The Individual Worker and Drug Testing: Tort Actions for Defamation, Emotional Distress and Invasion of Privacy

Charles J. Dangelo
The Individual Worker and Drug Testing: Tort Actions for Defamation, Emotional Distress and Invasion of Privacy

I. INTRODUCTION

As drug abuse in American society has expanded, employers have become intensely concerned about employee drug use. This concern is manifested in the widespread phenomenon of employers compelling their employees to submit to drug testing. Overzealous employer programs to eliminate drug use by employees, however, can result in abuse of the employee. Public sector employees can defend themselves against compulsory drug testing by asserting their rights under the Constitution. Private sector employees covered by a collective bargaining agreement can utilize the terms of the agreement to challenge an employer drug testing program. On the other hand, the private employee not protected by a collective bargaining agreement, has little protection against an employer drug testing program.

Individual workers have successfully recovered damages for injuries caused by mandatory employer drug testing. Several causes of action have been asserted by private employees to counter employer drug testing: invasion of privacy; defamation; intentional infliction of emotional distress; and negligent infliction of emotional distress. This comment will explore how private employees can use these tort actions to defend themselves against employer drug testing programs.

II. THE BASICS OF DRUG TESTING

Employers have four primary reasons for testing their employees

1. See Note, Drug Testing of Private Employees, 16 U. BALT. L. REV. 552, 554 (1987). In 1986, 25-35% of Fortune 500 companies used drug testing. That figure has gone up 250% in the last three years. Id. at 552 n.1.
5. See infra, pages 549-58.
for drugs. First employers are concerned with the economic costs of drug abuse which result from increased health care costs, absenteeism, and on the job accidents. Employers also fear liability for injuries to the general public caused by their employees drug use. Next, employers believe that drug use increases the amount of employee theft. Last, some employers wish to control the off duty conduct and lifestyles of their employees.

In addition to the above motivations for testing employees for drugs, employee drug testing became a popular political issue during the Reagan presidency. In 1986, President Reagan issued an executive order for a drug free federal workplace; the executive order outlined a program for compulsory random drug testing of federal employees. This executive order was designed to serve as a model for private employers to initiate their own drug testing schemes. This order may have encouraged private employers to institute employee drug testing programs.

Employers use drug testing programs in different ways. Some employers have a policy of testing all job applicants. Other employers use random drug testing to control drug abuse among present employees. Some employers will only test if they suspect an employee of drug abuse. The consequences faced by an employee who tests positive for drugs range from dismissal to counseling and rehabilitation programs.

Employer drug testing programs pose three major problems for the individual worker: the possibility of a false positive drug test; embarrassing and emotionally distressing methods of taking the drug test; and violation of the worker's right to be let alone.

The drug testing methods used by employers are notoriously in-

7. Id. at 407.
8. Id. at 408.
9. Id.
11. "The federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces..." Id. See Abrams, supra note 4, at 20.
14. Hartsfield, Medical Examinations as a method of Investigating Employee Wrongdoing, 37 Lab. L. J. 692 (1986). Some employers use a reasonable cause test. For example, when a supervisor has a reasonable suspicion that an employee is under the influence of drugs or is involved in a workplace accident, a drug test will be ordered. Id. at 693.
15. See infra, pages 549-58.
accurate. The most popular drug test used by employers is the EMIT urine test. Considering a five percent prevalence of drug use among employees, approximately two out of three positives identified by the EMIT test will be false positives. The manufacturer of the EMIT test recommends that control samples be used to insure that the testing equipment and personal are performing properly in order to insure the accuracy of the test. The Center for Disease Control conducted a study of thirteen drug testing laboratories for their accuracy in detecting drugs in urine. The study showed a false positive rate for methadone of 66 percent and a false positive rate for amphetamines of 37 percent. Much of this inaccuracy is caused by instrument malfunction and human error. For example, the United States Army was forced to recall 52,000 urine samples because the urine samples were mislabeled and became contaminated. Furthermore, the tests can confuse legal substances with illegal drugs causing false positives. The flaws in drug testing methodology call into question any employer action predicated on a positive drug test result.

Employers may require that an employee be observed while providing a urine sample for drug testing. This is embarrassing to the employee and can lead to emotional distress.

An individual has the right to be let alone and therefore one could argue that an employee should not be subject to a medical test on the whim of his employer. Being compelled, under a threat of termination, or discipline, to give up one's bodily fluids is offensive. In a civilized society there must be some limit to an employer's capacity to invade their employees person.

III. The Employment At Will Doctrine and Drug Testing

The concept of employment at will first appeared in a treatise

16. Bible, Screening Workers for Drugs: the Constitutional Implications of Urine Testing in Public Employment, 24 Am. Bus. L. J. 309 (1986). The enzyme multiplied immunoassay test (EMIT) is favored by employers because it is inexpensive and is available in field kits for use outside the laboratory. Id. at 311.


18. Note, supra note 1, at 555.


20. Note, supra note 1, at 556.

21. Rothstein, supra note 17, at 697-98.

22. See e.g., Kelly v Schlumberger, 489 F.2d 41 (1988).

written by Horace Wood, a New York lawyer.\textsuperscript{24} Since that time, the employment at will doctrine has been recognized in all jurisdictions, thus affecting the majority of non-union employees in the United States.\textsuperscript{25}

The employment at will doctrine presumes that employment can be terminated for any reason, unless the parties have a contract to the contrary.\textsuperscript{26} An employee subject to the doctrine may be discharged at the will of the employer; likewise, an employee has complete flexibility to resign from his employment at any time.\textsuperscript{27} Even though the employment at will concept has come under considerable attack in recent years, employees challenging drug testing programs have failed because of the doctrine. For example, in Jennings v. Minco Technology Labs,\textsuperscript{28} an employee brought a class action suit seeking an injunction to stop his employer from instituting a random drug testing program.\textsuperscript{29} The suit failed as the court held that the employment at will doctrine resulted in the employee having no cause of action against the employer.\textsuperscript{30}

The wrongful discharge action is an exception to the doctrine of employment at will. A wrongful discharge action generally arises when the termination of an employee violates public policy.\textsuperscript{31} The public policy violated is usually expressed in a statute. These actions, however, have not been very successful in drug testing litigation.

In Satterfield v. Lockheed Missle & Space Co.,\textsuperscript{32} an employee attempted to assert a wrongful discharge claim against his employer after the employer terminated him for testing positive on a urine test for marijuana.\textsuperscript{33} The claim was rejected because the plaintiff was unable to overcome the employment at will doctrine and, thus, could be terminated without cause.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{24} Wood, A Treatise on The Law of Master and Servant, 272 (1877).
\item \textsuperscript{25} Fogel, supra note 3, at 658.
\item \textsuperscript{26} See, Greene v. Oliver Realty, 526 A.2d 1192 (Pa. Super. 1987).
\item \textsuperscript{27} Fogel, supra note 3, at 658.
\item \textsuperscript{28} 765 S.W. 2d 497 (Tex. App. Austin 1989).
\item \textsuperscript{29} Id. at 498.
\item \textsuperscript{30} Id. at 498-502.
\item \textsuperscript{31} Fogel, supra note 3, at 661. Two other grounds out of which a wrongful discharge action may arise are where "the employer has breached an implied covenant of good faith and fair dealing" and where the employer has breached an implied employment contract. Id.
\item \textsuperscript{32} 617 F.Supp. 1359 (D.S.C. 1985).
\item \textsuperscript{33} Id. at 1360.
\item \textsuperscript{34} Id. at 1362-63. The plaintiff in this case attempted to avoid the employment at will doctrine by asserting that the defendant's employee manual created written contractual obli-
The effectiveness of a wrongful discharge claim will be determined by the statutes available to a plaintiff in the jurisdiction where the action is brought. For example, residents of San Francisco are protected by an ordinance which outlaws drug testing by private employers.\(^\text{35}\)

Clearly, the at will employee who refuses to submit to drug testing can be immediately discharged. An at will employee, moreover, who agrees to be tested may be terminated on the basis of one unconfirmed positive result. In spite of the employment at will doctrine and the ineffectiveness of wrongful discharge actions, some employees have recovered damages based on various tort theories. Those theories will now be discussed.

IV. TORT CAUSES OF ACTION AVAILABLE TO THE AT WILL EMPLOYEE SUBJECT TO DRUG TESTING

A. Defamation

Employees have successfully utilized the tort of defamation to defend against employer drug testing. Defamation is defined as an invasion of an individual’s interest in his name and reputation.\(^\text{36}\) This tort will materialize in the drug testing context when an employer makes false statements about the results of an employee’s test results to a third person damaging the employee’s reputation.

The leading defamation case in the drug testing area is *Houston Belt and Terminal Railway v. Wherry.*\(^\text{37}\) The plaintiff sustained a knee injury on the job and passed out.\(^\text{38}\) The defendant had the plaintiff examined by their doctor who tested the employee to discover if the fainting was caused by drug use.\(^\text{39}\) The test results indicated that the plaintiff was using methadone.\(^\text{40}\) The doctor’s findings were reported to the employer; the employer issued reports to officers of the railroad and federal labor officials stating that the plaintiff was a drug user.\(^\text{41}\) The employee was terminated.
even though subsequent tests found no evidence that the plaintiff used drugs.\textsuperscript{42}

The trial court awarded the employee compensatory and punitive damages for libel.\textsuperscript{43} The Court of Civil Appeals of Texas affirmed. The appellate court found that there was sufficient evidence that the employer made false statements in writing that the employee was a drug user.\textsuperscript{44} The evidence demonstrated that the defendant had the results of subsequent negative drug tests two weeks before the plaintiff was fired.\textsuperscript{45} Thus, the defendant communicated false information about the plaintiff to third parties.

In \textit{Merritt v. Detroit Memorial Hospital}\textsuperscript{46} an employee failed to prevail in a defamation action.\textsuperscript{47} The employee was required to submit to a drug test as part of a company required physical; the drug test was positive for morphine.\textsuperscript{48} The findings were communicated to hospital management.\textsuperscript{49} The employee was terminated for violating a work rule forbidding the personal use of drugs.\textsuperscript{50} The employee sued her employer for defamation.

The Court of Appeals of Michigan held that the employer had a qualified privilege to communicate the results of the drug test to management personnel.\textsuperscript{51} Therefore, even if the results were false, their communication to the employer’s management personnel was protected by the qualified privilege.

A recent development in defamation law may make this tort a more potent cause of action in drug testing cases. This recent development is the doctrine of compelled self publication. This doctrine allows an employee to recover damages for defamation when the employer communicated nothing to a third person; under this theory, the employee is compelled to reveal to a third person an

\begin{itemize}
  \item \textsuperscript{42} \textit{Id.} at 746-47. Before the plaintiff was terminated, the defendant received a medical report which found no evidence that the plaintiff used methadone. The plaintiff was officially terminated for being an "unsafe employee" and failure to file a timely report of his accident. \textit{Id.}
  \item \textsuperscript{43} \textit{Id.} at 753-55.
  \item \textsuperscript{44} \textit{Id.} at 752. The Texas court applied the standard established in Gertz v Robert Welch, 418 U.S. 323 (1975). \textit{Id.}
  \item \textsuperscript{45} \textit{Id.} at 748.
  \item \textsuperscript{46} 81 Mich. App. 279, 265 N.W. 2d 124 (1978).
  \item \textsuperscript{47} \textit{Id.} at 125.
  \item \textsuperscript{48} \textit{Id.} The test found the employee’s urine contained morphine sulphate. At the time of the test, however, the employee was using prescription medications, one of which contained codeine. \textit{Id.}
  \item \textsuperscript{49} \textit{Id.} at 127-28.
  \item \textsuperscript{50} \textit{Id.} at 125.
  \item \textsuperscript{51} \textit{Id.} at 127-28. The court stated that the qualified privilege to defame granted to employers is not violated as long as the employer acts in good faith. \textit{Id.} at 128.
\end{itemize}
employer's defamatory statement.\textsuperscript{52}

In \textit{Lewis v. Equitable Life Assur. Soc. of U.S.},\textsuperscript{53} the plaintiffs were employees terminated after a dispute with the company over travel expenses.\textsuperscript{54} The employees were not instructed by their employer on how to fill out expense reports.\textsuperscript{55} As a consequence, the employer ordered the plaintiff to revise their expense reports; they complied with this order.\textsuperscript{56} The company, however, asked the employees to revise the expense reports a second time to show reduced travel costs.\textsuperscript{57} The employees believed that the expense reports reflected their true travel costs and, therefore, they refused to further alter the reports.\textsuperscript{58} The employer knew that the employees honestly incurred the expenses; however, the employees were discharged.\textsuperscript{59} The employees were fired for gross insubordination.\textsuperscript{60}

When the plaintiffs sought out new positions they were asked in employment interviews why they were terminated. The employees informed the prospective employers that they were fired for gross insubordination.\textsuperscript{61} Once prospective employers heard why the employees were terminated, they found it difficult to find work.\textsuperscript{62}

The plaintiffs brought a defamation action against the company. A jury returned verdicts for the plaintiffs awarding them $75,000 in compensatory damages and $150,000 in punitive damages.\textsuperscript{63} Ultimately, the case was appealed to the Minnesota Supreme Court.

The Minnesota Supreme Court affirmed the trial court. The court recognized an exception to the rule that a defamation claim

\begin{itemize}
  \item \textsuperscript{53} 389 N.W. 2d 876 (Minn. 1986).
  \item \textsuperscript{54} \textit{Id}. at 880.
  \item \textsuperscript{55} \textit{Id}. at 880-81.
  \item \textsuperscript{56} \textit{Id}.Ironically, the employees were praised for their performance on the business trip from which the expenses arose. \textit{Id}. at 881.
  \item \textsuperscript{57} \textit{Id}. The company was attempting to recoup from each employee approximately $200. \textit{Id}.
  \item \textsuperscript{58} \textit{Id}.
  \item \textsuperscript{59} \textit{Id}.
  \item \textsuperscript{60} \textit{Id}.
  \item \textsuperscript{56} \textit{Id}. at 882. The company did not communicate the reasons why the employees were fired to the prospective employers. In fact, the company had a policy of not releasing more than an employee’s dates of employment and final job title unless authorized in writing. \textit{Id}. at 882.
  \item \textsuperscript{62} \textit{Id}. at 882. One plaintiff found a new position after candidly explaining the circumstances of the termination. Another plaintiff obtained employment after misrepresenting the reasons for the termination. A third plaintiff never revealed why she left the company. A fourth employee could not find work. \textit{Id}.
  \item \textsuperscript{63} See, \textit{Lewis} 361 N.W.2d at 879.
\end{itemize}
will not succeed if the plaintiff communicated the defendant's defamatory statement to a third party.\textsuperscript{64} If a plaintiff is in some way compelled to communicate a defendant's defamatory statement to a third person and it is foreseeable to the defendant that the plaintiff would be so compelled, a cause of action for defamation can be pursued.\textsuperscript{65} The plaintiffs in \textit{Lewis} satisfied these requirements. The plaintiffs need for new jobs and their obligation to be honest in answering questions constituted compulsion; the court found that it was foreseeable to the defendant that the plaintiffs would be asked by potential employers why they were fired.\textsuperscript{66}

The reasoning in \textit{Lewis} can be applied when an employee is fired on the basis of an inaccurate drug test. An employee terminated because of a false drug test result would be in the same position as the plaintiffs in \textit{Lewis}. The employee may be compelled to reveal at an interview why the termination occurred; it is foreseeable that such a question would be asked.

Eight states have adopted the compelled self publication rule in defamation actions arising from employment discharge.\textsuperscript{67} No defamation case, in the drug testing context, has been decided applying this doctrine. However, in those states which recognize the doctrine, this cause of action has considerable potential to be an effective remedy for the "at will" employee terminated because of an inaccurate drug test.

\textbf{B. Infliction of Emotional Distress}

Another tort action which at will employees have utilized in drug testing actions is the negligent infliction of emotional distress. This tort will arise when negligence has has been exhibited by an employer in the administration of a drug test. Negligent infliction of emotional distress exists when a defendant fails to use ordinary care not to inflict foreseeable emotional distress on another person.\textsuperscript{68} Depending on the jurisdiction, the plaintiff may or may not be required to prove accompanying physical injury.\textsuperscript{69}

\begin{itemize}
\item \textsuperscript{64} Lewis v. Equitable Life Assur. Soc. of U.S., 389 N.W.2d 875, 879 (Minn. App. 1985). \textit{See also, Restatement (Second) of Torts} § 577, comment m (1977).
\item \textsuperscript{65} Lewis, 389 N.W.2d at 886.
\item \textsuperscript{66} Id. at 888. The court found that the plaintiffs had the choice to either lie or reveal why they were terminated. The court found that this choice was unacceptable. \textit{Id}.
\item \textsuperscript{67} Langvardt, supra note 49, 243-44 note 79.
\item \textsuperscript{68} Kelley v. Schlumberger Technology Corp, 849 F.2d 41, 43 (1988).
\item \textsuperscript{69} \textit{See e.g., Gammon v Osteopathic Hospital of Maine}, 534 N. E.2d 1285-86 (1987).
\end{itemize}
In *Kelley v. Schlumberger Technology Corp.*, an employee succeeded in recovering damages for the negligent infliction of emotional distress resulting from an employer's drug testing program. The plaintiff was a barge engineer on an oil platform in the Gulf of Mexico. The defendant tested the plaintiff and all personnel for drugs. The test involved the taking of a urine sample while under the observation of a representative of the defendant. Observation of the plaintiff while providing the sample formed the core of the complaint against the defendant. The urine sample was tested allegedly yielding positive results for marijuana; a second test was administered which also produced positive results for marijuana. The plaintiff's employment was terminated. The plaintiff brought an action in the United States District Court for the District of Massachusetts against the defendant for invasion of privacy and negligent infliction of emotional distress. A jury awarded the plaintiff $125,000 in damages for negligent infliction of emotional distress. The defendant appealed.

The United States Court of Appeals for the First Circuit, affirmed the trial court. The court held that an employee could recover for the negligent infliction of emotional distress if an employer's conduct foreseeably caused emotional distress, and if a reasonable person in the employee's position would have been seriously distressed by the employer's drug testing program.

The *Kelley* decision was a diversity case; the Federal District Court of Massachusetts applied Louisiana law. In Louisiana a plaintiff may recover for emotional distress in the absence of any accompanying physical injury. Therefore, the tort of negligent infliction of emotional distress is best utilized in states which recognize the cause of action in the absence of resulting bodily injury.

Plaintiffs have also recovered against employers for the intentional infliction of emotional distress resulting from compulsory

---

70. 849 F.2d 41 (1988).
71. Id. at 42.
72. Id.
73. Id. at 43.
74. Id. The plaintiff stated that he "was disgusted by the whole idea of someone being paid to look at [his] penis while [he] urinated." Id.
75. Id.
76. Id. at 42.
77. Id. The plaintiff was awarded very nominal damages of $1 for his invasion of privacy claim. Id.
78. Id. at 44.
79. Id. at 44 n.1.
drug testing. This tort occurs when an employer engages in extreme and outrageous conduct and intentionally or recklessly causes severe emotional distress to an employee. An employee must prove that (1) the employer acted in an extreme and reckless manner, (2) the employer intended to cause or behaved with reckless disregard of the chance that severe emotional distress would occur, (3) the employer’s conduct actually caused emotional distress, and (4) the resulting emotional distress is severe.

In Luck v. Southern Pacific Railroad, an employee recovered damages for the intentional infliction of emotional distress caused by her employer’s implementation of a drug testing program. The plaintiff refused to sign a consent form agreeing to the defendant’s drug testing program. To encourage the plaintiff to sign the consent form, the defendant interrogated the plaintiff in a series of meetings for numerous hours over a two day period; the defendant centered the conversations on the plaintiff’s bodily functions, attitudes, and belief that her rights would be violated by the test. The plaintiff was awarded $485,000 in damages by a jury.

In Pettigrew v. Southern Pacific Railroad, a plaintiff was trapped in an Orwellian nightmare after he was given a drug test by his employer which produced positive results. The plaintiff challenged the results of the positive drug test. The defendant gave the plaintiff a second drug test, but required the plaintiff to spend four days in the hospital. The second test indicated that no drugs were present in the plaintiff’s system. Even though the second test was negative, the defendant committed the plaintiff to twenty eight days of inpatient rehabilitation in a drug clinic, forced the plaintiff to attend addiction meetings, and administered ten

82. Fogel, supra note 3, at 675.
84. Id. at 676.
85. Id.
86. Id.
87. Id.
89. Note, supra note 82, at 615.
90. Id.
91. Id.
more drug test which were all negative.\textsuperscript{92} The plaintiff brought an action against the defendant for the intentional infliction of emotional distress.\textsuperscript{93}

In \textit{Scatterfield v. Lockheed Missiles and Space Co.},\textsuperscript{94} a federal district court denied a plaintiff recovery for the intentional infliction of emotional distress.\textsuperscript{95} The plaintiff was terminated after a drug test given as part of an employee physical indicated that the plaintiff was a marijuana user.\textsuperscript{96} The court granted summary judgment in favor of the defendant on the ground that the plaintiff failed to prove all the elements of a claim for the intentional infliction of emotional distress.\textsuperscript{97}

Negligent infliction of emotional distress offers more promise as a remedy for ill treatment from employee drug testing than intentional infliction of emotional distress. The negligence standard is easier to prove because no showing of intent or recklessness is required.\textsuperscript{98}

C. Invasion of Privacy

Private sector employees are outside the scope of the Fourth Amendment of the United States Constitution.\textsuperscript{99} However, tort actions for invasion of privacy have been developed which protect similar rights. The concept of a common law right to privacy was postulated in 1890 in an article in the \textit{Harvard Law Review.}\textsuperscript{100} This concept has been evolving since that article was published.

Of Dean Prosser's four invasion of privacy actions, the one most appropriate to drug testing cases is the "unreasonable intrusion upon the seclusion of another." This theory states that "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 privacy, if the intrusion would

\begin{itemize}
\item \textsuperscript{92} \textit{Id.} Even though the drug tests were all negative and the doctors at the clinic believed that the plaintiff needed no rehabilitation, the defendant demanded more testing. \textit{Id.}
\item \textsuperscript{93} \textit{Id.} Pettigrew was able to get an injunction against further harassment by the defendant. \textit{Id.}
\item \textsuperscript{94} 617 F.Supp. 1359 (1985).
\item \textsuperscript{95} \textit{Id.} at 1360.
\item \textsuperscript{96} \textit{Id.} at 1366-69.
\item \textsuperscript{97} \textit{Id.} at 1360. The court found that the defendant's conduct did not constitute extreme and outrageous behavior. \textit{Id.}
\item \textsuperscript{98} Foyel, \textit{supra} note 3, at 677.
\item \textsuperscript{99} Burdeau v. McDowell, 256 U.S. 465 (1921).
\item \textsuperscript{100} See \textit{supra} note 22.
\end{itemize}
be highly offensive to a reasonable person." The law in employment cases, however, follows a different approach.

In *Bratt v. International Business Machines*, a test for the invasion of privacy in the employment context was developed. The plaintiff alleged that the defendant had violated his privacy rights by allowing a physician, hired by the defendant, to reveal the plaintiff's medical problems to the defendant. The trial court granted summary judgement for the defendant; the United States Court of Appeals for the First Circuit, remanded to the trial court to discover whether or not the plaintiff's privacy was violated.

In *Bratt*, the First Circuit developed a test for invasion of privacy actions brought by employees against employers. The court applied a balancing approach to the problem. According to the court, the "test for a violation of privacy is whether the substantiality of the intrusion on the employee's privacy . . . outweighs the employer's legitimate business interest in obtaining . . . the information." The court also stated that "the personal nature of the information is one factor to be considered in the intrusion." This test could be applied to drug cases. Any medical test reveals very personal information about the employee. Furthermore, the test forces employers to assert a legitimate business purpose for conducting a drug test.

Another employment case deciding the privacy rights of employees is *O'Brien v. Papa Gino's of America*. The defendant mandated that the plaintiff take a polygraph test to discover if the plaintiff was a drug user. The plaintiff sued for invasion of privacy and was awarded $448,200 in damages; the defendant appealed.

The United States Court of Appeals for the First Circuit, upheld the jury's finding that the polygraph was "highly offensive and in-

---

102. 785 F.2d 352 (1986).
103. Id. at 360.
104. Id. at 357-58.
105. Id. at 362. The court stated that the plaintiff created a genuine issue of material fact in his allegation that the doctor owed him a duty of confidentiality because of the doctor patient relationship. Id.
106. Id. at 360.
107. Id.
108. 780 F.2d 1067 (1986).
110. 780 F.2d at 1076.
vasive of the employee's privacy." Also the defendant's attempts to discover information concerning the plaintiff's alleged off duty drug use was held to be improper, as the plaintiff was entitled to keep such matters private.

The primary defense employers assert against employee's invasion of privacy claims is that the employee consented to have his privacy invaded.

In Texas Employment Commission v. Hughes Drill Fluids, an at will employee refused to submit a urine sample to his employer for drug screening purposes. A written copy of the company drug policy was mailed to the employee and all other employees of the company. The company ordered the employee to sign a consent form and to give a urine sample for drug testing; the employee refused and was discharged the next day. The employee filed an action against the company for invasion of privacy.

The Texas Appeals Court found that the employee consented to the drug screening program by continuing to work with full notice of the provisions of the drug testing policy. The mailing of the company drug policy to the employee constituted actual notice to the employee that the drug policy was a condition of the employee's continued employment with the company. Therefore, by simply mailing a notice to an employee's home, the employer negated the privacy rights of the employee.

In Jennings v Minco Technology Labs, Inc., an at will employee sued her employer for invasion of privacy. The employer established a plan in which employees would consent to have themselves tested for drugs. The plaintiff argued that her privacy would be invaded because of economic duress: the plaintiff

111. Id. at 1072. The defendant argued that the plaintiff contracted away his rights of privacy. The defendant's employee manual forbids the use of drugs; the defendant stated that the plaintiff impliedly consented to have his privacy invaded as he worked for the defendant when this rule was in force. The court found that this rule could not override a jury finding that the polygraph investigation invaded the plaintiff's privacy. Id.

112. Id.

113. 746 S.W.2d 796 (1988).

114. Id. at 798.

115. Id. at 799. This fact is important as the court held that the plaintiff had actual notice of the policy. Id. at 799-800.

116. Id.

117. Id. at 796-97.

118. Id.

119. 765 S.W.2d 497 (1989).

120. Id. at 502.

121. Id. at 498.
was poor and depends on her wages to survive, thus any consent would be illusory.\textsuperscript{122}

The court rejected the plaintiff's economic duress argument on the basis that the law was neutral on the plaintiff's economic circumstances.\textsuperscript{123} The plaintiff in this case, however, was not threatened with termination. If the plaintiff was threatened with termination, the court would not have disposed of this argument so easily.

An at will employee has a cause of action against an employer for the invasion of privacy. However, the defense of consent will prevent many plaintiffs from successfully utilizing this cause of action. The employee may be placed in a "Catch 22" type situation where he must quit or submit to the test. Therefore, the tort of invasion of privacy is of limited utility when challenging employer drug testing programs.

V. CONCLUSION

The actions available to at will employees challenging employer drug testing programs are limited and vary considerably between jurisdictions. The at will employee's chances of recovery often depend on which court he has access to.\textsuperscript{124}

Another problem faced by the at will employee is that the most effective remedies require the employee to be harmed by the testing. Remedies intended to stop the testing from taking place, for example challenging the implementation of an employee drug testing plan on the ground that it will invade the privacy of employees, are much less likely to be successful.

The lack of an effective remedy for the at will employee to counter employer drug testing programs is a symptom of a larger problem. The employment at will doctrine is a contract of adhesion which places an over balance of power into the hands of employers. The at will employment relation is imposed on the employee by the employer. The employer has the power to terminate the employee for any reason or no reason; that power is used to coerce employee submission to degrading working conditions such

\textsuperscript{122} Id. at 502. The court stated that they "could not imagine a theory more at war with the basic assumptions held by society and its law." Id.

\textsuperscript{123} Id.

\textsuperscript{124} This is particularly true in wrongful discharge cases which depend on the discharge violating public policy, generally expressed in a statute. See Note, supra, note 1 at 568.
as compulsory drug testing.\textsuperscript{125}

There is little interest among the legislatures to improve the legal position of at will employees subject to compulsory drug testing schemes.\textsuperscript{126} It is up to the courts to act to create better remedies for at will employees complaining of ill treatment caused by drug testing.

\emph{Charles J. Dangelo}

\footnotesize
\textsuperscript{125} Jennings, 765 S.W.2d at 501, n.3.

\textsuperscript{126} Only six states have expressed a policy in favor of regulating employment drug testing. See Fogel, supra, note 3 at 677-78.