit{Side Effects}\), supra note 21, at 21 (“The first 10 days after I filed the case, I had 170 phone calls . . . We had to hire a new person just to handle the phone calls. A lot of attorneys wanted a copy of the complaint”) INDIVIDUAL EMPLOYMENT RIGHTS, Sept. 2, 1986, Drug Alcohol Tests Clash with Privacy Rights, at 4 (Referencing \(\textit{Luck}\) litigation as a “key case” in the “right to privacy” area).
1. Invasion of State Constitutional or Statutory Rights of Privacy

Nineteen states including California recognize and protect the individual right of privacy either by constitutional or statutory provision. However, the degree and scope of protection vary.

1889.   

Alaska — "Right of Privacy. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." Art. I, sec. 22, Alaska Constitution, 1972.

Arizona — "Right to Privacy. No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Art II, sec. 8, Ariz. Constitution, 1912, as amended.

California — "All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and privacy." Art. I, sec. 1 Cal. Constitution, Nov. 1972. This right of privacy applies to actions of private as well as public employers. White v. Davis, 13 Cal. 3d 757, 775, 553 P.2d 222 (1975).

Florida — "Every natural person has a right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's rights of access to public records and meeting as provided by law." Art I, sec. 23, approved in the 1980 election. "Searches and Seizures. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated." Art I, sec. 12, Fla. Constitution, 1968.

Hawaii — "Searches, seizures and invasion of privacy. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications to be intercepted." Art. I, sec. 5, Hawaii Constitution, 1968.


Louisiana — "Right to Privacy. Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court." Art. I, sec. 5, La. Constitution, 1975.

Montana — "Right of Privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Art. I, sec. 9, Mont. Constitution, 1972.

1890.   

Connecticut — A firm may not "blacklist" an employee so as to prevent him or her from getting another job, but may give "a truthful statement" about a present or former employee. Conn. Gen. Stat. Ann. sec. 31-51.

Delaware — Violation of privacy is a class A misdemeanor. Del. Cod tit. 11, sec. 1335.

Florida — No derogatory or anonymous information may be kept in files of school employees; there is a right of access and amplification. Records are confidential with excep-
ies from state to state. For example, the overwhelming majority of state constitutional provisions proscribe only governmental intrusion into an individual’s privacy and do not extend protection against purely private invasions.1891

Others extend protection against invasions of privacy but only prohibit “searches and seizures,” borrowing terminology from the Fourth Amendment of the United States Constitution.1892 The statutory provisions tend to prohibit only narrow categories of privacy invasion, such as the unauthorized disclosure of medical information.1893

Of these currently existing statutory and constitutional safeguards for privacy, the California Constitution declaring the right

Illinois — Disciplinary reports may not be released to outsiders. No irrelevant data on off-hours activities may be collected. Ill. Ann. Stat. ch. 48, sec. 2001. [Query: does this mean that use of drug tests to determine off-duty drug use is prohibited or does it merely mean that you do not stockpile the test results?]

Iowa — Disclosure of personal information from public employees’ records is limited. Iowa Code Ann. sec. 68A.7(10)-(11).

Maine — State personnel files, which include medical records, are to be kept confidential. Title 5, sec. 554.

Massachusetts — “A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction to enforce such right and in connection therewith to award damages.” Mass. Gen. Laws Ch. 214 § 1B.


North Carolina — State employment records containing name, age, date of employment, position title, salary, most recent promotion and demotion are open to any person. All other information is confidential. Employee may supplement or seek removal of material in file considered inaccurate or misleading. N.W. Gen. Stat. sec. 126-22. Sec. 153-A-168 extend these provisions to county and local employees’ records, respectively.

Rhode Island — “It is the policy of this state that every person in this state shall have a right to privacy,” which includes freedom from intrusions, from appropriation of one’s name or likeness, from “unreasonable publicity given to one’s private life,” and from “publicity that reasonably places another in a false light before the public.” R.I. Gen. Laws sec. 9-1-28.1, enacted in 1980.


1891. Among those constitutional provisions prohibiting only governmental invasion or privacy are: Arizona (implied limitation); Florida (express); Hawaii (implied limitation); Illinois (by judicial interpretation); Louisiana (implied limitation); Montana (implied-requires compelling “state” interest). See supra note 1890.

1892. Such constitutional provisions are found in Florida, Hawaii, and Louisiana. See supra note 1890.

1893. See supra note 1891. But note the broad language used in the Rhode Island statute, supra note 1891. The Rhode Island statute codifies the tort of invasion or privacy as set forth in Restatement (Second) of Torts section 652A. See, e.g., infra notes 1901-08 and accompanying text. To this extent, any ruling in Luck on the common law privacy issue may have special impact on Rhode Island judicial thinking.
of privacy along with other select rights to be unalienable provides, by its terms and through judicial interpretation, the broadest protection for privacy rights. Thus, inasmuch as Luck's claim alleging violation of her privacy rests on the California Constitution, it is advanced in a unique legal framework. If ultimately the San Francisco Superior Court rules under principles of White v. Davis that a private employer could properly compel a drug screen of his employee only upon demonstrating a compelling employer interest to be served by the invasive procedure, the Luck decision would not be binding on sister jurisdictions interpreting their own statutory or constitutional privacy protections. Nevertheless, a pro-employee ruling in Luck on the drug testing issue would bolster the persuasive force of the privacy argument being advanced by drug screening opponents and perhaps might convince other state courts to construe their protective provisions broadly to restrict the use of drug screening in private employment.

2. Invasion of the Common Law Right of Privacy

Inasmuch as Luck's claim includes allegations of invasion of common law privacy rights, a ruling on that aspect of the privacy issue by the San Francisco Superior Court could potentially receive broader application in sister jurisdictions. The courts of other

1894. See supra note 1890 for the text of the California constitution.
1896. See 20 AMJUR2d 537, § 203 Decisions from Other American States ("The decision of a court of one American state does not have stare decisis effect in the court of another American state. Such a decision may be considered if it appears to throw light on the question in issue, but it will be followed by the court only if the reasoning of the decision is persuasive. It will certainly not be followed where it is against the public policy of the forum state"); id. at 538 ("Although sister state decisions construing statutes [constitutional provisions] substantially different from, though concerning the same general subject as the one under consideration, are of little value, a court will give weight to decisions of courts of sister states which construe statutory [constitutional] language identical or similar to the statutory [constitutional] language under consideration").
1897. See supra note 1897. Unfortunately the broadly worded constitutional provisions in Florida, Illinois and Louisiana are expressly limited to state action and do not apply to the actions of private persons. See supra note 1890 for these constitutional provisions. Might the Alaska constitutional provision be worded broadly enough to permit the Alaska court to borrow principles from a decision ultimately rendered in Luck? See supra note 1890 for the Alaska constitutional provision. Similarly, the courts of Massachusetts, Rhode Island and Wisconsin may be willing to apply the rationale of the decision ultimately rendered in Luck, when construing their state statutory protections of privacy. See supra note 1891 for the relevant statutory provisions.
1898. Particularly in an uncharted area such as drug testing, the courts will be unable to rely on a wealth of dispositive judicial precedents rendered within their own jurisdiction,
states could be expected to be more receptive to pronouncements on common law legal principles than a state constitutional provision peculiar to California.

The general common law principle of a right of privacy has been that an individual should be free from unreasonable inquiries and disclosures with respect to his personal and private affairs. What has emerged as the right of privacy since the classic Brandheis and Warren proposition, however, is not one but a

except perhaps by analogy to privacy challenges to polygraph testing. However, if the Luck court renders a well-reasoned, firm decision on the common law issue, sister jurisdictions, without controlling precedent of their own, could be expected to draw heavily upon the court's rationale and analysis in Luck. Indeed, it would not be the first time that the California courts have led the way in making fundamental revisions to common law principles. For example, California articulated the first judicial exception to the common law doctrine of employment-at-will in 2959, in a court of appeals decision in Petermann v. International Brotherhood of Teamsters, 174 Cal.App.2d 184, 344 P.2d (1959), and today is cited by at least one authority as the leading jurisdiction in the development of judicially created exceptions to employment-at-will. See LARSON & BOROWSKY, UNJUST DISMISSAL (MB) § 10.5 [State-by-State Analysis, California], at 10-22 (1987) [hereinafter referred to as LARSON, UNJUST DISMISSAL].

1899. "One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." Restatement (Second) of Torts § 652A(1) (1977). "The right of privacy has been defined as the right to be let alone." Id. at comment a to section 652A.

See generally, Prosser, Privacy, 48 CAL. L. REV. 383 (1960); Davis, What Do We Mean by the "Right to Privacy"?, 4 S.D.L. REV. 1, 19 (1959); Fried, Privacy, 77 YALE L. J. 475 (1968).

1900. Brandheis & Warren, The Right to Privacy, 4 HARV. L. REV. 193 (1890). Therein, the authors stated:

The protection afforded to thoughts, sentiments, and emotions expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.

Id. at 205.

In the overwhelming majority of states which have judicially recognized the common law right of privacy or have codified it into a state statute, a party subjected to drug screening as a requirement of continued employment who is able to establish that his privacy was invaded is eligible to recover a wide variety of damages. See, e.g., Restatement (Second) of Torts, Appendix, Vol. §§ 588-707A (Reporter's Note), at 268 (listing the various jurisdictions which have considered and recognized a common law right of privacy); see also PROSSER, TORTS § 117, The Right of Privacy, at 851 (1980) ("In one form or another the rights of privacy are recognized in virtually all jurisdictions . . . . And it has even been said that the only state not recognizing a right of privacy is some extent as of 1980 was Rhode Island") [Rhode Island recently enacted a statutory recognition of the individual right of privacy. See supra note 1891 for the text of the statute].

A cause of action for invasion of privacy entitles the plaintiff to recover compensatory damages for the harm to the particular element of his privacy invaded. The plaintiff may also recover damages for emotional distress or personal humiliation and any special damages that he can prove, of which invasion of privacy has been the legal cause. Restatement (Second) of Torts, section 652H, comments a, b and d.

Query: The invasion of an employee's privacy by a drug screen presents unique considera-
complex of four different interests held together by the concept of the "right to be let alone." The first three interests are concerned primarily with the publication of, or commercial use of private facts and include public disclosure of embarrassing private facts about an individual, publicity which places an individual in a false light in the public eye, and appropriation of the name

1901. PROSSER, TORTS, supra note 1901, at 851 ("As it has appeared in the cases thus far decided, it is not one tort, but a complex of four. To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff "to be let alone ").

1902. The nature of this cause of action is publicity, of a highly objectionable kind, given to private information concerning the plaintiff, even though it is true. Section 652D of the Restatement (Second) of Torts, Publicity Given to Private Life, defines this tort as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

Thus, while this tort may not arise in the context of a challenge to the propriety of drug testing in the first instance, it may nevertheless come into play if the employer or its agents subsequently misuse the test result information and disclose it to members of the public with no legitimate right to know.

1903. Like the tort of publicity given to private life, the tort of publicity placing a person in a false light also requires publicity beyond a legitimate employment relationship. Section 652E of the Restatement (Second) of Torts, Publicity Placing Person in False Light, defines this tort as follows:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Under this tort, unlike publicity given to private life, the information concerning the plaintiff which is published must be false. Id. at § 652E, comment a. However, the plaintiff need not be defamed by the publication, "[i]t is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or beliefs that are false, and so is placed before the public in a false position." Id. Again, while not applicable in a challenge to the employer's demand of an employee to submit to a drug test, it may nevertheless be available as a remedy against the employer who properly conducted the drug test but publishes false facts on the nature of the results, which attribute drug abuse to the plaintiff and places the plaintiff in a false light. See, e.g., Wherry v. Houston Belt and
or likeness of an individual. The fourth privacy interest concerns the intrusion into the seclusion, solitude or private affairs of the individual and is the one most likely to be implicated by employee drug testing.

Section 652B of the Restatement (Second) of Torts defines the tort of "Intrusion upon Seclusion" as:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

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Terminal, supra text accompanying notes 43-55.

1904. This tort protects the interest of the individual in the exclusive use of his own identity insofar as it is represented by his name or likeness and insofar as the use may be beneficial to himself or others. The typical example of the tort of appropriation of name or likeness occurs when the photograph of a private individual is used without the subject's consent in an endorsement for a product. In this respect, it seems very unlikely that the tort of appropriation would arise in a drug testing context. Section 652C of the Restatement (Second) of Torts, Appropriation of Name or Likeness, provides:

One who appropriates to his own use or benefit the name or likeness of another is subject to the other for invasion of his privacy.

1905. Restatement (Second) of Torts, section 652B. See infra text accompanying note 1908 for the text of section 652B.

1906. This will be especially true in cases in which the propriety of the entire testing program and the right of the employer to implement it is being challenged. However, the torts of publicity given to private life and publicity placing a person in a false light become relevant once the employer has personal and private information, either from the test results or from the medical consent form, and misuses it. See supra note 1903-04; infra note 1908.


1907. Restatement (Second) Torts section 652B.

The form of invasion of privacy covered by this tort does not depend upon any publicity given to the person whose interest is invaded or to his affairs, rather it consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs, of a kind that would be highly offensive to a reasonable man. Id. at section 652B, comment a. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of the information acquired by the intrusion. Id. at section 652B, comment b.

Robert T. Angarola, an attorney recognized for his expertise in the drug-testing field, suggests that the employee will rarely, if ever, be able to make out a claim for invasion of privacy under the tort of intrusion upon seclusion and solitude theory. Angarola reaches this conclusion based upon the "critical fact" that "activities that take place in the workplace, or that affect an employee's performance on the job are not private. An employee's working relationship with his employer and his workplace activities are not protected in the same way that his home activities are protected. See Angarola, Legal Issues of a Drug Free Environment: Testing for Substance Abuse in the Workplace, at 8.

Angarola's thesis, is an oversimplification of the claim that the employee is asserting under the tort of intrusion upon seclusion. A defendant can be subject to liability under the tort of intrusion for intruding into a private place or by otherwise invading a private seclusion that the plaintiff has thrown about his person or affairs. Restatement (Second) of
Comment (d) to Section 652B also provides that the intrusion must be substantial.\textsuperscript{1908}

Even if the San Francisco Superior Court is willing to consider Luck’s claims based on the tort of intrusion, the implication is that such a doctrine would not prohibit drug-testing across-the-board, but would limit it in certain ways.\textsuperscript{1909} Indeed, the question of whether an intrusion is highly offensive or unreasonable is a ques-

Torts, § 652B, comment c. It is this second type of intrusion which the plaintiff challenging an employer’s drug screen is claiming. Moreover, even in a public place there are still some matters about the plaintiff that are not exhibited to the public and remain private, and there may still be invasion of privacy when there is intrusion upon these matters. Restatement (Second) of Torts, § 652B, comment c.

Merely because an employee’s relationship with his employer and his workplace is carried on in public view does not mean that the employee has surrendered to every highly offensive intrusion upon his interest in solitude or seclusion, either as to his person or his affairs. Thus, inasmuch as drug-testing is able to delve into the off-duty, off-premises, personal activities of an employee, the drug screen constitutes an intrusion upon the employee’s solitude or seclusion of his private affairs. Whether that intrusion is highly offensive to a reasonable man is a separate inquiry. Likewise, the argument that the employee who is required to submit a urine sample under direct supervision of another in a public restroom has no privacy interest in his person because he is in a public restroom is indefensible, for, even then, the individual retains an interest in seclusion of his person which is invaded by the supervisor who is observing the employee performing the urination process. Cf. Daily Times Democrat v. Graham, 276 Ala. 380, 162 So.2d 474 (1964) (A young woman was attending a “Fun House” at a public amusement park where various tricks are played on the patrons. While she was there, a concealed jet of compressed air blew her skirt up over her head and revealed her underwear. The defendant took a photograph of the young woman while in this position. The defendant-photographer was found liable for infringing A’s privacy). Failing to focus on the precise interests in seclusion and solitude asserted by an employee in a challenge to the employer’s drug screening program, Angarola reasons in broad generalizations and concludes that the employee will fail to establish an actionable claim. However, once the inquiry is properly focused, it becomes apparent that Angarola’s conclusions are incorrect.

\textsuperscript{1908} Restatement (Second) of Torts, section 652B, comment d provides:

There is likewise no liability unless the interference with the plaintiff’s seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object. . . .

\textsuperscript{1909} This proposition is made clear by comment d to section 652B, supra, which indicates that only substantial interferences into a plaintiff’s seclusion which would be highly offensive to an ordinary reasonable man are actionable. See supra note 1909.

Thus, direct visual observation of the employee urinating into the specimen vial would likely be found highly offensive to an ordinary reasonable man and, therefore, be actionable. However, merely placing a dye in the toilet water prior to the employee entering the stall, to prevent substitution of the toilet water as a specimen, and checking the temperature of the specimen once delivered to the tester, to ensure a fresh sample, would probably not, standing alone, constitute a highly offensive interference actionable under the tort of intrusion. But the possibility exists that the court might consider urinalysis in an employment context to be so repugnant that absence of direct observation will not save it from scrutiny under the tort of intrusion on seclusion. This possibility should not be too lightly discounted inasmuch as at least one state legislature has assumed this posture in proposing an anti-drug screening bill which would bar urinalysis under any circumstances. See infra note 2025.
tion of fact dependent on the circumstances of the particular case.\footnote{1910}

Initially, the Luck court can be reasonably expected to conclude that urinalysis testing for drug use is an intrusion upon the "solitude or seclusion of another or his private affairs or concerns" by drawing on a wealth of federal constitutional precedent to this effect.\footnote{1911} Furthermore, since urinalysis tests measure exposure to substances and not present impairment, a urinalysis test is likely to reveal information about what the employee does on his or her own personal time, not work time.\footnote{1912} Thus, the crucial question facing the Luck court boils down to one of whether the intrusion occasioned by the drug test would be highly offensive to a reasonable person.\footnote{1913} The question of the reasonableness of drug testing for purposes of Section 652B will involve the Luck court in a two-pronged inquiry: whether a reasonable person would find the administration of the urinalysis test to be highly offensive in and of itself,\footnote{1914} and whether the test itself is administered in an unreasonable manner.\footnote{1916}

\footnote{1910} Factors which the court will probably take into consideration in assessing whether a reasonable man would find the particular drug screen highly offensive include: (1) whether the drug test was purely random, or blanket, or based on individualized suspicion; (2) the nature of the job in which the employee is engaged and the degree of other supervision exercised over the employee; (3) whether the drug tests were a surprise or were announced; (4) whether prior notice of the existence of the testing procedure was given to the employees; (5) the presence or absence of direct observation of urine specimen provision; (6) the general atmosphere in which the testing is administered (i.e., was the testing performed in a clinic or the employer's back room?); and the authority level of the person demanding the test (low level supervisors or upper management).

\footnote{1911} For the classic statement on this issue, see supra text accompanying note 539 (McDonell). See also text accompanying note 914 (NTEU, district court decision).

\footnote{1912} See supra notes 56-67 and accompanying text.

\footnote{1913} The "highly offensive" requirement will most likely be the most contentious element of the tort in the drug screening context.

\footnote{1914} Professor Prosser has observed:

The most recent cases on this tort seem to indicate the existence of two factors of primary importance in determining whether or not an intrusion which effects access to private information is actionable. The first is the means used. If the means used is abnormal in character for gaining access to private information, then the intrusion is likely to be actionable regardless of the purpose . . . . The second is the defendant's purpose for obtaining the information. . . .

PROSSER, TORTS, § 117, Right of Privacy, at 856.

\footnote{1915} This prong of the analysis corresponds to Prosser's "purpose" inquiry. See supra note 1915. For a discussion of the first prong of the analysis, see infra text accompanying notes 1918-27.

\footnote{1916} The alternative prong of the analysis focusing on the manner in which the test was conducted, correspond to Prosser's inquiry into the "means" employed to obtain the information. For factors the court will most likely consider in assessing the propriety of the means used, see supra note 1911.
With respect to the first prong of the analysis, the *Luck* court is likely to distinguish between drug tests administered in situations where the employer suspects an employee to be drug-impaired and unable to perform his job’s duties and those testing programs which are part of a “fishing expedition” designed to ascertain the existence and scope of drug use among employees without any factual basis to suspect such use. It is reasonable to anticipate that the *Luck* court will draw analogies to the federal constitutional public-sector cases and will find that the employer’s right to know would render the intrusion reasonable in the former situation.

Similarly, with respect to cases involving random testing based on objective standards or blanket testing that also involve workers engaged in hazardous occupations in which a drug-impaired employee would pose imminent threat to the safety of fellow workers and/or the general public, or involve occupations where there is easy access to illicit drugs and the potential for corruption is great; the identical argument can be made. Again, it is likely that the *Luck* court will reference the federal courts of appeal decisions in *Shoemaker* and *McDonell* to conclude that the employer’s right to know that employees are abusing drugs should prevail over the employee’s privacy interests, which may themselves be limited by the employee’s voluntary choice of the occupation.

1917. In *Luck*, the publicized facts of the pending litigation seem to indicate that Southern Pacific’s drug testing program of clerical employees is in the latter category. See supra text accompanying note 1875 (Southern Pacific acknowledged that Luck was an exemplary employee, that her work performance was up to par, and that the Company did not suspect her of abusing drugs or alcohol).

1918. See, e.g., *Division 241*, supra text accompanying notes 547-62 (reasonable individualized suspicion); *Allen*, supra text accompanying notes 563-77 (reasonable suspicion) (urinalysis program approved by the court). But see *McDonell*, supra text accompanying notes 578-603 (reasonable suspicion standard is an absolute must) (text accompanying note 592 declares this requirement in emphatic terms); *Capua*, supra text accompanying notes 753-806 (striking down a drug testing program based on no individualized reasonable suspicion of employee drug use); *Lovvorn*, supra text accompanying notes 807-45 (same as *Capua*). The court might also draw upon arbitration decisions emphasizing the need for individualized, job-related suspicion. See, e.g., supra text accompanying notes 1541-76 (*American Standard*); supra text accompanying notes 1618-52 (*Gen City Chemical*).

1919. Luck has asserted the converse of this argument, charging that since her job as computer operator does not bear on fellow-employee or public safety concerns, Southern Pacific lacks a sufficient business justification for requiring her to take the drug test. See supra text accompanying notes 1878-79, 1887-88.

1920. See supra text accompanying notes 994-1041.

1921. See supra text accompanying notes 1042-62.

1922. For a discussion of this concept of reduced expectation of privacy, see supra text accompanying notes 1026-27 (*Shoemaker*); 586 (*McDonell*) (district court decision); 1051 (*McDonell*) (Third Circuit decision).
Under the first prong of the "reasonableness" analysis, the lame justifications\textsuperscript{1923} advanced by Southern Pacific would not suffice to legitimize the blanket drug testing to which Barbara Luck objected.\textsuperscript{1924} A judgment that the drug testing program is unreasonable is inescapable, for Luck was involved in a non-hazardous position which threatened the safety of neither her fellow workers nor the general public,\textsuperscript{1925} and Southern Pacific openly acknowledged that it had no factually based suspicion that she was either using or impaired by drugs.\textsuperscript{1926}

Independent of the reasonableness of the testing procedure per se, an employer may also be liable under Section 652B if the test is administered in an offensive manner that impugns the dignity of the individual employee being tested.\textsuperscript{1927} Factors which the court should consider in resolving this aspect of the "reasonableness" issue include whether supervision of the employee's provision of the urine specimen, if necessary at all, was discreet, and whether the testing procedure was otherwise implemented in a manner aimed at preserving the individual employee's integrity.\textsuperscript{1928}

Insofar as Luck refused to submit to the test from the outset,\textsuperscript{1929} the alternative argument that the test was unreasonable because administered in an offensive manner is not available to Luck because the test was never actually administered in her case.\textsuperscript{1930} This notwithstanding, Luck's ability to demonstrate the unreasonable nature of Southern Pacific's drug testing program under the first prong of the analysis would satisfy the final requisite for maintaining her claim for tortious intrusion into her seclusion under Section 652B of the Restatement (Second) of Torts.\textsuperscript{1931}

A ruling in \textit{Luck} on the merits of the common law privacy claim, whether favoring Luck or Southern Pacific, will help to resolve the controversy over the viability of common law individual privacy principles as a check on overweaning private-sector employer drug

\textsuperscript{1923} See supra text accompanying note 1888.
\textsuperscript{1924} The drug test was conducted on 489 employees on the date Luck was requested to submit to the urinalysis. See supra text accompanying note 1872.
\textsuperscript{1925} See supra text accompanying notes 1878-79, 1887-88.
\textsuperscript{1926} See supra note 1874 and accompanying text.
\textsuperscript{1927} See supra text accompanying note 1917.
\textsuperscript{1928} For additional considerations see supra note 1911. For a discussion of the direct observation/privacy issue, see supra note 1381.
\textsuperscript{1929} See supra note 1873 and accompanying text.
\textsuperscript{1930} Id.
\textsuperscript{1931} Id. The "means" and "purpose" analyses identified by Prosser are alternative approaches. See supra notes 1915-17 and accompanying text.
testing policies and as a safeguard to employee privacy rights in the drug screening context. While in two recent cases the employees did not expressly rely on Section 652B in challenging their dismissals under the employers' testing program, the court's decision in each case intimates that employee testing might implicate the tort of intrusion upon seclusion. The existence of such a claim based on common law principles upon which relief can be granted remains uncertain.

Now, for the first time a court will be called upon in Luck to directly address and determine the existence and scope of protection afforded private-sector employees against drug testing under the common law right of privacy. Indeed, the Luck case may prove to be a watershed in this area.

1932. See Angarola, Legal Issues of a Drug Free Environment: Testing for Substance Abuse in the Workplace, at 8 ("Absent a strange fact situation, it is unlikely that an employee would succeed in a legal action challenging a drug detection program for invasion of privacy"); Lindsey, Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy, 13 J. LEGIS. 269, 283 (1986) ("Although committed to protecting the individual's privacy interests, tort law has not yet responded to the new type of threat posed by drug testing. As a result, it cannot be currently relief upon to protect employees from this intrusive practice") (hereinafter referred to as Lindsey, Drug Testing).

1933. In Satterfield v. Lockheed Missiles and Space Co., Inc., 617 F.Supp. 1359 (D.S.C. 1985), an electronic missile technician submitted to a urinalysis test for drug use while undergoing an annual physical required as part of his employment. Id. at 1360. He tested positive for marijuana and was terminated. Id. The employee sued Lockheed claiming an invasion of privacy. In his complaint, however, he failed to specify the type of invasion on which his claim was based. Id. at 1369. While the court did not rule in the employee's favor, this case is significant because the court "presumed" that the plaintiff was alleging a "wrongful intrusion into his private activities." Id. at 1369-70

Another indication of the applicability of the tort of intrusion upon seclusion to the type of invasion resulting from employee testing is O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067 (1st Cir. 1986). In O'Brien, an employee was confronted by his employer with rumors that he had been using drugs off-duty. Although the employee denied the rumors, the employer requested that he submit to a polygraph test because company policy prohibited drug use. Id. at 1070-71. The employee acquiesced and the test revealed that he had lied about his drug use. Id. at 1071. Following his termination, he sued his employer for an invasion of privacy.

The First Circuit upheld a special verdict which found the methods used by the employer to be highly offensive to a reasonable person and an invasion of privacy. Id. at 1071-72. Although the court did not expressly rely on § 652B, this case is significant because the court allowed the plaintiff to recover under a tort standard in an employee testing context. Furthermore, the type of invasion resulting from polygraph testing is analogous to that of drug testing in the form of urinalysis.

1934. Lindsey, Drug Testing, 13 J. LEGIS., supra note 1933, at 282 ("Despite its potential applicability, section 652B has not yet been held to apply to employee testing").

1935. See infra text accompanying notes 1990-2008 for a discussion of some of the many questions waiting for answers from the Luck court.
3. The Tort of Wrongful Discharge

An employee's ability to retain his job traditionally has been subject to the well-entrenched doctrine of employment-at-will under which an employer can discharge an employee for good cause, no cause, or for cause morally wrong.\footnote{1936} This long standing rule was recognized uniformly throughout the nation and until recently was applied without hesitation to give an employer the right to discharge an employee for any reason.\footnote{1937} During the past two decades, however, judicial recognition of employment-at-will exceptions has mushroomed, assuaging much of the harshness on the doctrine.\footnote{1938} These judicially created exceptions are based on either

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\footnote{1936} The at will rule is of comparatively recent origin. It first appeared as a rule of evidence in Horace Wood's 1877 Treatise on the Law of Master and Servant. H. Wood, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). According to Wood, an employment contract was presumed to be terminable at will unless its duration had been specified by the parties. \textit{Id.} This formulation departed from the English common law rule, under which employment was presumed to be for a year unless otherwise specified. For a brief history of the employment-at-will doctrine, see Feinmann, \textit{The Development of the Employment at Will Rule}, 20 AM. J. LEGAL HIST. 118, 119-20 (1976).

The case most frequently cited in support of this rule is \textit{Payne v. Western & Atl. R. Co.}, 82 Tenn. 507, 518-19 (1884), overruled on other grounds, \textit{Hutton v. Watters}, 132 Tenn. 527, 544, 179 S.W. 134, 138 (1915):

\textit{[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. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.}\footnote{Id., 82 Tenn. at 518-19. See also Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co., 158 Cal. 551, 554, 12 P.886, 888 (1910); McLaughlin v. Ford Motor Co., 269 F.2d 120, 125 (6th Cir. 1959); Laiken v. American Bank & Trust Co., 34 A.D.2d 514, 308 N.Y.S. 111, 112 (1960).

\footnote{1937} By 1934, the highest court in Kentucky declared that "there is now quite respectable authority establishing that [Wood's rule] to be a proper rule of construction." \textit{Pullnam v. Producers Live Stock Mktg. Ass'n}, 256 Ky. 196, 75 S.W.2d 1075, 100 A.L.R. 828, 831 (1934). Only eleven years after the Pullnam decision, the editor of a supplemental A.L.R. annotation stated that Wood's rule was followed in "a great number of American jurisdictions, which probably comprise a majority of those in which the question has been raised. . . ." 161 A.L.R. 706, 707 (1946). The case there annotated is \textit{Pryor v. Briggs Mfg. Co.}, 312 Mich. 476, 20 N.W.2d 279, 161 A.L.R. 699 (1946). And by 1976, the matter was considered so well settled that the Supreme Court of Oklahoma unanimously, and without extensive discussion, followed the "American doctrine," \textit{Singh v. Cities Serv. Oil Co.}, 554 P.2d 1367, 93 A.L.R.3d 654 (1976), which the editor of the accompanying annotation declared was "largely supported" by all but "a very small number of jurisdictions." 93 A.L.R.3d at 659, 662.

\footnote{1938} LARSON, UNJUST DISMISSAL § 1.01, at 1-1 ("Perhaps the most striking development in employment law in recent years has been the emergence, in a growing number of jurisdictions, of judicially created exceptions to the employment-at-will rule. Faced with some of the more egregious employer abuses, and lacking statutory remedies, courts have begun to supply remedies through the imaginative application of a variety of common law
contract or tort theory and are steadily increasing in number.\textsuperscript{1939} The following subsection focuses on the tort exceptions of wrongful termination and retaliatory discharge as alleged by the plaintiff in \textit{Luck}.\textsuperscript{1940}

\textsuperscript{1939} As for judicially recognized exceptions, the number of jurisdictions finding exceptions to the employment-at-will doctrine are on the rise. \textit{Id.}, \S 2.07, at 2-16, 2-17 ("The late 1970's and early 1980's have seen a mushrooming of the exceptions to the employment at will rule, both statutory and judicial").

In examining employment contracts, courts in several states have found implied promises of tenure in, for example, assurances in employee handbooks and personnel manuals that the employee would not be fired unless her job performance was unsatisfactory. \textit{Tousaint v. \textcolor{black}{Blue Cross & Blue Shield}}, 408 Mich. 579, N.W.2d 880 (1980); \textit{Weiner v. McGraw Hill}, 57 N.Y.2d 458, 443 N.E.2d 444, 457 N.Y.S.2d 193 (1982).

Courts in two states have imposed a nondisclaimable duty of good faith and fair dealing in employment contracts. In California the leading case is \textit{Cleary v. American Airlines}, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980) (finding a "covenant of good faith and fair dealing contained in all contracts, including employment contracts"). In Massachusetts the leading case is \textit{Fortune v. National Cash Register}, 373 Mass. 96, 364 N.E.2d 1251 (1977). \textit{See also McKinney v. National Dairy Council}, 491 F.Supp. 1108, 1121 (D. Mass. 1980) ("Massachusetts law . . . [took] a new turn in \textit{Fortune}, which for the first time recognized an implied-in-law term of an at-will employment contract requiring good faith and fair dealing with respect to a decision to terminate the employment"). New Hampshire, which was the first state to announce a "good faith" standard, \textit{see Monge v. Beebe Rubber Co.}, 114 N.H. 130, 133, 316 A.2d 549, m 551 (1974) (holding that "termination . . . motivated by bad faith or malice . . . constitutes a breach of the employment contract"); has since retreated from this view. \textit{See Howard v. Dorr Woolen Co.}, 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980) (limiting authority of \textit{Monge} to "situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn").

Under the good faith doctrine, an employee can recover damages for breach of contract if she can show that her dismissal was motivated by malice or bad faith. Even in the two jurisdictions that have recognized this duty, however, it has so far been applied chiefly to cases in which the employee has been at her job for a considerable length of time, \textit{see}, \textit{e.g.}, \textit{Cleary}, 111 Cal. App. 3d at 456, 168 Cal. Rptr. at 729; \textit{accord Pugh v. See's Candies, Inc.}, 116 Cal. App. 3d 311, 327-28, 171 Cal. Rptr. 917, 926-27 (1981), or the employer has deprived the employee of bonuses, wages, or commissions. \textit{See}, \textit{e.g.}, \textit{Fortune}, 373 Mass. 96, 364 N.E.2d 1251; \textit{also Siles v. Travenol Labs, Inc.}, 13 Mass. App. Ct. 354, 358, 433 N.E.2d 103, 106 (1982).
The tort of wrongful discharge creates a cause of action for employees who are discharged for engaging in certain activities which are protected as a matter of public policy. The cause of action attempts to eliminate the bad cause discharge or retaliatory discharge when an employee exercises a statutory right or engages in "whistle-blowing" activities which advance the recognized interests of society. California recognizes the tort of wrongful discharge,


1942. Although the public policy exception is still evolving, courts have so far found it to apply to discharges involving three broad categories of motives:


in fact, it is credited with first formulating the cause of action in *Petermann v. Teamsters Local 396*.1943

In *Petermann* an employee was discharged when he refused to commit perjury during an investigation of illegal acts which were alleged to have been engaged in by a union.1944 Declaring that the state's perjury laws reflected an important public policy upon which the viability of the judicial process depended,1945 the court of appeals held that an employee-at- will could not be fired for a reason which violated the public policy of the state1946 and, therefore, the employer's actions in *Petermann* were tortious.1947 In reaching its conclusion, the *Petermann* court reasoned that

[i]t would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.1949

Twenty-one years later, in *Tameny v. Atlantic Richfield Company*,1949 the California Supreme Court ratified the decision in *Petermann*, holding that an employee discharged for refusing to engage in illegal conduct at his employer's request could bring a tort action for wrongful discharge.1950 In *Tameny*, the plaintiff alleged that his former employer had discharged him after fifteen years of service because he refused to participate in an illegal scheme to fix retail gasoline prices.1951

The California Supreme Court found that the trial court erred in sustaining the defendant's demurrer to the tort cause of action for wrongful discharge,1952 instructing that an employer's obligation to refrain from discharging an employee who refused to commit a criminal act did not depend on any express or implied promises set

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1944. Id.
1946. Id.
1947. Id.
1948. Id.
1950. 27 Cal. 3d at 178, 610 P.2d 1330, 164 Cal. Rptr. 839.
1951. Id. at 169.
1952. Id. at 179.
forth in the employment contract. Rather, explained the Tameny court, it reflected a duty imposed by law on all employers in order to implement the fundamental public policy embodied in the penal statutes. The Tameny court further explained that, "where the employer's motivation for a discharge contravenes some substantial public policy principle, then the employer may be held liable to the employee for damages. . . ." Thus, Tameny set the framework for other cases seeking to limit the application of Labor Code section 2922, which statutorily recognizes employment-at-will as the rule in California.

The critical question under California's public policy exception thus becomes: from what sources can public policy be derived that imposes limitations on the employment-at-will doctrine? To date, the California courts have only recognized public policies grounded in statutes. In Shapiro v. Wells Fargo Realty Advisors the

1953. Id. at 176.
1954. Id.
1955. Id. at 179 n.12.
See also Cal. Lab. Code § 2924 (West Supp. 1985), which provides:

Any employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued capacity to perform it.

1957. See infra text accompanying note 1960. Additional examples of cases where the courts have recognized public policy violations include: Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970) (A statutory provision designed to protect an employee's rights to collective bargaining also gave rise to a private right of action which was enforceable when employees were fired for attempting to negotiate their rights to receive the minimum wage through a private attorney, rather than through a labor organization) (holding employees cannot be fired for asserting their rights to receive minimum wage); Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961) (holding that employees cannot be fired for engaging in union activity). See also Ostrofe v. H. S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982) (Applying California and federal law, the court held that an employee could collect treble damages when fired for trying to prevent an antitrust conspiracy).

In Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982), Hentzel claimed he was fired "in retaliation for his protesting what he considered to be hazardous working conditions caused by other employees smoking in the workplace." Id., p. 293, 188 Cal. Rptr. 159. The appellate court considered the question whether Singer had violated public policy by discharging Hentzel for protesting the lack of smoking regulations, and determined that it had. The court stated, "California has long maintained a policy of protecting the right of employees to voice their dissatisfaction with working conditions." Id., at p. 296, 188 Cal. Rptr. 159. The court went on to note various Labor Code sections which generally require employers to provide a safe and healthful work place for employees and stated, "It requires little analysis to perceive that the legislative purpose underlying these provisions would be
court of appeal announced the prevailing view in California on this subject:

... Although there is dictum in *Tameny* suggesting that there can be a public policy sufficient to support a cause of action for wrongful discharge absent statutory authority, no California cases have so held; however, one Court of Appeal case has expressly stated that courts have no power to declare public policy in wrongful discharge cases without statutory support.¹⁹⁵⁹

Therefore, to successfully plead a cause of action in California under the theory of wrongful discharge, a plaintiff must allege that he or she was terminated in retaliation for asserting his statutory

substantially undermined if employers were permitted to discharge employees simply for protesting working conditions which they reasonably believe constitute a hazard to their own health or safety, or the health or safety of others." *Id.*, at p. 298, 188 Cal. Rptr. 159. Although the *Hentzel* decision recognizes a public policy exception without an express statutory provision thereof, the fact remains that the court searched for a statutory scheme from which the public policy could be implied.


In *Shapiro*, the plaintiff, an at-will employee, was fired without cause. Plaintiff did not allege a retaliatory firing or that he was fired because he refused to obey an unlawful directive. Plaintiff alleged only that he was fired without cause and that "his termination was wrongful and malicious because [his employer] knew that an at-will employee could not be terminated except for good cause." The appellate court affirmed an order sustaining defendant's demurrer to a cause of action for wrongful discharge based on the theory that the termination violated public policy. The court stated "In the case before us, Shapiro has failed to allege that he was terminated either in retaliation for asserting his statutory rights, or for his refusal to perform an illegal act at the request of his employer, or because his employer directly violated a statute by dismissing him. ... The complaint does not set forth any facts which show that his 'employer's motivation for discharge contravened some substantial public policy principle ... .' (*Tameny v. Atlantic Richfield Co.*, supra, 27 Cal.3d at p. 177, italics added.)" *Id.* at 477, 199 Cal. Rptr. at 622.

1959. *Id.* Compare *Newfield v. Insurance Co. of the West*, 156 Cal. App. 3d 440, 203 Cal. Rptr. 9 (1984) (the California appellate court held that allegations that plaintiff had been discharged in contravention of "the express public policy of the state of California in that the defendant employer discharged him without good cause and wrongfully denied him the opportunity to continue in employment to obtain maximum benefits," did not establish a cause of action under *Tameny*, since job security is not, in itself, a substantial public policy sufficient to support a cause of action for wrongful discharge) ("There is no public policy that people are or should be entitled to permanent employment or that an employer is not entitled to discharge an employee. The law as set forth by statute reflects a contrary policy. The general rule codified in Labor Code section 2922 provides that 'An employment, having no specified term may be terminated at the will of either party ... .'").

*But see Dabbs v. Cardiopulmonary Management Services*, 188 Cal. App. 3d 1437, 1448, 234 Cal. Rptr. 129, 139 (1987) ("We disagree with the *Shapiro* court's decision that the Legislature is the only source of public policy determinations") ("... fundamental public policy may be expressed either by the Legislature in a statute or by courts in decisional law. Insofar as affording remedies to an employee discharged in contravention of a fundamental public policy is concerned, it is immaterial whether the public policy is proclaimed by statute or delineated in a judicial decision") (quoting the earlier case of *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 1165, 226 Cal. Rptr. 820, 829 (1986)).
Drug Testing

rights, or for refusal to perform an illegal act at the request of his employer, or that the employer directly violated a statute by dismissing him or her. ¹⁹⁶⁰

The plaintiff's wrongful discharge claim in Luck is apparently based on the theory that her termination for refusal to submit to the drug test on privacy grounds violates clear California public policy concerned with safeguarding the individual's inalienable right of privacy.¹⁹⁶¹ This inalienable right of privacy is expressly set forth in Article 1, Section 1, of the California Constitution which the Supreme Court of California suggested, in White v. Davis,¹⁹⁶² was directed in part against the "overbroad collection and retention of unnecessary personal information by ... business interests."¹⁹⁶³

The threshold issue for the court to decide in Luck in order to resolve the plaintiff's wrongful discharge claim is whether to extend public policy status to the general protection of privacy embodied in the California Constitution.¹⁹⁶⁴ Clearly, the court's decision would be substantially easier if there was a state law expressly prohibiting drug testing of employees similar to California's anti-polygraph testing statute;¹⁹⁶⁵ however, no such state law exists.¹⁹⁶⁶

Expansion of the public policy exception to include the general constitutional privacy provision is an issue of first impression before the California courts, although the California Supreme Court intimated in Davis that the constitutional provision was

¹⁹⁶０. Shapiro, 152 Cal. App. 3d at 477, 199 Cal. Rptr. at 622.
¹⁹⁶¹. The facts in Luck as reported by several commentators in the legal community do not suggest that Luck has based her wrongful discharge on a basis other than an alleged violation of the public policy of protecting individual employee privacy rights.
¹⁹⁶³. Id. at 775, 533 P.2d at 248.
¹⁹⁶⁴. See supra note 1890 for text of Article 1, section 1 of the California Constitution.
(a) No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test or examination as a condition of employment or continued employment. The prohibition of this section does not apply to the federal government or any agency thereof or the state government or any agency or local subdivision thereof, including, but not limited to, counties, cities and counties, cities, districts, authorities, and agencies.
(b) No employer shall request any person to take such a test, without first advising the person in writing at the time the test is to be administered of the rights guaranteed by this section.
¹⁹⁶⁶. The California Senate presently has a drug-testing bill under consideration, however, the bill grants the employer wide latitude in conducting drug screens. For the text of this bill, see infra note 2024.
designed to reflect the public policy against unreasonable intrusions into an employee's privacy. Although not binding on California courts, the Massachusetts Supreme Court's decision in *Cort v. Bristol Meyers Company,* by analogy, reinforces the argument under *Davis* that the public policy exception should be extended to encompass the general right of privacy incorporated in the California Constitution.

In *Cort,* several salesmen were discharged from their jobs for their refusal to supply answers to certain questions on a company questionnaire which they considered to be extremely personal, offensive and unrelated to their jobs. The *Cort* majority framed the issue before the bench as whether the employer should be liable for discharging any employee for failure to provide complete responses to the questionnaire. At the outset of its analysis the court acknowledged that while the Massachusetts Legislature previously imposed statutory restrictions on an employer's inquiry into certain criminal and health care histories of employees, the Legislature did not forbid the gathering of information of the character sought in the case. This notwithstanding, the Massachusetts Supreme Court declared:

... if the questionnaire sought to obtain information in circumstances that constituted an "unreasonable, substantial or serious interference with his privacy" in violation of the principles expressed in G.L.c. 214, § 1B, the discharge of an employee for failure to provide such information could contravene public policy and warrant the imposition of liability on the employer for the discharge. In short, if Bristol-Meyers had no right to ask the questions that the plaintiffs declined to answer, Bristol-Meyers could be lia-

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1967. 13 Cal.3d 757, 533 P.2d 222 (1975). Might the *Luck* court be persuaded by the reasoning of the few cases holding that public policy can be divined from judicial decisions? *See supra* note 1960.


1969. For the text of Article 1, section 1 of the California Constitution, *see supra* note 1890.


1971. *Id.* at 302, 431 N.E.2d at 910.

1972. An employer who subjects an employee or prospective employee to a lie detector test, or requests submission to such a test, is guilty of a crime. G.L. c. 149, § 19B (West 1976 Supp. 1986). It is an unlawful practice under G.L. c. 151B, § 4(9) (West. 1976 Supp. 1986), for an employer in connection with the discharge of an employee, among other things, to seek information on various subjects, such as (a) arrests in which no conviction resulted, (b) a first conviction for certain minor crimes, and (c) if other conditions are met, convictions of certain misdemeanors that occurred five or more years earlier.


ble for discharging the plaintiffs for their failure to answer those questions.\textsuperscript{1976}

The Massachusetts Supreme Court then announced that in the area of private employment there may be inquiries of a personal nature that are unreasonably intrusive and no business of the employer and that an employee may not be discharged for refusal to answer such inquiries.\textsuperscript{1976} However, qualified the court:

We would not go so far as to say that an employer would always be liable for discharging an employee for his refusal to answer questions not relevant to its business purposes. In public policy terms, it is the degree of intrusion on the rights of the employee which is most important.\textsuperscript{1977}

To maintain their claims of wrongful discharge, the plaintiffs were required to demonstrate that the questionnaire was an "unreasonable, substantial or serious interference with their privacy."\textsuperscript{1978} Reasonableness, suggested the court, depends on the nature of the job in questions, for the permissible breadth in scope and personal nature of the information sought is commensurate with the degree of responsibility and confidentiality involved in the particular position.\textsuperscript{1979} Inasmuch as temperament and dedication were important factors in a salesman's effectiveness, questions bearing on these subjects were reasonable and permissible.\textsuperscript{1980}

\textsuperscript{1975} Id. at 304, 431 N.E.2d at 911. See supra note 1891 for the text of the Massachusetts statute.
\textsuperscript{1976} Id. at 305, 431 N.E.2d at 911-12.
\textsuperscript{1977} Id., 431 N.E.2d at 912.
\textsuperscript{1978} Id.
\textsuperscript{1979} Id. The court explained:

In public policy terms, it is the degree of intrusion on the rights of the employee which is most important. In measuring the nature of the intrusion, at least as to its reasonableness (but perhaps as well to its substantiality and seriousness), the nature of the employee's job is one of some significance. The information that a high level or confidential employee should be reasonably expected to disclose is broader in scope and more personal than that which should be expected from an employee who mows grass or empties wastebaskets . . . .

\textit{Id.}

\textsuperscript{1980} The court reasoned that

[a] salesman responsible for the sale of drug products to hospitals, doctors, and pharmacists falls in the middle of this range, but toward its upper side. The temperament and dedication of a salesman are important factors in his effectiveness, and questions bearing on these subjects are certainly reasonable and should be expected. \textit{Id.} at 306, 431 N.E.2d at 913.

The questionnaire, entitled Biographical Summary, sought information which, it represented, would be held in strict confidence. The subjects covered included business experience, education, family, home ownership, physical data, activities, and aims. In general, each plaintiff furnished answers to the questions concerning his business experience, education, and family. \textit{Id.}
Noting that many of the questions bearing on family and home ownership to which the plaintiffs objected were matters of public record and were no more intrusive than those asked on a bank loan or life insurance application, the Court implicitly determined that the plaintiffs also failed to establish that the unanswered questions on the questionnaire entailed a substantial or serious intrusion into their privacy.\(^\text{1981}\) Thus, concluded the court, the plaintiffs did not meet their burden of making out a case for wrongful discharge, and the trial court's entry of a judgment N.O.V. against the plaintiffs on the issue was proper.\(^\text{1982}\)

Despite the fact that the decision in \textit{Cort} rested upon a general statutory protection of individual privacy\(^\text{1983}\) and in \textit{Luck} the protection is embodied in a constitutional provision,\(^\text{1984}\) the recognized purpose behind each of the protective provisions is, at least in part, to limit the extent to which informational activities of an employer permissibly intrude on an employee's privacy.\(^\text{1985}\) Therefore, the justification for extending public policy status to the California constitutional provision protecting individual privacy is no less compelling than the reasons advanced in \textit{Cort} for holding that the Massachusetts statute's protection of individual privacy expressed recognized public policy.\(^\text{1986}\)

Even if the plaintiff in \textit{Luck} succeeds in convincing the San Francisco Superior Court that Article 1, Section 1, of the California Constitution embodies a recognized public policy of protecting individual rights of privacy, the \textit{Luck} ruling will be of limited value to other jurisdictions which recognize the tort of wrongful discharge; because, as discussed previously, the California constitutional recognition of broad-based individual privacy rights is relatively unique.\(^\text{1987}\) To the extent however that a particular state's constitution can be construed to include an analogous provision, a ruling in \textit{Luck} recognizing a public policy of protecting employee privacy interests may inaugurate a trend in which these other

\(\text{1981. Id. at 307, 431 N.E.2d at 914.}\)
\(\text{1982. Id.}\)
\(\text{1983. See supra note 1976 for the text of the applicable Massachusetts statute.}\)
\(\text{1984. See supra note 1890 for the text of Article 1, Section 1 of the California Constitution.}\)
\(\text{1985. This purpose was articulated by the Davis court in California and by the Cort court in Massachusetts. Compare supra texts accompanying notes 1882-86 (Davis); 1976-82 (Cort).}\)
\(\text{1986. Id.}\)
\(\text{1987. See supra text accompanying notes 1890-95.}\)
states will follow suit.\textsuperscript{1988}

4. Luck v. Southern Pacific: Is it Pandora's Box?

A ruling in Luck, which recognizes an employee's statutory or constitutional protection of privacy against an employer's drug screening policies or creates a public policy exception to employment-at-will arising from the California constitutional protection of individual privacy would hardly be an end to the inquiry for the court. Once any of these claims are recognized as legally cognizable, the court will face the far more difficult task of identifying, sorting, and balancing the relevant competing interests of employer and employee to determine the propriety of the drug testing program.

If the court gets this far, it will be quite interesting to see how the court will handle this task. Will the Luck court merely adopt the analysis employed by the federal courts in the public-sector drug screening cases, or will the court engage in a more in-depth examination of the competing interests?\textsuperscript{1989} Will the court apply a "reasonable suspicion" standard across-the-board to all types of private employment or will it establish a scheme of various levels of cause, one of which the employer must demonstrate based upon the nature of the particular employment to justify testing of individual employees?\textsuperscript{1990} For example, while nuclear reactor operators

\textsuperscript{1988. See supra notes 1898-99.}

\textsuperscript{1989. The federal district court rulings in the public-sector employment drug screening cases are discussed supra beginning with the text accompanying note 489.}

\textsuperscript{1990. The classic definition of "reasonable suspicion" was set forth by the federal district court in McDonnell. See text accompanying note 593.}

If the Luck court chooses to apply a reasonable suspicion standard, will it smooth out the conceptual rough edges? See supra text accompanying notes 1085-95.

If, instead, the court decides to start with a clean slate and establish guidelines for permissible testing based on types of employment, it will instantly be forced to consider what aspects of employment are indispensible to the analysis. That is, should safety be the only factor involved, and, depending upon the level of hazard involving in the occupation, the level of necessary cause to test will be adjusted? Or should other factors be figured into the formula, such as potential economic losses from negligent employees impaired by drugs? Or possession of national security information? Or possession of knowledge of the corporation's trade secrets? [The decision in Cort seems to suggest that levels of confidentiality should be considered in the analysis. See supra note 198]. How many factors should be considered? Should/Could the employer be expected to expend the time and expense in breaking down occupational positions into the various considerations and then rate the job according to the degree of presence of absence of each factor? The resulting drug testing policy would be volumes thick and understood, if at all, only by those who compiled it. How would this square with notions of due process? Suddenly, would the consideration of too many factors make it an impracticable test to apply in a given case? See infra text accompanying note 1992.
might be justifiably tested for drugs based on a reasonable suspicion standard, perhaps nothing short of probable cause should be required before testing a retail sales clerk employee.\textsuperscript{1991} Or, will the \textit{Luck} court insist that an \textit{ad hoc} case-by-case analysis is necessary to recognize the individual exceptions to the general rule?\textsuperscript{1992}

Another critical consideration presented by the facts in \textit{Luck} is whether the court will recognize the employer's interest in reducing economic losses and profitability declines from drug use, without additional public or fellow employee safety concerns, as a sufficient justification for compulsory employee drug screening.\textsuperscript{1993} If this interest is recognized at all, what level of cause must the employer demonstrate before testing employees?\textsuperscript{1994} Is random testing justified when the only alleged threat to employer interests is economic?\textsuperscript{1995} How much of a loss is necessary to justify an employer's action and how must it be demonstrated to be drug-related?\textsuperscript{1996}

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Query: Is the court equipped to make all the necessary policy choices? Does it possess the necessary knowledge of the drug screening problem to make informed, just policy decisions as required here? [Even the United States House of Representatives is conducting hearings on the testing issue. See Government Employee Relations Report, Apr. 13, 1987, \textit{Testing Federal Workers No Panacea, Witnesses Tell House Panel}, at 540.]

\textsuperscript{1991} At least one arbitration panel has ruled that while unilaterally imposed random drug testing of nuclear employees was not a reasonable work rule, testing on a reasonable cause basis was permissible past practice. See BNA Daily Report, Oct. 15, 1986, \textit{Arbitration Panel Bars Random Drug Tests at Three Mile Island Nuclear Power Plant}, at A-5.

\textsuperscript{1992} This appears to be the course selected by the federal courts which have announced the general rule of "reasonable suspicion" and then have carved out exceptions to the rule for highly-regulated industries and medium/maximum security prison officials. The public-sector cases are discussed \textit{supra} beginning at text accompanying note 489.

\textsuperscript{1993} While Company admits that it had no reason to suspect Luck of using drugs since her work performance was exemplary, Southern Pacific seeks to justify its decision to test Luck and other members of her department on the public policy argument that society does not condone illegal drugs and the argument that drug testing represents a legitimate business practice. See \textit{supra} text accompanying notes 1875, 1888. Implicit in this argument, then, is that Southern Pacific has the legitimate right to test for drug abuse among its employee, where safety is not an issue, for the purposes of protecting its economic interest in the efficient and profitable operation of its enterprise.

\textsuperscript{1994} When the only threatened interest is the employer's economic interest, should a higher standard than reasonable suspicion be required? Perhaps, probable cause?

\textsuperscript{1995} If random testing is impermissible, is blanket-testing permissible?

\textsuperscript{1996} Quantification could be a real problem. What is a substantial loss to a sole-proprietor, or even a small corporation may only be the equivalent of postage expenses for a corporation among the Fortune 500. Is quantity the only factor involved? Must a loss be demonstrated at all? Could the potential for economic loss be enough? Should it matter that certain items produced by the employer are used for national defense? Or for the health industry? [In both instances, declined productivity could be disastrous].

How will the employer establish a link between drug abuse and economic loss? Must the link be direct or will it suffice to rely on circumstantial proof such as national percentages on drug-related business loss? See \textit{supra} note 19.
Will the court consider procedural safeguards at all in ruling on the propriety of Southern Pacific's drug testing procedure, or will it reserve judgment on these issues for a subsequent case in which the test is actually administered and adverse employer acts based on the test results is being challenged? For example, must adequate procedures for confidentiality,\textsuperscript{1987} chain-of-custody,\textsuperscript{1998} confirmation,\textsuperscript{1999} and sample retention for independent testing\textsuperscript{2000} be in place in order for the drug screening procedures to be reasonable and for the employer to be permitted to compel an employee to take the test?

Perhaps on a more fundamental basis, how broadly will the Luck court define the privacy interest to be protected?\textsuperscript{2001} That is, will the court recognize only the confidentiality interest in the privacy of personal medical records and physiological information\textsuperscript{2002} or will it choose the broader concept of privacy interests in human bodily integrity and dignity?\textsuperscript{2003}

The foregoing briefly illustrates the plethora of issues with which the Luck court will be faced if, and when, it decides to recognize privacy as a potential limitation on private employer drug screening policies. It is no small wonder the legal community and labor interest groups await a decision in Luck with baited breath.\textsuperscript{2004}

5. Intentional Infliction of Emotional Distress

Virtually all of the courts which have ruled on the issue of intentional infliction of emotional distress in the employer-employee
context have explicitly or implicitly recognized independent tort liability for such conduct and California is no exception. In order for a plaintiff to make out a prima facie case for intentional infliction of emotional distress in California, he or she must demonstrate four elements: outrageous conduct by the defendant, intention to cause or reckless disregard of the probability of causing emotional distress, severe emotional suffering, and, actual and proximate causation of emotional distress.

The ability to recover on a claim for intentional infliction of emotional distress turns on whether the plaintiff successfully demonstrates that the challenged conduct was "extreme and outrageous." Following the Restatement (Second) of Torts, Section 46, California courts have defined "extreme and outrageous" conduct as "beyond all bounds of decency," such as to be regarded as "atrocious and utterly intolerable." Thus, ordinary, rude or insulting behavior is not enough to qualify for an award of damages. Determining in the first instance whether the challenged conduct "may reasonably be regarded as so extreme and outrageous as to permit recovery," the California courts have grudgingly permitted recovery for intentional infliction of emotional distress in the past.

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2006. Duersen, 189 Cal. App. 3d at 651, 234 Cal. Rptr. at 524 (citing 4 WITKIN; SUMMARY OF CALIFORNIA LAW, Torts § 234, at 2515 (8th Ed. 1974)).


2010. In a number of cases arising from employment relationships, the court denied recovery on a theory of intentional infliction of emotional distress because the conduct in question was not "outrageous" for purposes of the tort: Ankney v. Lockheed Missiles & Space Co., 88 Cal. App. 3d 531, 536-37, 151 Cal. Rptr. 828, 833 (1979) (numerous acts of harrassment, including denial of promotion, temporary termination of employment); Cornbleth v. First Maintenance Supply Co., 268 Cal. App. 2d 564, 565, 74 Cal. Rptr. 216, 217 (1968) (instructions to co-workers not to assist plaintiff, intended to induce plaintiff to quit); Agastini v. Strycula, 231 Cal. App. 2d 804, 808-09, 42 Cal. Rptr. 314, 318 (1965) (insulting conduct concerning plaintiff's unsuitability for the position); Perati v. Atkinson, 213 Cal.
In the employment context, due to the employer’s right to discharge an at-will employee, a claim of outrage cannot be predicated upon the fact of discharge alone. However, the manner in which the discharge is accomplished or the circumstances under which it occurs may render the employer liable. In *Luck*, it is not clear from the reports on the pending litigation exactly on what allegations the plaintiff rests her claim for intentional infliction of emotional distress beyond the fact that her supervisor on July 11, 1985, handed her a sample jar at her desk and directed her to go to the ladies restroom and produce a urine specimen, which Luck refused to do.

Luck’s claim for intentional infliction of emotional distress as a result of her discharge for refusing to submit to Southern Pacific’s drug test is an issue of first impression in California. The *Luck* case presents the court with the opportunity to offer insight into the type of employer conduct in implementing and administering a drug screening program that will support a claim for intentional infliction of emotional distress. It seems almost certain, however, that the plaintiff’s claim in *Luck* under this cause of action will be denied by the court.


2012. See Restatement (Second) of Torts, § 46, comment g.

2013. *NLJ, Drug Testing*, supra note 16, at 27 (“Barbara Luck, . . ., was seated at her desk last July 11 when her supervisor, carrying a glass bottle, came over and asked her to go down the hall to take a urine test”).

2014. The court will likely perceive the supervisor’s method of requesting Luck to submit the urine sample embarrassing perhaps, but not “outrageous” as required by the tort. There is no indication from the facts reported that the employer’s conduct in *Luck* rises to the same egregious evil as in *Renteria v. County of Orange*, supra note 2013, 82 Cal. App.
B. State Statutory Regulation of Employer Drug Testing Practices is Both Sparse and Incongruent, Leaving Private-Sector Employees Largely Unprotected

As the foregoing discussion of the *Luck* case illustrates, the controversy between the countervailing interests of employer and employee is further exacerbated by the incipient stage of the legal development of adequate forms of redress available to the private-sector employee challenging an employer's drug testing policies.\(^{2015}\) This is particularly true in the area of individual rights of privacy which, although recognized by society and cognizable under its laws, by-and-large currently afford inadequate protection to the private-sector employee in the drug screening context.\(^{2016}\) Furthermore, a surge in jurisprudential development in these areas is not likely because the private-sector employee has no basic common law right to secure or retain a job and, therefore, oftentimes lacks an adjudicative channel.\(^{2017}\)

One commentator calls for a legislative response to fill the present gap in the legal system, advancing five reasons for legislative regulation of drug testing in private employment:

1. it is an intrusive procedure that violates a person's dignity;  
2. its process of obtaining information invades a person's privacy;  
3. its results are not always accurate and their application in the employment context is questionable;  
4. an inaccurate or misinterpreted test result may cause an unjustified dismissal or denial of employment as well as jeopardize future employment opportunities; and  
5. current law does not adequately protect

2016. For a discussion of the general lack of protection of individual privacy rights in the drug screening context, *see supra* text accompanying notes 1890-98.  
Moreover, the common law of privacy has not developed to a point where it can be said with any degree of certainty that a private-sector employee would have a legally cognizable claim for invasion of privacy against an employer for an abusive drug testing policy. In fact, the *Luck* case will put such a theory to the test for the first time. *See supra* text accompanying notes 1899-1936.  
2017. Inasmuch as the majority of jurisdictions still abide by the employment-at-will doctrine subject to specific exceptions, the non-unionized private-sector employees access to the courts is greatly limited. The tort of wrongful discharge is a restricted avenue into the courts, because the majority of jurisdictions which recognize this exception require the public policy upon which the tort is based to be expressly set forth in a statute, or, maybe, a constitutional provision. *See* LARSON, UNJUST DISMISSAL, § 6.01, at 6-4. As already discussed, the constitutional and statutory protection of individual privacy interests is extremely limited, and even more so in a drug screening context. *See supra* note 2017. Thus, without a pronouncement recognizing or evidencing such a policy, the employee has no public policy to allege has been violated. Presently, contractually-based claims for wrongful discharge are similarly limited. *See supra* note 1940.
private-sector employees from the adverse consequences of drug testing.\textsuperscript{2018}

Several states have either enacted or are in the process of formulating some sort of statutory regulatory scheme on private employer drug testing. San Francisco, California, pioneered drug-testing regulation with its enactment of a municipal ordinance restricting the employer's use of drug tests to certain prescribed situations in December, 1985.\textsuperscript{2019} The State of Utah recently en-
acted an even more comprehensive statute regulating drug testing in employment. Meanwhile, a California state legislative bill, re-

(a) the employer has reasonable grounds to believe that an employee's faculties are impaired on the job; and

(b) the employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and

(c) the employer provides the employee, at the employer's expense, the opportunity to have the sample tested or evaluated by State licensed independent laboratory/testing facility and provides the employee with a reasonable opportunity to rebut or explain the results.

In conducting those tests designed to identify the presence of chemical substances in the body, and not prohibited by this section, the employer shall ensure to the extent feasible that the test only measure and that its records only show or make use of information regarding chemical substances in the body which are likely to affect the ability of the employee to perform safely his or her duties while on the job.

Under no circumstances may employers request, require or conduct random or company-wide blood, urine or encephalographic testing.

In any action brought under this Article alleging that the employer had violated this section, the employer shall have the burden of proving that the requirements of Subsections (a), (b) and (c) as stated above have been satisfied.

Sec. 3300A.6 MEDICAL SCREENING FOR EXPOSURE TO TOXIC SUBSTANCES. Nothing in this Article shall prevent any employer from conducting medical screening, with the express written consent of the employees, to monitor exposure to toxic or other unhealthy substances in the workplace or in the performance of their job responsibilities. Any such screenings or tests must be limited to the specific substances expressly identified in the employee consent form.

Sec. 3300A.7 PROHIBITING USE OF INTOXICATING SUBSTANCES DURING WORKING HOURS; DISCIPLINE FOR BEING UNDER THE INFLUENCE OF INTOXICATING SUBSTANCES DURING WORKING HOURS. Nothing in this Article shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours, or restrict an employer's ability to discipline employees for being under the influence of intoxicating substances during working hours.

Sec. 3300A.8 ENFORCEMENT.

(a) Any aggrieved person may enforce the provisions of this Article by means of a civil action. Any person who violates any of the provisions of this Article or who aids in the violation of this Article shall be liable to the person aggrieved for special and general damages, together with attorney's fees and the costs of action.

(b) Injunction.

(1) Any person who commits, or proposes to commit, an act in violation of this Article may be enjoined therefrom by any court of competent jurisdiction.

(2) An action for injunctive relief under this subsection may be brought by any aggrieved person, by the District Attorney, or by the City Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class.

2020. The Utah Statute provides in pertinent part:

DRUG AND ALCOHOL TESTING ACT

1987

GENERAL SESSION

AN ACT RELATING TO LABOR; SPECIFYING PROCEDURES AND GUIDELINES FOR PRIVATE EMPLOYERS TO CONDUCT DRUG AND ALCOHOL
Be it enacted by the Legislature of the state of Utah:

Section 1. Section 34-38-1, Utah Code Annotated 1953, is enacted to read:

34-38-1. The Legislature finds that a healthy and productive work force, safe working conditions free from the effects of drugs and alcohol, and maintenance of the quality of products produced and services rendered in this state, are important to employers, employees, and the general public. The Legislature further finds that the abuse of drugs and alcohol creates a variety of workplace problems, including increased injuries on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services.

Therefore, in balancing the interests of employers, employees, and the welfare of the general public, the Legislature finds that fair and equitable testing for drugs and alcohol in the workplace, in accordance with this chapter, is in the best interest of all parties.

The Legislature does not intend to prohibit any employee from seeking damages or job reinstatement, if action was taken by his employer based on a false drug or alcohol test result.

Section 2. Section 34-38-2, Utah Code Annotated 1953, is enacted to read:

34-38-2. For purposes of this chapter:

(1) "Alcohol" means ethyl alcohol or ethanol.

(2) "Drugs" means any substance recognized as a drug in the United States Pharmacopeia, the National Formulary, the Homeopathic Pharmacopoeia, or other drug compendia, or supplement to any of those compendia.

(3) "Employer" means any person, firm, or corporation, including any public utility or transit district, which has one or more workers or operators employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written. "Employer" does not include the federal or state government, or other local political subdivisions.

(4) "Employee" means any person in the service of an employer, as defined by Subsection (3), for compensation.

(6) "Sample" means urine, blood, breath, saliva, or hair.

Section 3. Section 34-38-3, Utah Code Annotated 1953, is enacted to read:

34-38-3. It is not unlawful for an employer to test employees or prospective employees for the presence of drugs or alcohol, in accordance with the provisions of this chapter, as a condition of hiring or continued employment. However, employers and management in general must submit to the testing themselves on a periodic basis.

Section 4. Section 34-38-4, Utah Code Annotated 1953, is enacted to read:

34-38-4. In order to test reliably for the presence of drugs or alcohol, an employer may require samples from his employees and prospective employees, and may require presentation of reliable identification to the person collecting the samples. Collection of the sample shall be in conformance with the requirements of Section 34-38-6. The employer may designate the type of sample to be used for testing.

Section 5. Section 34-38-5, Utah Code Annotated 1953, is enacted to read:

34-38-5. (1) Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees.

(2) An employer shall pay all costs of testing for drugs or alcohol required by the employer, including the cost of transportation if the testing of a current employee is conducted at a place other than the workplace.
(2) Within the terms of this written policy, an employer may require the collection and testing of samples for the following purposes:
(a) investigation of possible individual employee impairment;
(b) investigation of accidents in the workplace or incidents of workplace theft;
(c) maintenance of safety for employees or the general public; or
(d) maintenance of productivity, quality of products or services, or security of property or information.

(3) The collection and testing of samples shall be conducted in accordance with Sections 34-38-4, 34-38-5, and 34-38-6, and need not be limited to circumstances where there are indications of individual, job-related impairment of an employee or prospective employee.

(4) The employer's use and disposition of all drug or alcohol test results are subject to the limitations of Sections 34-38-8 and 34-38-13.

Section 6. Section 34-38-6, Utah Code Annotated 1953, is enacted to read:
34-38-6. All sample collection and testing for drugs and alcohol under this chapter shall be performed in accordance with the following conditions:
(1) the collection of samples shall be performed under reasonable and sanitary conditions;
(2) samples shall be collected and tested with due regard to the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;
(3) sample collection shall be documented, and the documentation procedures shall include:
(a) labeling of samples so as reasonably to preclude the probability of erroneous identification of test results; and
(b) an opportunity for the employee or prospective employee to provide notification of any information which he considers relevant to the test, including identification of currently or recently used prescription or nonprescription drugs, or other relevant medical information.
(4) sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the probability of sample contamination or adulteration; and
(5) sample testing shall conform to scientifically accepted analytical methods and procedures. Testing shall include verification or confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method, before the result of any test may be used as a basis for any action by an employer under Section 34-38-8.

Section 7. Section 34-38-7, Utah Code Annotated 1953, is enacted to read:
34-38-7. (1) Testing or retesting for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy which has been distributed to employees and is available for review by prospective employees.
(1) a requirement that the employee enroll in an employer-approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, as a condition of continued employment;
(2) suspension of the employee with or without pay for a period of time;
(3) termination of employment;
(4) refusal to hire a prospective employee; or
(5) other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement.

Section 8. Section 34-38-8, Utah Code Annotated 1953, is enacted to read:
34-38-8. Upon receipt of a verified or confirmed positive drug or alcohol test result which indicates a violation of the employer's written policy, or upon the refusal of an employee or prospective employee to provide a sample, an employer may use that test result or refusal as the basis for disciplinary or rehabilitative actions, which may include the following:
which were state licensed and met other listed criteria, passed

(2) In any claim, including a claim under Section 34-38-11, where it is alleged that an employer's action was based on a false test result:
   (a) there is a rebuttable presumption that the test result was valid if the employer complied with the provisions of Section 34-38-6; and
   (b) the employer is not liable for monetary damages if his reliance on a false test result was reasonable and in good faith.

Section 9. Section 34-38-9, Utah Code Annotated 1953, is enacted to read:
34-38-9. No cause of action arises in favor of any person against an employer who has established a policy and initiated a testing program in accordance with this chapter, for any of the following:
(1) failure to test for drugs or alcohol, or failure to test for a specific drug or other substance;
(2) failure to test for, or if tested for, failure to detect, any specific drug or other substance, disease, infectious agent, virus, or other physical abnormality, problem, or defect of any kind; or
(3) termination or suspension of any drug or alcohol testing program or policy.

Section 10. Section 34-38-10, Utah Code Annotated 1953, is enacted to read:
34-38-10. (1) No cause of action arises in favor of any person against an employer who has established a program of drug or alcohol testing in accordance with this chapter, and who has taken any action under Section 34-38-8, unless the employer's action was based on a false test result.
   (3) the false test result was disclosed with malice; and
   (4) all elements of an action for defamation of character, libel, slander, or damage to reputation as established by statute or common law, are satisfied.

Section 11. Section 34-38-11, Utah Code Annotated 1953, is enacted to read:
34-38-11. No cause of action for defamation of character, libel, slander, or damage to reputation arises in favor of any person against an employer who has established a program of drug or alcohol testing in accordance with this chapter, unless:
(1) the results of that test were disclosed to any person other than the employer, an authorized employee or agent of the employer, the tested employee, or the tested prospective employee;
(2) the information disclosed was based on a false test result;
(3) the false test result was disclosed with malice; and
(4) all elements of an action for defamation of character, libel, slander, or damage to reputation as established by statute or common law, are satisfied.

Section 12. Section 34-38-12, Utah Code Annotated 1953, is enacted to read:
34-38-12. No cause of action arises in favor of any person based upon the failure of an employer to establish a program or policy of drug or alcohol testing.

Section 13. Section 34-38-13, Utah Code Annotated 1953, is enacted to read:
34-38-13. (1) All information, interviews, reports, statements, memoranda, or test results received by the employer through his drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding, except in a proceeding related to an action taken by an employer under Section 34-38-8 or an action under Section 34-38-11.
   (2) The information described in Subsection (1) shall be the property of the employer.
   (3) An employer is entitled to use a drug or alcohol test result as a basis for action under Section 34-38-8.
   (4) An employer may not be examined as a witness with regard to the information described in Subsection (1), except in a proceeding related to an action taken by the employer under Section 34-38-8 or an action under Section 34-38-11.

2021. Bill AB4242 provided in relevant part:
An act to amend Section 1300 of the Business and Professions Code, to add Chap-
both houses of the California Legislature but was vetoed by the Governor, who viewed the proposed law as potentially inappropriately discouraging employers from using drug testing in the workplace.2022

Additionally, California,2023

Section 5 (commencing with Section 11998) to Part 5 of Division 10.5 of the Health and Safety code, and to amend Sections 1025, 1026, and 1027 of, and to amend the hearing of Chapter 3.7 (commencing with Section 1025) of Part 3 of Division 2 of, the Labor Code, relating to substance abuse.

SEC. 2. Chapter 5 (commencing with Section 11998) is added to Part 5 of Division 10.5 of the Health and Safety Code, to read:

CHAPTER 5. SUBSTANCE ABUSE TESTING

11998. This chapter shall be known and may be cited as the "Substance Abuse Testing Act of 1986."

11998.1. The Legislature finds and declares all of the following:

(a) Employers are increasingly using substance abuse testing to screen job applicants and employees.

(b) The Center for Disease Control report finds that some of these tests may not be conducted properly. In a 1985 study, the CDC found "serious shortcomings" in the quality controls of testing laboratories.

(c) Licensure of the state's laboratories which test on behalf of employers will balance the rights of employees with adequate protections for the public. Reducing illicit drug use in the workplace will improve the safety, health, and productivity of all Californians.

11998.2. If an employer requests or requires a job applicant or an employee to submit to a substance abuse test of any type, the employer shall use a clinical laboratory licensed by the State Department of Health Services under Chapter 3 (commencing with Section 1200) of Division 2 of the Business and Professions Code or a public health laboratory certified by the state department under Chapter 7 (commencing with Section 1000) of Division 1.

11998.3. Notwithstanding any negotiated collective bargaining agreement between an employer and his or her employees which provides for additional substance abuse testing standards, employers shall inform employees and job applicants of the testing policies in writing upon the adoption of the policy or when the employee is hired, if the policy was previously adopted. An employee shall have the right to request a copy of the results of a substance abuse test conducted pursuant to this chapter.

11998.4. Employers, employees, and laboratories shall keep all samples and test results confidential in compliance with the Information Practices Act of 1977 provided for in Chapter 1 (commencing with Section 1798) of Title 1 of the Civil Code and the California Public Records Act provided for in Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

11998.5. This chapter shall apply to private employers and to state and local entities of government.

2022. The Governor stated in his veto message:

This bill would require that all employers requiring substance abuse testing for employees use a State licensed clinical or certified public health laboratory. Additionally, the bill would require an employer with 25 or more employees to accommodate an employee who wishes to enter a drug rehabilitation program. I am concerned that this bill would inappropriately discourage employers from testing for drug abuse. Apparently, this bill would prohibit California employers from
using qualified labs that may provide faster processing times or lower prices. Additionally, it would prohibit the use of reliable test kits, even for preliminary screening, which are particularly useful for employees who are not at fixed locations.

Moreover, this bill would not permit the use of highly qualified law enforcement laboratories, such as the Los Angeles Police Department Scientific Investigation Division laboratory, to conduct drug testing analyses. Thus, this bill would impose an unnecessary and expensive burden on law enforcement agencies who operate qualified labs.

Newsletter from Johan Klehs, app., at 2 (July 24, 1986) discussing the Governor's veto of AB4242, the Substance Abuse Testing Act (Contact: Brian Maas (916) 445-8160).

Responding to the Governor's veto of the bill, Assemblyman Johan Klehs, the sponsor of the bill, stated:

Governor Deukmejian has chosen to ignore the potential drug testing crisis in California. Although he claims in his veto message that he acted to protect businesses from needless expenses, the Governor has instead failed to protect these businesses from the losses they will suffer if drug testing laboratories continue to be unlicensed and unmonitored.

Newsletter from Johan Klehs, at 1 (July 24, 1986) discussing Governor's veto of AB4242, the Substance Abuse Testing Act (Contact: Brian Maas (916) 445-8160). Feeling strongly about the need for testing laboratory licensing and certification, Assemblyman Klehs has vowed to reintroduce the subject of drug testing laboratory licensing in the next session of the Legislature and to produce a regulatory statute that will meet with the Governor's approval. Id. at 2.

2023. SENATE BILL No. 2175, introduced by Senator Seymour, Feb. 20, 1986, amended Apr. 1, 1986, states as follows:

The people of the State of California do enact as follows:

SECTION 1. Article 3.5 (commencing with Section 440) is added to Chapter 3 of Part 1 of Division 2 of the Labor Code, to read:

Article 3.5 Drug and Alcohol Testing

440. An employer may request or require an employee, as a condition of continued employment, to submit to or undergo a blood, urine, breath, or other chemical test to determine the presence in the body of alcohol or controlled substances, in any of the following circumstances:

(a) Whenever the employer has a reasonable suspicion that an employee or group of employees is, or may be, impaired or affected on the job by alcohol or controlled substances.

(b) Whenever the employer has a reasonable suspicion that alcohol or controlled substances are present in an employee's bodily system in violation of the employer's published rules or policy.

(c) Whenever an employee has been involved in a work-related accident causing bodily injury or damage to property, however minor.

(d) As part of a physical examination which the employer, under its established policies, requires employees to undergo on a regular or periodic basis, or as a result of specified occurrences, such as declining performance or absenteeism, so long as employees are notified in advance that the examination will include testing for alcohol or controlled substances.

(e) In accordance with the terms of a collective bargaining agreement between the employer and the bargaining representative of its employees, or a written employment agreement between an employer and an employee.

(f) As part of the employer's program of rehabilitation or employee assistance.

(g) Whenever an employee has tested positively for the presence of alcohol or illegal controlled substances within the prior 12-month period.

(h) As may be required or authorized by any federal or state health, safety, or other law or regulation.
441. In addition to the circumstances specified in Section 440, an employer may conduct testing of employees, including random, on-the-spot, or company-wide testing, in any of the following circumstances:

(a) Once in any 12-month period, regardless of the employees' job classification.
(b) Up to three times in any 12-month period in the case of employees whose jobs involve the operation of vehicles in public transit, the operation of heavy construction or off-shore oil drilling equipment, the handling of hazardous substances, or any job in which impairment due to alcohol or controlled substances would present a safety hazard to employees or members of the public. However, before the testing of an employee may be conducted pursuant to this section, the employer shall advise the employee, in advance, of its policy that the testing may be required.

442. Nothing in this article shall prohibit an employer, or an agent thereof, from requiring an applicant for employment to undergo a blood, urine, or other chemical test to determine the presence in the body of alcohol or controlled substances.

443. Employers who conduct testing pursuant to this article shall take reasonable precautions to ensure the confidentiality of the test results. Employers shall also ensure that the substance abuse testing is not used for any other purpose, such as testing for pregnancy, presence of AIDS antibodies, or other medical or bodily conditions.

444. It is the Legislature's intention to occupy the field of regulation of substance abuse testing in employment encompassed by this article, exclusive of all other laws regulating that testing in employment by any city, county, city and county, or other political subdivisions of this state. This article shall preempt and take precedence over any local ordinance, law, or regulation in the event of any conflict between that local provision and this article.

2024. Massachusetts' House Bill No. 5583 provides in relevant part:

AN ACT TO PROHIBIT THE DENIAL OF EMPLOYMENT OPPORTUNITIES BY PROHIBITING THE USE OF URINALYSIS TESTING BY EMPLOYERS

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Short Title.
This act may be cited as the "Employee Urinalysis Testing Protection Act of 1986."

SECTION 2. Prohibitions on Urinalysis Testing.
It shall be unlawful for any employer:

(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any urinalysis test;
(2) to use, accept, refer to or inquire concerning the results of any urinalysis test of any employee or prospective employee;
(3) to discharge, dismiss, discipline in any manner, or deny employment or promotion to, or threaten to take any such action against—
   (a) any employee or prospective employee who refuses, declines or fails to take or submit to urinalysis test; or
   (b) any employee or prospective employee on the basis of any urinalysis test; or
(4) to discharge or in any manner or discriminate against an employee or prospective employee because—
   (a) such employee or prospective employee has filed any complaint or instituted any proceeding under or related to the Act; or
   (b) such employee or prospective employee has testified or is about to testify in any such proceeding; or
   (c) of the exercise by such employee, on behalf of himself or others, of any right afforded by this Act.

SECTION 3. Notice of Protection.
The Secretary of Labor and Industries shall prepare, have printed, and distribute a notice that employers are prohibited by this Act from using urinalysis testing on any employee or prospective employee. Upon receipt by the employer, such notice shall be posted at all times in conspicuous places upon the premises of every employer engaged in commerce or in the production of goods for commerce.

SECTION 4. Authority of the Secretary of Labor and Industries.
(a) In General.—The Secretary of Labor and Industries shall—
(1) issue such rules and regulations as may be necessary or appropriate for carrying out this Act;
(2) cooperate with regional, State, local and other agencies and cooperate with and furnished technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act; and
(3) make investigations and inspections and require the keeping of records necessary or appropriate for the administration of this Act.
(b) Subpoena Authority.—For the purpose of any hearing or investigation under this Act, the Secretary of Labor and Industries shall have the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50).

(a) Civil Penalties.—(1) Subject to paragraph (2), whoever violates this Act may be assessed a civil penalty of not more than $10,000, or imprisoned in the House of Correction for one year, or both.
(2) In determining the amount of any penalty under this Act, a court shall take into account the previous record of the person in terms of compliance with this Act and the gravity of the violation.
(3) Any civil penalty assessed under this subsection shall be collected in the same manner as required by subsections (b) through (e) of section 503 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1853) with respect to civil penalties assessed under subsection (a) of such section.
(b) Injunctive Actions by the Secretary of Labor and Industries.—The Secretary of Labor and Industries, or any other interested person, may bring an action to restrain violations of this Act. The Superior Court shall have jurisdiction, for cause shown, to issue temporary or permanent restraining orders and injunctions to require compliance with this Act.
(c) Private Civil Actions.—(1) An employer who violates the provisions of this Act shall be liable to the employee or prospective employee affected by such violation. An employer who violates the provisions of this Act shall be liable for such legal or equitable relief as may be appropriate, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional amount as liquidated damages and punitive damages.
(2) An action to recover the liability prescribed in paragraph (1) may be maintained against the employer in the Superior Court by any one or more employees for or in behalf of himself or themselves and other employees similarly situated.
(3) The court shall award to a prevailing plaintiff in any action under this subsection the reasonable costs of such action, including reasonable attorneys' fees.

SECTION 6. DEFINITIONS.
As used in this Act—
(1) The term "urinalysis test" includes any examination of urine involving the use of any chemicals, gasses or a combination thereof, or any other material (whether mechanical, electrical, or chemical) which is used, or the results of which are used, for the purpose of detecting the presence of controlled substances in the urine.
(2) The term "employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.
The Maine Commission to Examine Chemical Testing of Employees developed a legislation proposal which was introduced into the Maine State Legislature in early 1987 designed to ensure confidential and reliable substance abuse testing of employees. The bill, MRSA § 595, would permit employers, both public and private, to test employees provided that they adhere to the safeguards outlined below:

I. Testing procedures. No employer may require, request or suggest that any employee or applicant submit to a substance abuse test, except as provided in this subsection.

A. Before establishing any substance abuse testing program, an employer must develop a written policy governing the following:
   (1) When substance abuse testing may occur;
   (2) Collection of samples;
   (3) Chain of custody of samples sufficient to protect the sample from being tampered with and to verify the identity of each sample and test result;
   (4) The cut-off level at which the presence of a substance of abuse in a sample is considered a positive test result;
   (5) Consequences of a confirmed positive result;
   (6) Consequences for refusal to submit to a substance abuse test; and
   (7) To what extent an employee or applicant who requests a sample to be tested on his own must share the results of the test with the employer.

B. The employer shall provide each employee and applicant with a copy of the written policy under paragraph A.

C. The employer shall obtain and handle samples according to the written policy under paragraph A.

D. At the request of the employee or applicant at the time the test sample is taken, the employer shall make available to the employee or applicant tested a portion or portions of the sample for that person's own testing. The employee or applicant shall pay the costs of the additional test.

E. The employer shall promptly provide a legible copy of the laboratory report to the employee or applicant tested. The laboratory report shall, at a minimum, state:
   (1) The name of the laboratory which conducted the test or tests;
   (2) The type or types of test conducted, both for screening and for confirmation;
   (3) The results of each test;
   (4) The sensitivity or cut-off level of the confirmation test; and
   (5) Any available information concerning the margin of accuracy and precision of the quantitative data reported for the confirmation test.

In the case of a negative test result, the report shall specify only that the test was negative for the particular substance.

F. The employer shall pay the costs of all substance abuse tests to which he requires, requests or suggests an employee or applicant to submit. The employee or applicant shall pay the costs of any additional substance abuse tests.

II. Use of test results. An employer's use of substance abuse test results is limited as provided in this subsection.

A. Only a confirmed positive result may be used by an employer who desires to use the results of a substance abuse test as a factor in any of the following decisions:
   (1) Refusal to hire an applicant for employment;
   (2) Discharge of a current employee;
   (3) Discipline of a current employee;
   (4) Determination of qualification to receive any employment benefit.

B. An employer may not convey the results of any substance abuse test to any law enforcement agency.

This outline of the proposed Maine bill was taken from EMPLOYEE TESTING & the Law, Mar. 1987, Legislation, at 4.
The New Jersey Assembly recently passed the Pre-employment and Employment Drug Testing Standards Act which establishes uniform testing standards for both current employees and job applicants. The Act was then reported out to the Senate Labor Industry and Professions Committee where it is still under consideration. If the bill passes the Senate, it will then be forwarded to the Governor of New Jersey to be signed into law.

The Pre-employment and Employment Drug Testing Standards Act purports to cover any test “administered for the purpose of determining the presence or absence of an illegal drug in a person’s body.”

I. Testing procedures.
A. The Act requires that any public or private sector current employee requested to submit to a drug test must be given a policy notice at least 30 days prior to the test. This notice must include:
   (1) Under what circumstances the employer may require a drug test;
   (2) What disciplinary actions may result;
   (3) A guarantee of confidentiality;
   (4) Descriptions of the samples to be required and the testing methods to be used;
   (5) Instructions about reporting use of prescription or non-prescription drugs; and,
   (6) An indication of who the employee can contact concerning a drug abuse problem.

B. An employee may be requested to sign a statement indicating that he has read and understands the policy notice, but refusal to sign does not invalidate the test results nor bar the employer from administering it.

C. Within two working days of the public or private employer’s receipt of the test results, the employee will be given written notice of these results.

D. A sample yielding a positive test result on the initial screening will be submitted for a confirmation test as designated by the state Commissioner of Health. A confirmation test shall utilize a methodology equal to or more reliable than gas chromatography/mass spectrometry (GC/MS).

E. The tested employee will have access to his sample and, at his own expense, may have it tested independently.

F. Testing by public or private employers shall be done only at medical facilities approved by the Commissioner of Health.

II. Use of test results.
A. A public employer must provide for an employee who has tested positive for the first time a leave of absence to enter a rehabilitation or counseling program.

B. A private employer may provide this type of leave in accordance with the company’s policy.

C. All employers shall cooperate fully with the Departments of Labor, Health, and Law and Public Safety in educating employees about the dangers of drug abuse.

D. The drug test information shall be kept confidential on a “need-to-know” basis.

A. A private employer may require an employee to submit to a drug test if there is reasonable suspicion that the employee’s job performance is being affected by drug use. A positive confirmation test result creates a rebuttable presumption that the employer had reasonable suspicion.

B. A private employer may also require an employee to submit to a drug test if:
   (1) the test is part of an employee assistance program sponsored by the employer;
   (2) the employment is designated “high-risk” by the Commissioner of Labor;
   (3) the employer has a compelling interest in administering drug screens on a random or routine basis;
   (4) the test is part of a regularly scheduled medical exam for all members of an employment group; or
   (5) the testing is in accordance with a collective bargaining agreement which may provide
lation-making process. Unfortunately, a review of the pertinent provisions of both those laws enacted and those under consideration demonstrates one commentator's thesis that if the drug testing controversy is to be resolved uniformly, it will have to be pursuant to federal regulation\textsuperscript{2027} for these various legislative schemes reflect incongruent results and diametrically opposite stands on crucial issues.\textsuperscript{2028}

1. Inconsistent Provisions

Perhaps the most fundamental inconsistency among the regulatory schemes is found in the scope of employments to which the legislation's protection applies. The San Francisco ordinance, for example, applies by its terms to both public and private employment but carves out uniformed members of the police, fire and sheriff's departments and operators of emergency vehicles from its coverage.\textsuperscript{2029} Meanwhile, the Utah statute covers only private employment, expressly excluding from coverage federal, state, and local political subdivisions as employers.\textsuperscript{2030} By contrast, the proposed bills in Massachusetts,\textsuperscript{2031} Maine,\textsuperscript{2032} and New Jersey\textsuperscript{2033} for routine or random testing.

C. A private employer may discharge an employee for refusal to submit to a drug test if the discharge is consistent with federal and state laws, the employer's policy, and any applicable collective bargaining agreement.

IV. Conditions for Permissible Testing for Public Employment.

A. A public employer may also require a drug test under the reasonable suspicion standard.

B. Public employers and unions are authorized to establish collective bargaining agreements which either prohibit or permit drug tests and which set guidelines for the drug test program.

C. A public employer may also discharge an employee for refusal to submit to an authorized test.

V. Penalties for Non-Compliance.

Any employer who takes disciplinary action on the basis of an initial screening test - not a confirmation test - shall be fined $250 for the first offense and $1,000 for the second offense. Likewise similar fines are levied against an employer to violate the Commissioner of Health's test standards.

This outline of the proposed New Jersey bill was taken from EMPLOYEE TESTING & THE LAW, Jan. 1987, Legislation, at 4.

\textsuperscript{2027} Lindsey, Drug Testing, supra note 1933, at 287.

\textsuperscript{2028} See infra text accompanying notes 2030-2073.

\textsuperscript{2029} See supra note 2020 for section 3300A.2(1), (3) of the San Francisco ordinance.

Another exception is carved out for police department communications dispatchers. See supra note 2020 for section 3300A.2(1).

\textsuperscript{2030} See supra note 2021 for sections 34-38-2(3), (4) of the Utah statute.

\textsuperscript{2031} See supra note 2025.

\textsuperscript{2032} See supra note 2026.

\textsuperscript{2033} See supra note 2027.
embrace both public and private employment; however, the New Jersey bill distinguishes between the public and private sectors when delineating the rights and obligations of the employer.\textsuperscript{2034} The proposed California bill, SB-2175, apparently also covers both types of employment, drawing no distinction in application between the public and private sector.\textsuperscript{2035}

This basic incongruence in protection is amplified by the disparity in restrictions governing the circumstances under which the employer may compel an employee to submit to a drug test. The proposed Massachusetts bill, HB-5583, bans employment drug testing across the board,\textsuperscript{2036} while the Utah statute grants the private employer near plenary authority to demand drug tests of its employees by eliminating the requirement of individualized, job-related suspicion that a particular employee is impaired by drugs.\textsuperscript{2037} The employer's authority to test under the Utah statute

\begin{itemize}
\item \textsuperscript{2034} See infra text accompanying notes 2049, 66 and 67.
\item One commentator suggests that the better provision of coverage includes both public and private employers without distinction in order to rectify the discrepancy of inadequate protection afforded the private-sector employee and to avoid the perpetuation of a double standard. Lindsey, Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy, 13 J. LEGIS. 269, 288-89 (1986).
\item \textsuperscript{2035} See supra note 2024 for the text of SB-2175.
\item \textsuperscript{2036} See supra note 2025 for the text of the Massachusetts bill.
\item The proposed legislation in Massachusetts prohibiting the use of drug screens in employment offers a seemingly inappropriate solution to the problem; for it sacrifices in toto the legitimate interests of the employer to those of the employee. First, an across-the-board prohibition of drug screening ignores any present utility of the urinalysis procedure and forecloses its use, see supra note 22, despite the prospect that properly used, under the appropriate circumstances, drug testing can be a viable supervisory tool in promoting workplace safety, proficiency and productivity. Second, while the drug testing procedure is not a paragon of accuracy, adherence to strict testing, reporting, storage and analysis guidelines can bring the accuracy to scientifically and medically acceptable levels. For example, see the draft of proposed Laboratory Accreditation Standards for Drug Testing announced by the NIDA, supra note 207. Moreover, future developments may insure its accuracy and requiring corroborative objective facts in addition to a confirmed drug screen result before discipline could also be imposed to reduce the problem of inaccuracy. In short, the proposed Massachusetts bill represents the easy-way out for the Legislature, by ignoring the employer's interests entirely, rather than recognizing the present and future use of urinalysis as an investigative tool under narrowly defined circumstances and adequate safeguards to protect the employee's individual rights.
\item \textsuperscript{2037} See supra note 2021 for section 34-38-7(3) of the text of the Utah statute. This provision is bothersome. See supra note 1089-90. This elimination of individualized suspicion goes against the grain of the bulk of the public-sector cases as well as the majority of arbitration decisions in this area. See generally, supra text accompanying notes 578-603 (McDonell); 604-21 (Turner); 622-667 (Bauman); 668-709 (Caruso); 710-47 (Bostic); 753-806 (Capua); 807-845 (Lovvorn); 933-993 (AFGE). See also supra text accompanying notes 1837-38 (discussing arbitration standard).
\item Query: How much different is the testing authorized under the Utah statute, 34-38-7(3),
is also broadened by the recognition of the employer's economic concerns as a sufficient, independent justification for compelling private employees to submit to drug screens. Proposed bill SB-2175, before the California Senate, also confers wide latitude in conducting drug screens to the employer, permitting testing under a variety of individualized circumstances but also authorizing random and blanket drug screening of employees at least once in every twelve-month period, or more frequently, depending on the nature of the job.

from random or blanket drug screening?

Section 34-38-7(2)(b) permits the employer to use drug testing to investigate accidents and theft. While the questionable correlation between accidents and drug use has already been raised; see supra text accompanying note 1817, also note 1090; the logical necessity of an inference of drug use in the case of a theft is equally dubious.

2038. See supra notes 1385, 1994-97 for a discussion of the conceptual problems with permitting economic factors serve as the basis for conducting drug screens.

2039. For example, section 440(c), permitting the employer to require drug testing of an employee any time an employee is involved in a work-related accident causing bodily injury or damage to property, even if minor in nature. See supra note 2024 for the text of section 440(c) of SB-2175.

Query: Does this include trips to the first-aid cabinet for every bandaid? Compare supra note 1090 [Is this reasonable?].

See also note 2024 section 440(d) of the proposed bill, permitting the employer to test an employee for drugs in the event of absenteeism. While extensive absenteeism may be a symptom of drug use, see supra note 1089, is it conclusive enough to justify requiring a drug test? See supra note 1090. Under this subsection, it appears that the drafters of the bill think so. Does the advance notice of such a testing policy really resolve the questionable basis of using absenteeism as a sole factor? Will more employers come to work sick? [Imagine that. They will come to work sick, perhaps have an accident, and be required to take the drug test anyway!] The absenteeism provision would be a lot less objectionable if it provided the suspect-employee to offer another explanation for his absences before the testing is required.

2040. See supra note 2024, SB-2175, section 441. Section 441(a) permits random drug testing once in any twelve month period irrespective of job classification. If job classification is of no importance and the test is otherwise random, what justification does the employer have in requiring the test? None? Does the fact that it is done only once every twelve months mitigate the fact that it is standardless? Is the provision in section 441(b) for random testing, pertaining to employees whose jobs involve safety any more justified? To the extent that the bill would cover public-sector employees, this random drug testing provision is inconsistent with the federal court rulings in the public-sector case. See supra notes 578-603 (McDonell) (especially text accompanying note 592); 622-667 (Bauman); 668-709 (Caruso); 710-47 (Bostic); 753-806 (Capua).

For a diametrically oppositive provision see the San Francisco Ordinance, section 3300A.5, which prohibits the use of random and blanket testing under any circumstances. Supra note 2020.

Query: Since under section 34-38-7(3) of the Utah statute the employer's decision to test need not be tied to individual job-related impairment, is the statute tacitly permitting random testing? See supra note 2021 for text of the statutory provision. Although the Utah statute sets forth a variety of safeguards such as the reporting, chain-of-custody, and confidentiality requirements, see supra note 2021 for section 34-38-13 of the Utah statute; is this
Between these extremes, the San Francisco ordinance requires "reasonable grounds" for believing that an employee is impaired by drugs on the job to justify drug testing a particular employee. The Ordinance further insists that drug testing be limited to those employees whose job duties implicate safety concerns and forbids random and blanket drug screening under any circumstances. The proposed New Jersey bill permits a private employer to test employees for drugs if the employer reasonably suspects that an employee's performance is drug-impaired, or if the employee position is in a "high risk" category as defined by the state Commissioner of Labor, but permits a public employer to test only on a reasonable suspicion basis. In contrast to the San Francisco ordinance, the New Jersey bill permits random or routine drug testing of private-sector employees, if the employer can demonstrate a "compelling interest" to be served by such testing.

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enough to otherwise justify random testing by analogy to Shoemaker in the public sector cases? See supra text accompanying notes 994-1041. It is suggested that it would not be, since the decision in Shoemaker rests partially on the fact that the random selection process was entirely random and was not subject to abuse by the supervisory personnel.

Might the federal court rulings in Shoemaker and McDonell help in defining a "compelling" interest. See supra text accompanying notes 994-1041 (Shoemaker) and 1042-62 (McDonell).

2041. See supra note 2020 for section 3300A.5(a) of the San Francisco ordinance.

Although the section uses the term "reasonable grounds," it will most likely be construed to be the equivalent of the "reasonable suspicion" standard articulated by the federal courts in the public-sector cases. For the classic formulation of the "reasonable suspicion" standard by the McDonell court, see supra text accompanying note 593.

2042. See supra note 2020 for section 3300A.5(b) of the San Francisco ordinance. Note that conditions (a)-(c) of section 3300A.5 are conjunctive, that is, all three elements must be satisfied.

2043. See supra note 2020, section 3300A.5 of the San Francisco ordinance. ("Under no circumstances may employers request, require, or conduct random or company-wide . . . urine . . . testing").

2044. See supra note 2027 (section III.A. of the New Jersey outline). Notably, the New Jersey bill would add a new twist to the "reasonable suspicion" analysis by creating a rebuttable presumption of "reasonable suspicion" after the fact, if the employee's specimen returns a confirmed positive result. Id.

Query: Was it individualized reasonable suspicion of job-related impairment? Or just luck?

2045. Id. (subsection (B)(2)).

Query: Can the Commissioner of Labor be expected to construe "high risk" along lines similar to "sensitive" positions as used by President Reagan in Executive Order 12564. See supra note 9 (discussing Executive Order 12564, and listing representative "sensitive" positions).

2046. See supra note 2027 (section IV.A. of the New Jersey outline).

2047. See supra note 2044 and accompanying text.

2048. See supra note 2027 (section IV.B(3) of the New Jersey outline).
Another crucial point of divergence among the legislation concerns whether the employer can compel an employee to submit to a drug screen as a condition of continued employment or, put another way, whether an employer may discharge an employee for simply refusing to submit to the employer's drug screen. The Utah statute and the proposed Senate bill in California, SB-2175, expressly permit the employer to require drug testing as a condition of continued employment. Similarly, the New Jersey bill authorizes the employer to discharge an employee who refuses to submit to the drug test, and the Maine bill defers to the discretion of the employer on the issue of appropriate discipline for such refusals. At the polar extreme, the San Francisco ordinance expressly prohibits the employer from mandating drug screens as a condition of continued employment.

Apart from the incongruent approach to the circumstances under which drug screening of employees may be justifiably required, the regulatory legislation is also inconsistent in the areas of maintenance of testing integrity and accuracy and preservation of confidentiality of test information. For example, while the Utah statute sets forth explicit guidelines for collecting, labelling, storing, and transporting the employee's urine specimen and requires confirmation of any initial positive by an alternative, more reliable

Query: How will the courts interpret the "compelling interest" standard as used in the statute? Along the same lines as used by the federal courts in analyzing claims of deprivation of fundamental constitution rights? If so, it would seem unlikely that the private employer will be able to take advantage of random testing too often. If the court does not follow such a construction of "compelling interest", how might it define the term? Would purely economic concerns satisfy the standard? Might the federal court rulings in Shoemaker and McDonell be helpful in defining a "compelling interest?" See supra text accompanying notes 994-1041 (Shoemaker) and 1042-62 (McDonell).

2049. See supra note 2021 for the Utah statute, section 34-38-3.

It has been suggested that, if legislation hopes to properly balance the competing interests of employer and employee, then it must prohibit the employer from demanding, requiring or requesting employees to submit to urinalysis as a condition of employment. Such a provision addresses the coercive nature of the employer-employee relationship and the adverse effect it is likely to have on consent. It puts the employer-employee on an equal footing in an effort to curtail the potential for abuse in the administration of the testing.

Lindsey, Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy, 13 J. LEGIS., at 289.

2050. See supra note 2024 for section 440 of SB-2175.

2051. See supra note 2027 (sections III.C., and IV.C.).

2052. See supra note 2026 for an outline of the provision of the proposed Maine bill. If the employer can choose the discipline to be administered for a refusal to take the drug test, then, a fortiori, it has the right to require the test as a condition of employment.

2053. See supra note 2020 for section 3300A.5. (first paragraph) of the San Francisco Ordinance.
analytical method, the San Francisco ordinance makes no mention of chain-of-custody procedures or confirmation requirements. Both the Utah statute and the San Francisco ordinance, however, fail to provide for the establishment of procedures designed to ensure the confidentiality of the test results and any other personal medical information disclosed during the testing procedure.

Although less explicit than the Utah statute, the Maine bill requires the employer to establish chain-of-custody procedures designed to ensure integrity of the test sample and confirmation procedures to ensure integrity of the test results. However, confidentiality receives minimal consideration in the Maine bill which merely prohibits the employer from disclosing the results of the drug screen to any law enforcement agency. The New Jersey bill, on the other hand, restricts access to confidential drug test information to a “need-to-know” basis and mandates the employer to guarantee the confidentiality of any information disclosed in the drug testing procedure. Although chain-of-custody procedures are not mentioned in the New Jersey bill, confirmation of all initial positives by a methodology equal to or more reliable than gas chromatography/mass spectrometry is required before an employer makes an adverse employment decision. Meanwhile, the California Senate bill, SB-2175, remains silent on the issues of chain of custody and confirmation and vaguely requires the employer to take “reasonable precautions” to ensure the confidentiality of the test results.

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2054. See supra note 2021 for section 34-38-6 the text of the Utah statute.
2055. See supra note 2020 for the text of the San Francisco ordinance.
2056. See supra notes 2020, 2021 for the texts of the San Francisco ordinance and the Utah statute respectively.

The Utah statute does, however, place limitations on the public disclosure in litigation proceeding of all testing information compiled under the testing procedure. See supra note 2021, Utah statute, section 34-38-13(1)-(4).
2057. See supra note 2026 (section I.A.(3), (5)).
2058. See supra note 2026 (section I.B).
2059. See supra note 2027 (sections II.D., I.A.(3)).
2060. See supra note 2027 (section I.D). For a brief description of the GC/MS technique, see supra text accompanying notes 115-20.
2061. See supra note 2024 for section 443 of SB-2175.

SB-2175 contains a unique provision in section 443, which provides that the employer must ensure that the only purpose for which the drug testing will be used is to detect the presence of controlled substances and will not be used for identifying such things as pregnancy, presence of AIDS antibodies, or other medical bodily disorders. Id. Compare section 3300A.6 of the San Francisco ordinance, limiting the drug screens to those substances specifically identified on the employee consent form. See supra note 2020. To the extent that
Only three of the legislative schemes, the Utah statute, the Maine bill, and the New Jersey bill, address the thorny issue of whether the employer may discharge an employee solely on the basis of a confirmed positive test result, and, not surprisingly, they are not entirely consistent in their approach to the issue. While under the Utah statute the private employer is entitled to use the confirmed positive as a basis for discharge, the Maine bill suggests that both public and private employers may consider it as one factor in a termination decision. The New Jersey bill requires public employers to offer employees who test positive for drugs for the first time the opportunity to attend rehabilitation or counselling programs but places no corresponding obligation on the private employer. Beyond this distinction between the public and private sector, both employers are implicitly authorized to discharge an employee solely on the basis of a confirmed positive test result.

The final area of inconsistency among the legislation concerns the remedial measures available to the employee who has been
wrongfully discharged under the employer's drug testing policy. Remedies may include a private cause of action for compensatory damages, and/or injunctive relief, or no remedy at all. For example, under the San Francisco ordinance, an aggrieved party may seek both compensatory relief, including general and special damages, costs and attorneys' fees, and injunctive relief. By contrast, the Utah statute forecloses virtually all causes of action against an employer who has complied with the prescribed statutory procedures. Exception is made for those causes of action challenging an employer's action based on a false result; however, even in these cases, the employer is only liable for monetary damages in instances of a bad faith or unreasonable reliance on a false test result. Neither the Maine bill nor the California bill, SB-2175, mention private causes of action for the discharged employee, and, while the New Jersey bill subjects an employer to a nominal fine for basing adverse employment decisions on unconfirmed positive test results, these penalties do not inure to the ben-

2067. See supra note 2020 for section 3300A.8 of the San Francisco ordinance. In order to encourage the individual employee to institute proceedings and to broaden the alternative modes of relief, a civil damages remedy with a minimum recovery established in the statute might be provided.

Query: Is compensatory damages and injunctive relief an adequate remedy in this context? See supra note 1901 ("Query").

2068. See supra note 2021 for sections 34-38-9, 10, 11 and 12 of the Utah statute. See infra note 2070.

2069. See supra note 2021 for section 34-38-10 of the Utah statute. This restriction of the available causes of action to those based on a false result is overly narrow and deprives the employee of potential causes of action which arise whether the test result was a true positive or not. For example, in spite of the fact that the test result was a true positive, the employer's decision to fire the employee based on the result might violate the terms of an express contract between the employer and employee, which limits the employer's right to terminate to certain circumstances, none of which include the presence of drugs in the employee's system. By its terms, section 34-38-10 would unjustly preclude this hypothetical employee from bringing his breach of contract claim. Likewise, this section would also unfairly eliminate claims of right of privacy violations (public disclosure of private facts; intrusion on seclusion - see supra note 1903 and accompanying text; see also supra text accompanying notes 1906-1909) or claims for intentional infliction of emotional distress, see, e.g. RESTATEMENT (Second) of Torts, § 46, Intentional Infliction of Emotional Distress; see also supra note 2006; which could arise independent of the fact that the test result was not false.

Section 34-38-11 of the Utah statute, while recognizing an employee's potential cause of action for defamation of character, libel, slander, or damage to reputation, substantially increases the employee's burden of proof by requiring him to prove the element of malice. There is no justifiable reason for elevating the private employee's burden in such cases to the level of the burden imposed on a public figure or a public official.

2070. See supra note 2026 for the text of the proposed Maine bill.

2071. See supra note 2024 for the text of the California bill, SB-2175.
2. A Proposal

The legislative remedy is the best method of regulating the employer's use of drug screening in the private workplace, and is perhaps the only practical way to do so. A strong argument can be made for the proposition that development of the sorely needed regulation should not lie with the employee. As a practical matter, if the current employee passes the drug screen and is retained in his position, he will not then sue his employer for invasion of his privacy because it would jeopardize his job. On the other hand, if the employee fails the drug test and is subsequently terminated, he must resort to his legal remedy, which will cost him time and money. Even if the courts begin to recognize his right of privacy and afford the employee relief, this will be a slow process, providing relief only on a case-by-case basis.

A well-drafted statute has numerous advantages over this common law approach, not the least of which is that good legislation is generally more definite and specific than case law, lending a higher degree of certainty to a given situation.

Drug screening in employment is an area of the law where a high level of certainty is essential, not only because it is a novel issue but more importantly because of the compelling and competing interests at stake. Several states and one municipality have undertaken legislative attempts to balance the competing interests and bring some certainty to the controversy, but as the preceding section demonstrates, the result has been a piecemeal and inconsistent approach to the crucial issues with rights and obligations of the employer and employee varying widely from one state to the next. Uniformity is as desirable as certainty in this controversial area of the law, and conventional wisdom teaches that a federal statute or a uniform law, will be necessary to achieve it.

Legislation can be framed not only to preserve the demonstrated utility of drug screening to an employer but also to protect the employee from abusive and deceptive misuses of the procedure. The legislation should (1) incorporate a comprehensive licensing act for the certification of drug testing laboratories and drug test-

2072. See supra note 2072 (section IV of the New Jersey outline).
2073. See supra text accompanying notes 2030-73.
2074. See supra note 22.
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ing technicians;\textsuperscript{2075} (2) expressly delineate chain-of-custody and quality assurance procedures to be followed by the testing lab which, if called upon, the employer must be able to demonstrate compliance;\textsuperscript{2076} (3) mandate confirmation of all initial positives by an alternative, reliable technique at least as analytically reliable as GC/MS, as a prerequisite to any proper employer action on the test result;\textsuperscript{2077} (4) require the automatic retention for a set period of all urine specimens returning a confirmed positive result, for purposes of affording the employee the opportunity, at the employer's expense, to subject the specimen to independent analysis;\textsuperscript{2078} (5) establish a detailed system of notice covering both the

\textsuperscript{2075} The vetoed California bill provides an example of such a licensing statute. See supra note 2022. A well-drafted licensing and certification statute should incorporate specifications for laboratory compliance monitoring through blind testing; documentation of all stages of the testing process; security and confidentiality procedures; necessary credentials and qualifications for all levels of personnel in the testing operation; and necessary accuracy levels of compliance to retain licensing to operate. An excellent set of guidelines in these areas has been proposed by the NIDA earlier this year. See supra note 207.

\textsuperscript{2076} Both the San Francisco ordinance and the New Jersey bill fail in this essential area. See supra text accompanying notes 2056 and 2061 respectively.

For an example of a rather complete listing of the types of items that should be covered in this area, see section 34-38-6 of the Utah statute, supra note 2021. See also supra text accompanying note 2058 (discussing the Maine bill); and text accompanying notes 212-15 (discussing chain-of-custody requirements).

Requiring the employer to be able to demonstrate upon demand compliance with these requirements is not unduly burdensome, but necessarily requires the maintenance of adequate documentation. The NIDA suggests that such documentation be retained for a period of at least two years. See supra note 207 ("Documentation").

\textsuperscript{2077} The need for confirmation cannot be overstated. See generally, supra text accompanying notes 92-125. The California Senate bill, SB-2175, is fatally defective in this respect, making no provision for confirmation of initial positive test results. See supra text accompanying note 2062. Beyond merely compelling confirmation of initial positives, the statute must require confirmation by an alternative, more reliable technique such as GC/MS, as does the Utah statute, and the New Jersey bill. See supra text accompanying notes 2055 and 2061 respectively. This requirement is absolutely necessary in light of (1) the demonstrated propensity of some employers to simply re-test the sample under the same technique and call it a confirmation or skip it entirely, see supra note 122 and accompanying text, and (2) judicial pronouncement that alternative confirmation testing is necessary, at least in the public sector, see supra text accompanying notes 250-80, 184-88 (Jones); 1224-25 (Capua); 932 (NTEU); and (3) arbitral opinion that drug testing procedures must include alternative confirmatory testing to be "reasonable," see supra text accompanying notes 1795-98, and note 1863.

\textsuperscript{2078} Only three of the legislative schemes, San Francisco, Maine, and New Jersey, mention this requirement. While the San Francisco ordinance and the Maine bill require the employer to preserve those specimens testing positive as a matter of course, see supra note 2020 for section 3300A.5(c) of the San Francisco ordinance, and note 2026 for section I.D. of the Maine outline, the New Jersey bill requires the employee to request preservation at the time the specimen is taken before the employer is under the affirmative duty to do so, see supra note 2027 for section I.E. of the New Jersey outline. The position taken by the San Francisco ordinance and the Maine bill is the preferable approach, being consistent
implementation of the drug testing program and the communication of testing result information; implementation of the drug testing program and the communication of testing result information; mandate the development of a procedure which safeguards the confidentiality of any information obtained in the drug testing procedure and includes a definite hierarchy of persons to whom access of the personal medical information is available only on a "needs-to-know" basis; prohibit the employer from communicating or supplying any law enforcement agency with any information compiled under its drug testing procedure, including but not limited to the test results; provide the employee with a private cause of action at law and in equity, making available both compensatory damages, injunctive relief and other equitable relief, such as expungement of personnel records and possibly reinstatement; provide the employer with several public-sector decisions as well as at least one arbitration award. See, e.g., supra text accompanying notes 126-49, 1272-75 (discussing the affirmative duty of an employer to preserve all samples returning a positive result as perceived by the courts in the public sector cases). See also text accompanying note 1795 (discussing the arbitrator's decision in Bay Rapid Transit declaring the employer's failure to provide for the employee to have access to a portion of his sample for independent testing was "unreasonable").

It is curious that both the Maine and New Jersey bills place the expense of independent testing on the employee while the San Francisco ordinance requires the employer to foot the bill. Although the public-sector cases and the arbitration awards provide no insight in this area, common sense would dictate that the employer should bear the expense. An employee may not be able to afford to have his specimen re-tested and confirmed and thus will be forced to forego his only viable defense to the drug-related charges. Permitting the employer to take advantage of such a situation in any employment context would be inequitable to say the least. And, as a practical matter, it is easier and less prone to abuse, to require the employer to subsidize all employee requests for an independent re-test and confirmation rather than requiring the employer to subsidize only on a need basis.

The legislative provision for an employee's independent analysis of his specimen should be tied directly to the laboratory licensing and certification section, see supra text accompanying note 2075, to ensure that the employee is receiving a fair, reliable, and accurate independent analysis.

Together, the Maine and New Jersey bills offer a fairly complete compilation of the types of issues which should be covered in the notice of implementation of the drug testing policy and the report of the test result information. For a discussion of the notice requirements in the public-sector cases, see supra text accompanying notes 1260-69, 1276-82, and for an arbitrator's view on the absolute necessity of proper notice and what such notice entails, see supra text accompanying notes 1618-52 (Gem City); 1716-54 (UNOCAL); see also generally text accompanying notes 1828-36.

None of the legislation discussed in the previous section adequately addressed the need to preserve the confidentiality of the test information (i.e., medical disclosure/certification forms, interviews, statements, memoranda, and test results). An example of a fairly comprehensive regulatory scheme incorporating such confidentiality safeguards is in the Shoemaker case, supra text accompanying notes 1357-62.

Such a provision is found in the proposed Maine bill. See supra note 2026 for section II.B. of the outline. The Maine provision could be improved, however, by adding a provision similar to section 34-38-13(1) of the Utah statute. See supra note 2021.

Without creating a private cause of action for employees, it would be extremely
with an affirmative defense to certain causes of action, conditioned upon the employer's demonstrated compliance with the statute's provisions;\textsuperscript{2083} and (10) spell out the requirement of an individualized job-related suspicion to justify drug testing of employees as well as specify those limited occupations and special circumstances in which random or blanket drug testing is permissible.\textsuperscript{2084}

VII. CONCLUSION

It is undeniable that drug abuse represents a real and pervasive problem in American society. Recently, the nation's employers have assumed, and properly so, a role in helping eliminate the plague of drug abuse from a crucial sector of society - the workplace. Thus, the public and private sector employee increasingly finds himself subject to the employer's unilaterally established anti-drug policy which, for a growing majority of jobs,\textsuperscript{2085} includes drug screening through urinalysis. Both the intrinsic and extrinsic reliability and validity of the urinalysis procedure is the subject of much debate,\textsuperscript{2086} but the most serious threat from an employee's perspective posed by the employer's use of drug screening is the unwarranted invasion of his personal liberty and dignity. Balancing these countervailing interests of employer and employee is the challenge presently facing the legal system.

In the public sector, the federal and state courts have achieved more difficult to police compliance with the anti-drug statute.

It is suggested that the equitable remedies of reinstatement and expungement of personnel records are absolutely necessary to afford the employee complete relief. See supra note 2068. With this addition, the San Francisco ordinance, section 3300A.8, provides a good example of an effective remedial provision. See supra note 2020.

2083. This provision would protect the employer from causes of action such as failure to test for a given drug or controlled substance, failure to identify/detect a given drug or controlled substance, failure to maintain a drug testing program in operation. It could be modeled after section 34-38-9(1)-(3) of the Utah statute. The employer's immunity, however, should be extended no further. See supra notes 2069-70 and accompanying text.

2084. The overwhelming weight of authority in both the public-sector cases as well as the arbitration awards requires an individualized, job-related suspicion that the employee is impaired by drugs on the job. See supra note 2038. For a discussion of the shortcomings of the reasonable suspicion standard and some suggestions on improvement, see supra notes 1089-90 and accompanying text.

For a critique of several of the statutory sections which appear to provide specific instances giving rise to "reasonable suspicion," such as the occurrence of an accident, see supra notes 2039-40. The Utah statute, which has departed from the individualized job-related suspicion standard, is clearly an unwelcome aberration. See supra note 2021, for section 34-38-7(3) of the Utah statute. See also supra note 2038.

2085. See supra notes 13-15 and accompanying text.

2086. See supra text accompanying notes 24, 29-32.
limited success in balancing these competing interests primarily under the auspices of the fourth amendment and the use of a “reasonable suspicion” standard. While possessing great potential as a balancing device, the “reasonable suspicion” standard, as currently articulated by the federal courts is, however, an incomplete response to the drug screening controversy. The prevailing narrow judicial definition of federal constitutional rights of privacy serves as a limited alternative source of relief to the public sector employee, protecting confidentiality of personal medical information and records but failing to recognize and protect an employee’s privacy interests in his personal off-duty affairs and his interest in bodily integrity and dignity. The greatest achievements by the federal courts in the drug-screening context have been the definition of a public employee’s due process rights to fair notice of the drug testing policy’s terms, to confirmation of all initial positives by an alternative technique, and to the opportunity to rebut or otherwise explain the test results.

In the collective bargaining arena, arbitrators sorting out the competing interests of employer and employee under a “just cause” standard have contributed to the drug screening discussion on issues including fair and proper notice, the appropriate standard for conducting drug screens; permissible discipline for refusal to submit to the test; and permissible discipline for testing positive for proscribed drugs, in violation of a valid work rule. Unfortunately, the corps of arbitrators have not been able to reconcile strong differences of opinion and, thus, have not reached a consensus on these same issues. Although a set of minimal standards for satisfying “just cause” can be gleaned from the arbitrators’ decisions, the lack of consensus subjects the resolution of individual grievances to the uncertainty of an ad hoc analysis.

Despite the marginal advancements in the drug screening context made by the federal and state courts in the public sector and the uncertainty in the arbitration cases, the public employee and

2087. See supra text accompanying note 489. The development of the “reasonable suspicion” standard in the drug screening context is charted in the text accompanying notes 489-1077.
2088. See supra text accompanying notes 1078-95.
2089. See supra text accompanying notes 1311-1415.
2090. See supra text accompanying notes 1260-1290.
2091. See supra text accompanying notes 1838-36, 1844-45.
2092. See supra text accompanying notes 1839-43.
2093. See supra text accompanying notes 1848-56.
2094. See supra text accompanying notes 1857-63.
the unionized worker are still in a much better position than their private sector counterpart.\textsuperscript{2095} This inferior position of the private employee is the product of a variety of factors including the inability to avail himself of federal constitutional protection due to the state action doctrine,\textsuperscript{2096} the general lack of state constitutional or statutory protection of individual privacy rights\textsuperscript{2097} and the underdevelopment of common law principles of privacy.\textsuperscript{2098} Although the \textit{Luck} case may initiate a trend in judicial thinking, bridging these legal "gaps," to afford protection to the private employee in a drug screening context, the change cannot be expected over night.\textsuperscript{2099}

A few states and one municipality, have decided to bypass these obstacles and have resorted to legislative regulation of employment drug screening.\textsuperscript{2100} These individual attempts at regulation have produced fundamentally inconsistent results from one legislative scheme to the next.\textsuperscript{2101} This experience teaches that, if use of drug screening in private employment is to be regulated in a uniform manner, the regulatory scheme will have to be promulgated by the federal government or pursuant to a uniform law developed by committee. It is submitted that, by drawing upon the federal and state court decisions in the public sector, the arbitration awards in the drug-screening grievances, and aspects of the various legislative schemes, legislation along the lines proposed above, applicable to all three categories of employment, would postulate a fair balancing of the competing interests and offer a more equitable approach.\textsuperscript{2102}

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\begin{itemize}
\item \textsuperscript{2095} See supra text accompanying notes 1826-27.
\item \textsuperscript{2096} See supra text accompanying notes 466-84.
\item \textsuperscript{2097} See supra text accompanying notes 1890-97. See also supra text accompanying notes 2016-18.
\item \textsuperscript{2098} See supra text accompanying notes 1933-36. See also supra text accompanying notes 2016-18.
\item \textsuperscript{2099} See supra notes 2097-98.
\item \textsuperscript{2100} The various enacted and proposed pieces of legislation are set forth supra notes 2020-22, 2024-27.
\item \textsuperscript{2101} See supra text accompanying notes 2030-73.
\item \textsuperscript{2102} See supra text accompanying notes 2073-84.
\end{itemize}