WHEN WORKERS SAY "NO" TO DRUG TESTING: ISSUES IN THE PUBLIC AND PRIVATE SECTORS

INTRODUCTION

On September 5, 1989, in a nationally televised speech, President George Bush announced several policies designed to combat the sale and use of illegal drugs in the United States. In his address, President Bush demanded that employers eliminate drugs from the workplace. Many employers have already begun to screen current or potential employees for drug use.

Employers who institute drug testing programs may encounter a variety of legal and practical problems. This article will analyze the legal issues surrounding an employer's decision to initiate such programs by comparing issues raised in current decisions on testing of public employees with the concerns affecting private employers.

I. PUBLIC EMPLOYERS — LEGAL ISSUES

A. Search and Seizure

The fourth amendment to the United States Constitution protects citizens from unreasonable governmental searches and seizures.

2. Id. at B7, col. 6.
4. The fourth amendment provides, in pertinent part: "The right of the people to be
Courts have held that urinalysis, breathalyzer tests and blood tests constitute searches under the fourth amendment. In determining the reasonableness of a search, courts balance the nature and quality of the intrusion upon the employee's fourth amendment interest against the importance of the governmental interest asserted as justification for the search. In drug testing situations, courts weigh employee privacy interests against governmental interests in effective operation of the workplace.

 secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. . . ." U.S. CONST. amend. IV. See O'Connor v. Ortega, 480 U.S. 709 (1987) (searches by government employers are subject to constitutional restraints).


Prior to Skinner, the Southern District of New York in Fowler v. New York City Department of Sanitation, 704 F. Supp. 1264 (S.D.N.Y. 1989), held that a urine test of a job applicant was not a search because the prospective employee was fully aware that a test would take place and, therefore, had no expectation of privacy. Cf. City of Palm Bay v. Bauman, 475 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1985) (consent procured under threat of disciplinary action held invalid).

6. Weinberger, 818 F.2d at 942.

7. Among these interests, courts have enumerated freedom from giving involuntary samples and privacy in the act of urination. Fowler, 704 F. Supp. at 1269. For further discussion of the scope of public employee privacy interests, see infra notes 26-37 and accompanying text.


The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace . . .

Section 1. Drug-Free Workplace
(a) Federal employees are required to refrain from the use of illegal drugs.
(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.
(c) Persons who use illegal drugs are not suitable for Federal employment. . . .

Section 3. Drug Testing Programs
(a) The head of each Executive agency shall establish a program test for the use of illegal drugs by employees in sensitive positions . . .
In rejecting the fourth amendment claims of government employees, some courts have held that certain employees, because of the nature of their jobs, have a diminished expectation of privacy.9 Further, it is uncertain whether a person has an expectation of privacy with respect to illegal activity such as the use of illegal drugs.10 Yet urinalysis can reveal information in which an individual has a reasonable expectation of privacy. For example, a urine specimen may reveal that an employee is pregnant or undergoing treatment for diabetes, epilepsy, schizophrenia or heart problems.11

Until March, 1989, the constitutionality of random drug testing was

(c) [T]he head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;
(2) In an examination authorized by the agency regarding an accident or unsafe practice. . . .
(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.


In addition to Reagan’s Executive Order, 41 U.S.C.A. § 701 (West 1987 & Supp. 1990) requires that government contractors and grant recipients be drug-free. It emphasizes awareness programs and rehabilitation assistance.


10. Cf. United States v. Jacobsen, 466 U.S. 109 (1984) (governmental conduct that can reveal whether a substance is cocaine, and no other arguably “private” fact, does not intrude on a legitimate privacy interest); United States v. Place, 462 U.S. 696 (1983) (tests or searches designed only to reveal the presence or absence of contraband do not intrude upon a reasonable expectation of privacy). It is not necessarily the case that “private possession” of an article which cannot be sold in commerce is itself illegal. See Jacobsen, 466 U.S. at 123 n.23; Stanley v. Georgia, 394 U.S. 557 (1969) (obscenity); Raven v. State, 537 P.2d 494 (Alaska 1975) (marijuana in the home).

an issue that divided the federal courts. However, in *National Treasury Employees Union v. Von Raab* and *Skinner v. Railway Labor Exec. Ass'n* the Supreme Court allowed drug testing of individuals in certain critical jobs without requiring the employer to suspect that the worker had been using drugs.

### B. Equal Protection

Public sector employees challenging drug testing schemes have brought equal protection claims against their employers. In *Poole v. Stephens*, for example, corrections officers, corrections officer recruits and a labor union brought a civil rights action against a state corrections department. They maintained that random testing of recruits, while officers were tested only upon individualized suspicion, as well as


When an incident occurs that brings an employee to the attention of management regarding drug use, courts generally uphold an employer's right to test its employees. See *Brotherhood of Maintenance of Way Employees v. Burlington N. R.R. Co.*, 802 F.2d 1016 (8th Cir. 1986) (testing after incident possibly resulting from employee error); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), cert. denied, 429 U.S. 1029 (1976) (testing after accident); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) (testing employees found smoking marijuana).


15. In *Von Raab*, the Court allowed the government employer to test custom employees involved in drug interdiction. The court reasoned that the employer's interest in random drug testing is enhanced because employees in customs are vital to the war on drugs in the United States, so the public interest demands that they be drug-free.

109 S. Ct. at 1397-98. The *Von Raab* and *Skinner* opinions allowed random testing of employees in positions that implicate safety concerns such as carrying guns, *Von Raab*, 109 S. Ct. at 1397, or working on railways, *Skinner*, 109 S. Ct. at 1420. In *Von Raab*, the Court vacated the determination of the Seventh Circuit that employees handling "classified" materials could be subjected to random drug testing. 109 S. Ct. at 1396-97.


17. *Id.* at 150.
the department's failure to test other categories of employees, depriving them of equal protection under the law. Rejecting these claims, the District Court for the District of New Jersey found a rational basis for the differing schemes. The court therefore held that the testing scheme did not violate the plaintiffs' right to equal protection.

In Shoemaker v. Handel, differential testing of various categories of employees led a horse racing jockey to bring an equal protection action against the New Jersey Racing Commission. The Third Circuit determined that because jockeys are the most visible participants in horse racing, a jockey's drug abuse could more seriously undermine the integrity of the sport than could abuse by trainers, grooms and officials who were not subject to random testing. Hence, the court found that random testing of jockeys alone was a rational step towards eradicating drug abuse in the horse racing industry.

C. Right of Privacy

Employees challenging drug testing schemes have asserted that testing programs intrude upon a constitutional right of privacy distinct from the privacy factor balanced in search and seizure claims. The District Court for the Eastern District of Louisiana, in National Treasury Employees Union v. Von Raab, found that drug testing of cus-

18. Id.
19. Id.
20. Id. at 156-57.
22. Id. at 1137. Because the racing industry conducted the test pursuant to administrative regulations promulgated by the Commission, the court applied constitutional analysis to the claims. Id. at 1141.
23. Id. at 1144.
24. Id. at 1144.
26. For discussion of employees' privacy rights in light of fourth amendment claims, see supra notes 7-12 and accompanying text.
toms workers who sought promotion into certain positions unconstitutionally interfered with employees’ "penumbral right of privacy." The court found that the urinalysis offended the dignity of the workers. The court noted that "excreting bodily wastes" is a function accompanied by "a legitimate expectation of privacy in both the process and the product."

Other courts have refused to sustain constitutional privacy claims, citing a countervailing state interests that outweigh employees' rights. In Smith v. White, employees of the Tennessee Valley Authority brought an action seeking damages for alleged violation of their constitutional rights as a consequence of drug urinalysis. The Eastern District of Tennessee found that because investigations ensured that other persons were unaware that plaintiffs were targets of investigation, the Tennessee Valley Authority protected the employees' privacy rights. Further, the court noted its uncertainty as to whether a non-consensual urinalysis is an infringement of constitutional privacy guarantees. On appeal, the Fifth Circuit vacated the lower court's judgment. The Union, in its appeal, did not seek to support its injunction based upon penumbral rights to privacy. Therefore, the Fifth Circuit expressed no opinion on the issue save to note, that such rights are "limited by countervailing state interests." The case eventually reached the Supreme Court which approved testing of certain employees.


29. 649 F. Supp. at 389. Standing behind partitions, officials observed workers from the shoulders up as employees produced urine samples. Id. at 382.

30. Id. at 389.

31. Id. On appeal, the Fifth Circuit vacated the lower court's judgment. 816 F.2d 170 (5th Cir. 1987). The Union, in its appeal, did not seek to support its injunction based upon penumbral rights to privacy. Therefore, the Fifth Circuit expressed no opinion on the issue save to note, that such rights are "limited by countervailing state interests." 816 F.2d at 181. The case eventually reached the Supreme Court which approved testing of certain employees. 109 S. Ct. 1384 (1989).


33. Id. at 1086. The testing was part of an investigation which began when a Tennessee Valley Authority (TVA) public safety officer began treatment for drug abuse. When personnel of the TVA's Office of the Inspector General (OIG) questioned the public safety officer, he provided the investigators with information about drug usage and distribution at the power plant where he was employed. This information ultimately led to the TVA's testing of the plaintiffs. Id. at 1086-87.

OIG officers questioned the plaintiffs, then requested samples. Employees who refused to give samples received a memorandum from the OIG. The memorandum stated that a failure to consent to the sample or a positive result could lead to adverse administrative action. The memo also enumerated confidentiality guarantees. OIG investigators observed all but one of the employees as the workers produced the samples. Id. at 1087-88.

34. Id. at 1090.

35. Id. The court assumed that plaintiff asserted a "penumbral personal privacy
nally, the court concluded that the government's need to secure a drug-free workplace outweighed any privacy rights the workers had.\textsuperscript{36}

D. Self-Incrimination

Employees alleging a violation of the privilege against self-incrimination in drug testing schemes generally assert a two-fold violation of their fifth amendment rights. They contend that an employer's taking and analysis of urine samples constitutes one infringement, and that an employer's demand for medical information on consent forms also violates their privilege against self-incrimination.\textsuperscript{37} Courts have concluded that chemical analysis results are not the evidence of a "testimonial or communicative nature"\textsuperscript{38} that the fifth amendment requires in order to trigger the privilege.\textsuperscript{39} With regard to the consent forms, the court in \textit{Rushton v. Nebraska Public Power District}\textsuperscript{40} held that evidence of the use of licit medication gleaned from the consent forms does not compel employees to be witnesses against themselves.\textsuperscript{41}

\textsuperscript{36} 666 F. Supp. at 1090. The Sixth Circuit affirmed \textit{Smith} in a brief disposition. 857 F.2d 1475 (6th Cir. 1988).

\textit{See also} \textit{Amalgamated Tran. Union v. Sunline Tran. Agcy.}, 663 F. Supp. 1560, 1571-72 (C.D. Cal. 1987). The Central District of California found no privacy interest that rose to an independent fundamental right, concluding that employees had vindicated their interest with their other constitutional claims of search and seizure, procedural due process and self-incrimination. \textit{Id.} at 1572.


\textit{Id.}; \textit{Amalgamated}, 663 F. Supp. at 1570-71. Both courts relied on \textit{Schmerber v. California}, 384 U.S. 757 (1966), in which the Supreme Court held that blood tests and analysis thereof did not constitute evidence of a testimonial nature that compelled an accused to testify against himself. 384 U.S. at 757.

\textit{Id.} at 1528. In \textit{Amalgamated}, the court found that even if an employee admitted drug use, the employee would not be subject to criminal sanction under the program at issue. Thus, even though employees received warning that use of a controlled substance could result in discharge, sanctions short of criminal prosecution did not implicate the self-incrimination clause. 663 F. Supp. at 1571.

The district court in \textit{National Treasury Employees Union v. Von Raab}, 649 F. Supp. 380 (E.D. La. 1986), \textit{vacated}, 816 F.2d 170 (5th Cir. 1987), \textit{aff'd in part}, 109 S. Ct. 1384 (1989), held that urine samples and pre-test forms constitute testimonial evidence. 649 F. Supp. at 388. Distinguishing \textit{Schmerber}, the district court found that because observers listened to employees producing samples, the procedure was a shocking invasion of privacy. \textit{Id.} These conclusions led the court to find a violation of the fifth amend-
E. Due Process

Another argument that the district court noted in *Rushton* was deprivation of substantive due process. This claim alleged arbitrary and capricious deprivation of liberty. Based on evidence presented, the district court found that the testing program was not so susceptible to error as to violate the due process clause.

In *Everett v. Napper*, the Eleventh Circuit rejected plaintiff’s substantive due process claims. In *Everett*, a drug dealer implicated a firefighter as a drug user. As a result of the dealer’s statement, Everett’s employer ordered him to submit to urinalysis. Everett’s refusal to cooperate with the investigation resulted in his suspension. In rejecting Everett’s claim, the court determined that the employer’s requirement was rationally related to the city’s strong and legitimate interest in public safety. The court further held that a rational basis
for testing those suspected of drug use existed such that the urinalysis requirement was neither arbitrary nor capricious in violation of due process.50

II. PRIVATE EMPLOYERS — LEGAL ISSUES

A. Constitutional provisions

Privacy interests that plaintiffs have asserted in private sector drug-testing cases differ from claims by public employees. Most significantly, fourth amendment claims are unavailable in the private sector as courts have historically applied these claims solely to governmental institutions.51 Similarly, state constitutional right of privacy provisions are applied to state actors.52 Recently, however, a California appellate court considered whether private employers, without violating the state's constitutional privacy provision,53 can require job applicants to a substantive due process violation requires an egregious violation of decency and fairness. Id. The court cited Rochin v. California, 342 U.S. 165 (1952), in which the Supreme Court found that compelling an individual to vomit two capsules by forcing an emetic into his stomach violated the individual's due process rights. Id.

50. 833 F.2d at 1513. This article's scope regarding due process violations of public employees focuses on substantive due process. However, several courts have found violations of procedural due process in drug testing of public employees. See, e.g., Fraternal Order of Police Lodge No. 5 v. Tucker, 868 F.2d 74 (3d Cir. 1989) (merely advising police officers of complaint involving their drug use without presenting specific allegations or evidence or affording plaintiffs an opportunity to explain or rebut evidence violated policemen's due process right); Murphy v. McClendon, 712 F. Supp. 921 (N.D. Ga. 1988) (city board violated public employee's procedural due process rights when city gave only general, conclusory reasons for discharge); Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987) (firefighter who had benefit of counsel and opportunity to present evidence and cross-examine witnesses not deprived of due process).


In Porten v. University of San Francisco, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976), a suit against a private school for unauthorized disclosure of a transcript, a California court stated that the right of privacy “is protected not merely against state
submit to urine tests as a condition of employment. In *Wilkinson v. Times Mirror Books*, a publishing office declined to hire three applicants who refused urinalysis. The California Court of Appeals upheld the urinalysis testing. The court reasoned that the state constitutional privacy provision applied to the private sector, but the testing scheme did not unduly burden the applicants' privacy rights.

### B. Other actions

#### 1. Other Privacy Claims

Private sector workers in most jurisdictions bring actions for tortious invasion of privacy or breach of common law right of privacy. In *Luedtke v. Nabors Alaska Drilling*, two former employees of a drilling rig brought suit against their former employer challenging their discharge following refusal to submit to urinalysis. After rejecting

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**Note:**

64 Cal. App. 3d at 829, 134 Cal. Rptr. at 842. The court cited an election brochure argument referring to the provision as a restriction upon business as well as upon government. *Id.* at 829 n.2, 134 Cal. Rptr. at 842 n.2.


55. *Id.* at __, 264 Cal. Rptr. at 196.

56. *Id.* at __, 264 Cal. Rptr. at 203. The court reasoned that plaintiffs would expect a physical exam to accompany their application for employment. Moreover, applicants had the opportunity to choose testing or seeking other employment. The court also noted that the testing procedures and means for disseminating test results provided safeguards to an applicant's privacy. *Id.* at __, 264 Cal. Rptr. at 204.

One commentator notes that plaintiffs have successfully invoked the state right to privacy to halt testing at two California plants. McGovern, *Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1466 (1987).

Additionally, plaintiff in *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988), brought a claim to enjoin drug testing under Article 1, § 1 of the California Constitution, but the court held that federal labor law preempted the claim. *Id.* at 434. The court relied upon absence of a published opinion applying the privacy right to drug testing. *Id.* at 434 n.5.


58. *Id.* at 1125. The court considered Clarence Luedtke's and Paul Luedtke's separate actions on appeal. Paul Luedtke, twice accused of violating the company's drug and alcohol policies, submitted to a "comprehensive physical" without notice that the company was screening his urine samples for drug use. He was suspended thereafter for drug use. Paul's examination occurred two weeks prior to Nabors' announcement of its drug testing policy. When the company requested that Paul submit two more urine tests in order to return to work, he refused. *Id.* at 1125-26.

Clarence's complaint arose after the company's policy announcement. When Clarence saw his name on a list of individuals to be tested, he declined "as a matter of principle." At that point, the company fired Clarence. *Id.* at 1126.
the employees' state constitutional privacy claims, the Alaska Supreme Court determined that in order for the former employees to claim invasion of privacy, they had to show that the intrusion was unwarranted or conducted in an unreasonable manner. The court found that no cause of action for invasion of privacy arose because the employees' refusal to submit to urinalysis prevented any intrusion from occurring. In considering whether the company's taking and testing of urine during a comprehensive physical was tortious, the court held that the manner of testing was not unreasonable because the employee volunteered the sample. Further, because the employer could test employees for drug use pursuant to an employment agreement, the intrusion was not unwarranted.

A private employee may also base a claim on state statutes providing a right to privacy. In *Jackson v. Liquid Carbonic*, a truck driver dis-

59. The Alaska Constitution confers a privacy right upon the state's citizens. ALASKA CONST. art. I, § 22. The *Luedtke* court declined to extend this privacy right to the actions of private parties, distinguishing the Alaska provision from California's provision by the history surrounding voters' adoption of the California amendment. *Id.* at 1130. For discussion of the California provision and its history and application, see supra notes 54-57 and accompanying text.

60. 768 P.2d at 1137.

61. The court held that because the employee continued to work with actual notice of the screening, he thereby consented to urinalysis. His consent precluded a violation of his common-law right of privacy. *Id.* at 1135. *Cf.* City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) (signature of public employee on consent form procured under threat of disciplinary action did not constitute consent to procedure).


63. 768 P.2d at 1138. The court also held that Paul's lack of awareness of the nature of the tests upon his urine did not render the analysis an invasion of privacy because Paul knew that the test results would reach Nabors. *Id.*

The *Luedtke* opinion noted that, historically, invasion of privacy arose from publication of private facts. In *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359 (D.S.C. 1985), the court noted that under applicable law, plaintiffs claiming libelous invasion of privacy must prove either publicity of private facts or an outrageous intrusion into private activities. The court found that the employer's practice of drug testing as part of an annual physical met neither standard. *Id.* at 1369-70. *See also* DiTomaso v. Electronic Data Systems, No. 87-CV-60320AA (E.D. Mich. October 7, 1988) (1988 WL 156317) (urinalysis test violated none of four possible bases for a cause of action under applicable law).

64. 863 F.2d 111 (1st Cir. 1988).
missed after failing a mandatory drug test brought an action under the Massachusetts right of privacy statute. The statute created a balancing test where the court could weigh the employer's legitimate business interest in obtaining information against the substantiality of the privacy infringement resulting from the disclosure of test results. The court held that the state created no additional privacy right independent of the parties' collective bargaining agreement.

2. **Intentional Infliction of Emotional Distress**

Workers challenging drug testing schemes have also sued employers for intentional infliction of emotional distress. Aggrieved employees allege emotional harm resulting from both the manner of testing and post-test disciplinary measures.

In *Kelley v. Schlumberger Technology Corporation*, a successful plaintiff's claim for negligent infliction of emotional distress arose from the establishment, implementation and administration of an employer's drug testing plan. Plaintiff complained of the company's practice of

65. Liquid Carbonic traditionally required biennial medical examinations in compliance with federal safety regulations. These examinations included urinalysis to screen for diabetes. In March 1985, the company announced that it would thereafter screen urine samples for drugs and alcohol. Liquid Carbonic distributed consent forms, notifying drivers that testing was a condition of continued employment. The company fired Jackson in February 1986 when traces of marijuana appeared in his sample. 863 F.2d at 112-13.

66. The statute provides in part: "A person shall have a right against unreasonable, substantial or serious interference with his privacy...." MASS. ANN. LAWS ch. 214, § 1B (Law. Co-op 1986).

67. 863 F.2d at 118. Compare this analysis with reasoning in fourth amendment claims discussed supra notes 4-15 and accompanying text.

68. 863 F.2d at 117. The court found that because plaintiff's claims were dependent on the agreement, federal labor law preempted the claims. *Id.* at 120.


70. 849 F.2d 41 (1st Cir. 1988).

71. *Id.* at 42. Plaintiff challenged his discharge following a positive drug test. Plaintiff alleged a variety of torts and constitutional violations. At the trial level, the court directed a verdict for defendant company on a claim of wrongful discharge. Plaintiff voluntarily dismissed claims for intentional infliction of emotional distress and defamation. Plaintiff won damages at trial for tortious invasion of privacy and negligent infliction of emotional distress. *Id.*

The jury also found that Schlumberger violated plaintiff's right to privacy under the Louisiana Constitution. *Id.* The appellate opinion contained no analysis of state action.
observing employees provide urine samples. The trial court instructed the jury to find for plaintiff if the defendant’s conduct foreseeably caused the plaintiff serious emotional distress and if a reasonable person in the plaintiff’s position would have been seriously distressed. The First Circuit affirmed a jury verdict for Kelley finding that the instructions on foreseeability applied Louisiana law correctly.

Kelley demonstrates the extent to which private employees’ claims are grounded in state law. Additionally, evidence that Kelly’s drug use and injury declined two years after dismissal and after institution of the urinalysis program was irrelevant to the reasonableness of the test policy at the time of Kelley’s discharge. This holding will drastically affect future presentation of an employer’s case supporting drug testing.

3. Defamation

Dissemination of an employee’s positive drug test results beyond those who are privileged to know the results may lead an employee to sue for defamation. In Houston Belt & Terminal Railing Co. v. Wherry, the railroad tested Wherry after he sustained an injury and

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72. 849 F.2d at 43.
73. Id.
74. Id. at 44. The First Circuit also found that the employer had failed to preserve the issue of the instruction’s adequacy by neglecting to object. Id. For a decision contrary to Kelley, see Satterfield v. Lockheed Missile & Space Co., 617 F. Supp. 1359 (D.S.C. 1985). In Satterfield, plaintiff brought an action alleging infliction of emotional harm after losing his job following a positive result on an involuntary urine test. Id. at 1365. In ruling against plaintiff, the court held that the employer’s conduct was neither “extreme” nor “outrageous.” Id. at 1366. The court appeared to rely on the fact that the company approached the employee privately, expressed reluctance at having to terminate the employee and informed the employee that he could fight the termination decision. Hébert, supra note 69, at 843. Additionally, the company allowed the employee’s work record to reflect a voluntary dismissal and offered the employee favorable references. Id.
75. 849 F.2d at 45.
76. For further discussion of the business sense of drug testing, see infra note 200 and accompanying text.
77. See Hébert, supra note 69, at 841.
subsequently fainted. The test results revealed a trace of methadone. After receipt of the results, the superintendent forwarded a report of the results and doctor's recommendations to several company officers. Pending an investigation, Wherry arranged for another urine test, which revealed no methadone or other illicit drugs. Even though Wherry testified that he had never used narcotics, the company dismissed him for being an "unsafe employee" and for failing to report his accident in a timely fashion. After Wherry's discharge, the United States Department of Labor inquired into his dismissal. The employer sent the Department a letter indicating that traces of methadone appeared in Wherry's urine.

In his action, Wherry claimed that the original doctor's report, the superintendent's report and the letter to the Department of Labor were defamatory. Although the Texas Appeals Court found that the superintendent's report and the letter to the Department of Labor were defamatory, the doctor's statement was not defamatory because the doctor intended to convey only a possibility that Wherry used drugs. The statements concerning methadone were false based upon Wherry's testimony and a negative result on the later test. Necessary publication of the defamatory statements occurred when company officials received superintendent's report and when the company sent the letter to

79. 548 S.W.2d at 746. The testing was done to determine if the fainting resulted from diabetes or drug use. Id.

80. Id. The doctor performing the test informed the railroad that methadone was commonly used to treat heroin addicts. The doctor also told the railroad's safety superintendent that it was uncertain if the presence of methadone signified drug use. However, methadone's presence might warrant further investigation. Id.

81. Id. at 746. The superintendent sent the communications pursuant to normal company reporting procedures. Id. See also Hébert, supra note 69, at 841.

82. 548 S.W.2d at 746. See also Hébert, supra note 69, at 841.

83. 548 S.W.2d at 746-47. The court indicates that the time which elapsed between Wherry's mishap and his report thereof was actually quite short. The opinion also indicated that the railroad did not dismiss Wherry for a violation of company rules prohibiting drug use. Id. at 747.

84. Id. Inquiry occurred because Wherry sought assistance from the Veteran's Administration. Id.

85. Id. See also Hébert, supra note 69, at 841-42.

86. Hébert, supra note 69, at 842.

87. 548 S.W.2d at 748-49. See also Hébert, supra note 69, at 842.

88. 548 S.W.2d at 746.

89. Id. at 750.
the Department of Labor. 90

Similarly, in Strachan v. Union Oil Co., 91 an employer suspended two employees because of a suspicion of drug use. The employer reinstated them only after negative drug tests. 92 Addressing plaintiff's defamation claims, the Fifth Circuit noted that to hold an employer guilty of defamation for merely inquiring about drug use would hamper investigation of possible disciplinary, mental or physical problems of workers. 93 One commentator cites Strachan for the proposition that while reasonable internal dissemination of investigation and urinalysis results should not lead to defamation liability, communication of such information should be as limited as possible. 94

4. Employment Contract Issues

Public employees fighting drug testing schemes often allege a deprivation of property interest in employment. 95 In contrast, private employees usually face the employee-at-will doctrine which greatly restricts actions for wrongful discharge. 96 Employees bringing such actions usually seek relief under two modifications to the doctrine: public policy exceptions and implied covenant of good faith and fair dealing.

In Greco v. Halliburton Co. 97 plaintiff brought an action against his employer alleging wrongful discharge and breach of an implied covenant of good faith and fair dealing in his contract. 98 The District

90. Id. at 754.
91. 768 F.2d 703 (5th Cir. 1985).
92. Id. at 704. See Hébert, supra note 69, at 842.
93. 768 F.2d at 706. The court emphasized that the company in no way tried to cast the workers in an unfavorable light. Further, the opinion noted that Strachan was not charged with drug use; he was merely told that the company had "a possible suspicion of drug use." Finally, the court described the unusual behavior of plaintiff Gaspard as support for a finding of no malice on the part of the company. Id. at 706.
94. Hébert, supra note 69, at 843.
95. For analysis of this type of action, see supra note 51 discussing procedural due process claims.
96. See Hébert, supra note 69, at 845. The commentator notes that in states which have abrogated the doctrine, wrongful discharge issues resemble issues in labor arbitration cases. Id. For discussion of labor arbitration cases on drug testing, see infra notes 158-86 and accompanying text.
98. Id. at 1448. The employer fired Greco for refusing to submit to a drug test. Id. at 1449.
Court for the District of Wyoming determined that a "contraband policy" requiring employees to submit to random urinalysis formed part of plaintiff's at-will employment contract upon signing a copy of its terms. 99 Furthermore, the court noted that even if a good faith or fair dealing covenant was implied in the parties' contract, plaintiff failed to show that Halliburton dismissed plaintiff in bad faith. 100

Good faith and fair dealing exceptions also formed the basis of at-will workers' claims in Luedtke v. Nabors Alaska Drilling. 101 However, a discussion of the public policy exception theory controlled the court's analysis. According to the Alaska Supreme Court, a public policy exists in protecting a worker's right to withhold certain private facts from his employer. 102 A public policy of paramount importance to these rights was support for the health and safety of workers at the rig. 103

The Luedtke court, although recognizing an employer's testing prerogative, imposed certain guidelines upon testing. The court mandated that the drug test occur at a time reasonably contemporaneous with the employee's work time. The employer's interest, the court held, is limited to the quality of employees' work and does not warrant the company assuming the role of a police officer. 104 The opinion also required notice of testing procedures for employees so that workers could con-
test the additional term of employment.\textsuperscript{105}

In \textit{Jennings v. Minco Technology Labs}\textsuperscript{106} plaintiff faced dismissal if she did not accept a testing policy as new terms of employment.\textsuperscript{107} Claiming a public policy exception, Jennings wished to continue in her employment without assenting to the modification. The company, however, objected to a contract without the testing scheme.\textsuperscript{108} The court refused to grant plaintiff's request. Noting that Jennings consented to the testing,\textsuperscript{109} the court refused to modify the at-will employment contract on the basis of a public policy exception for employee privacy interests in freedom from drug testing.\textsuperscript{110}

\section*{5. Handicap Discrimination}

\subsection*{a. Federal Law}

An employer who receives federal financial assistance is subject to the Rehabilitation Act of 1973. The Act prohibits discrimination against handicapped persons based solely on their handicap when such
persons are otherwise qualified for their duties.\textsuperscript{111} In defining handicapped person, the Act excludes an alcoholic or one who abuses drugs and whose current alcohol or drug use prevents them from performing their duties or causes their employment to constitute a direct threat to the safety or property of others.\textsuperscript{112}

A court clarified this construction of the Act in \textit{Burka v. New York City Transit Authority}.\textsuperscript{113} Plaintiffs alleged that the Transit Authority characterized them as “drug abusers” by virtue of their positive drug test. Therefore, plaintiffs were “handicapped individuals” the employer could not discharge or reject unless the Authority demonstrated that their performance or others’ safety would be impaired.\textsuperscript{114} In rejecting plaintiffs’ contentions, the court held that in light of the federal government’s efforts to eradicate drugs in the workplace, Congress could not have allowed the Rehabilitation Act to be a “bulwark to protect illegal drug users from ‘discrimination’ in employment.”\textsuperscript{115} The court emphasized that in 1978 Congress added statutory language dealing with drug abusers as a response to employers’ concerns that they would be forced to hire drug abusers without regard to their qualifications if such persons were considered “handicapped.”\textsuperscript{116} Consequently, the court held that only rehabilitated drug and alcohol abusers fell within the definition of handicapped under the Act.\textsuperscript{117}


\textsuperscript{114} \textit{Id.} at 596. Plaintiffs alleged that because the authority based its hiring and firing decisions solely on the basis of drug test results, without to inquiring about job qualifications, the authority violated the Rehabilitation Act. \textit{Id.}

\textsuperscript{115} \textit{Id.} at 597.

\textsuperscript{116} \textit{Id.} at 598. Employers were concerned with the effects interpretations of various administrative regulations finding that alcoholics and drug users were “handicapped individuals” could have on affirmative action programs. \textit{Id.}

\textsuperscript{117} \textit{Id.} The court’s opinion noted that the 1978 amendment to the Act limited application of the Act to the protection articulated in Davis v. Bucher, 451 F. Supp. 791, 796 (E.D. Pa. 1978), which held that the Act’s protection extended to users in the process of rehabilitation. Plaintiffs interpreted the amendment as expanding the enactment’s protection. 680 F. Supp. at 598.

The \textit{Burka} court also dismissed plaintiff’s claim under 49 C.F.R. § 27.37(a) (1986), which prohibits employers in the transportation industry from conducting pre-employ-
b. **State Law**

More than forty of the fifty states and the District of Columbia have handicap discrimination legislation.\(^{118}\) The legislation in many of the states includes alcohol and drug addiction as conditions constituting handicap.

In December, 1989, the Illinois Court of Appeals in *Habinka v. Human Rights Commission*\(^ {119}\) determined that plaintiff failed to sustain his burden of proof that his participation in a methadone program constituted a handicapped condition under relevant state law.\(^{120}\) However, the court left open the possibility that other drug dependencies could be cognizable handicaps.\(^{121}\) A New York court reached a contrary conclusion in *Doe v. Roe Inc.*\(^ {122}\) where it held that a job applicant's status as an alleged drug addict made him a protected disabled person under state law.\(^ {123}\)

### III. STATE STATUTORY REGULATIONS

Seven states have enacted statutes specifically dealing with employee

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\(^{118}\) For a comprehensive list of these enactments, see Hébert, *supra* note 69, at 849 n.171.


\(^{120}\) The court construed the Joint Rules of the Department of Human Rights and the Human Rights Commission Section 2500.20. The relevant provisions provide that a drug abuse condition is not a handicap unless the person can demonstrate that the condition arises from a disease or functional disorder. *Id.* at __, 548 N.E.2d at 713. Additionally, the handicap must be unrelated to the person's ability to perform at work. *Id.*

\(^{121}\) *Id.* at __, 548 N.E.2d at 721.

\(^{122}\) 143 Misc. 2d 156, 539 N.Y.S.2d 876 (1989).

\(^{123}\) *Id.* at __, 539 N.Y.S.2d at 879. Besides drug dependency, alcoholism may also constitute a protected disability. For example, in *Consolidated Freightways v. Cedar Rapids Civil Rights Comm'n*, 366 N.W.2d 522 (Iowa 1985), the Iowa Supreme Court decided that accepted definitions of handicaps and disabilities included alcoholism, so substance abuse fell within the purview of the statute. *Id.* at 527-28. The court found sufficient evidence that the employee was an alcoholic and the employer violated the employee's rights in refusing to allow the employee to return to work after receiving a certification of good health from a treatment center. *Id.* at 530, 532. See also *Clowes v. Terminex Int'l Inc.*, 109 N.J. 575, 538 A.2d 794 (1988) (New Jersey law against discrimination includes alcoholism as a handicap).
drug testing. Many of the statutory guidelines resemble the principles guiding public employee testing.

Minnesota, for example, permits random drug testing only for workers in "safety-sensitive" positions. Such a scheme resembles the Supreme Court's standard in National Treasury Employees' Union v. Von Raab, which allowed random testing only for customs officials in certain critical positions. Vermont allows such testing only when required by federal law. Of all the state enactments, Utah's is the least restrictive, placing few limits on testing rationales or circumstances. In contrast, Iowa, Montana and Rhode Island forbid random testing.

Rhode Island considers privacy interests of employees by requiring that workers provide testing samples in private. Moreover, all state enactments provide procedures for ensuring the accuracy of results.

124. These states are Iowa, Minnesota, Vermont, Connecticut, Utah, Rhode Island and Montana.


126. 109 S. Ct. 1384 (1989). For further discussion of Von Raab, see supra note 15 and accompanying text.

127. 109 S. Ct. at 1397.


130. The Code allows testing as a condition of employment, for investigation of accidents or employee impairment and in order to maintain safety and productivity. Utah Code Ann. § 34-38-7(2) (a)-(d) (1988). Random and pre-employment screening is permissible. Id. § 34-38-7(3). See Hébert, supra note 69, at 828.


133. Utah provides that employers must conduct testing in order to prevent sample substitution. Utah Code Ann. § 34-38-6(a). Safeguards against contamination must
Several of the statutes also indicate proper uses for the results with respect to disciplinary measures.\textsuperscript{134}

IV. UNION AND ARBITRATION ISSUES

A. Railway Labor Act

Recently, the Supreme Court decided\textsuperscript{135} that disputes about the ad-

continue through storage and transportation and include careful labeling of the jars. \textit{Id.} at § 34-38-6(3)-(4). A confirmation test must verify a positive test. \textit{Id.} at § 34-38-6(5). Additionally, employers must allow workers the opportunity to provide medical information relevant to the test. \textit{Id.} at § 34-38-6(3)(d).

The Iowa enactment provides that lab analysis occur at a facility approved by the state’s health department. IOWA CODE ANN. § 730.5(3)(e). Testing must measure only substances which affect job performance. \textit{Id.} § 730.5(4). The Code requires confirmation testing and the opportunity for an employee to explain a positive test. \textit{Id.} at § 730.5(3)(d)-(e).

Montana requires a written policy providing for accurate collection of samples with minimum intrusion on employee privacy. The law provides guidelines for storage, confirmatory testing and employee rebuttal. MONT. CODE ANN. § 39-2-304(2)-(3) (1989). Minnesota has enacted similar provisions. \textit{See} MINN. STAT. ANN. § 181.952-53. Additionally, the Minnesota law requires the state health department to promulgate rules safeguarding test reliability. \textit{Id.} at § 181.953(1)(b). Connecticut provides for confirmation testing and for privacy of test results. CONN. GEN. STAT. ANN. § 31-51v,w(b).

Vermont requires a detailed written policy. VT. STAT. ANN. tit. 21, § 514(2) (1987). Employers may test only to detect drugs at non-therapeutic levels. \textit{Id.} at § 514(1). Chain-of-custody procedures are mandatory, along with the preservation of positive samples for at least ninety days after the employee receives notification of the result. \textit{Id.} at § 514(5),(10). Confirmation testing is also mandatory. \textit{Id.} at § 514(6)(A). The Vermont Act also regulates laboratory selection and the dissemination of test results from the labs. \textit{Id.} at §§ 514(7)-(8), 518(a). Employees must have an opportunity to explain the results and have an independent re-test. \textit{Id.} at § 515.

Rhode Island provides for confirmation testing so the employee may order another independent test at the employer’s expense. R.I. GEN. LAWS § 28-6.5-1(D)-(E). Employees must also have an opportunity to explain test results. \textit{Id.} at § 228-6.5-1(F).

For further analysis of statutory requirements, see Hébert, \textit{supra} note 69, at 828-38.\textsuperscript{134} \textit{See}, e.g., MINN. STAT. ANN. § 181.953 10(b)(1) which forbids discharge based on a single positive test result until the company gives the employee a chance to participate in counseling or rehabilitation. For more extensive analysis of drug testing laws in the states, see generally Comment, \textit{supra} note 130. \textit{See also} Hébert, \textit{supra} note 69, at 828-38. For in-depth analysis of state and local enactments both passed and proposed, see generally McGovern, \textit{Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs}, 39 STAN. L. REV. 1453 (1987).


For purposes of the Act, a major dispute deals with the formation of contractual
dition of a drug testing component to routine physicals are "minor disputes" under the Railway Labor Act.\textsuperscript{136} Courts have found that the controversy is a minor dispute if the disputed action is arguably justified by an existing labor agreement or if contentions that the contract sanction the disputed action are not insubstantial or frivolous.\textsuperscript{137}

In \textit{Consolidated Rail v. Railway Labor Exec. Ass'n},\textsuperscript{138} the Supreme Court considered Conrail's past practices.\textsuperscript{139} The employer had historically required physical exams that included urinalysis and had periodically performed drug screenings.\textsuperscript{140} The Union asserted that while past screenings were limited to circumstances in which the employer had cause to believe workers were on drugs, the current program included testing without cause.\textsuperscript{141} The Union also contended that the new program regulated private, off-duty employee behavior.\textsuperscript{142} The Court found that while the Union's arguments could carry weight in an arbitration setting, the Union could not convince the Court that Conrail's arguments were frivolous.\textsuperscript{143} The absence of a challenge to Conrail's past practice supported a finding that Conrail retained a degree of discretion with respect to testing.\textsuperscript{144} Further, the Court determined that testing without particularized suspicion and the disciplinary con-

\begin{footnotesize}
\textsuperscript{137} 109 S. Ct. at 2482. The union in \textit{Consolidated Rail} asserted that the dispute was a "hybrid dispute" because it involved a change in working conditions made in accordance with a contractual right to make such a change. \textit{Id.} at 2488. The Court refused to recognize a third category of dispute. \textit{Id.} at 2484.
\textsuperscript{138} 109 S. Ct. 2477 (1989).
\textsuperscript{139} \textit{Id.} at 2485.
\textsuperscript{140} \textit{Id.} at 2485-86.
\textsuperscript{141} \textit{Id.} at 2487.
\textsuperscript{142} \textit{Id.} at 2488. The union also disputed certain provisions which could result in employee discharge instead of suspension for drug problems. In effect, the union asserted that the employer's motive was disciplinary, not safety-related. \textit{Id.} at 2489.
\textsuperscript{143} \textit{Id.} at 2488-89.
\textsuperscript{144} \textit{Id.} at 2488.
\end{footnotesize}
sequences of positive testing were "arguably justified.""\textsuperscript{145}

B. The National Labor Relations Act

The National Labor Relations Board recently found that an employer's requirement of drug and alcohol testing for employees who require medical treatment for work injuries was a mandatory subject of bargaining under Section 8(a)(5) of the National Labor Relations Act.\textsuperscript{146} In \textit{Johnson-Bateman Co.},\textsuperscript{147} an employer posted a notice, without notifying or bargaining with the Union, informing employees that a drug and alcohol test would accompany medical treatment for work-related injuries.\textsuperscript{148} Despite objections from the employee's labor union, the employer implemented its program.\textsuperscript{149}

Applying the standard of \textit{Ford Motor Co. v. NLRB},\textsuperscript{150} the Board decided that the testing requirement was "germane to the working environment"\textsuperscript{151} and "outside the scope of managerial decisions, which lie at the core of entrepreneurial control."\textsuperscript{152} In finding that the policy had a nexus with the company's work environment, the Board analogized \textit{Johnson-Bateman}'s policy to physical examinations and polygraph testing, both mandatory subjects of bargaining.\textsuperscript{153} The Board

\textsuperscript{145}. \textit{Id.} at 2488-89. The Court cited \textit{Skinner v. Railway Labor Execs}, 109 S. Ct. 1402 (1989), to illustrate that a railroad has a right to discharge a worker for one positive drug test, a right which Conrail did not assert. \textit{Consolidated Rail}, 109 S. Ct. at 2486. For further discussion of \textit{Skinner}, see supra note 15 and accompanying text.

The Supreme Court subsequently vacated and remanded a case holding that the use of dogs trained to smell drugs in searches constitutes a major dispute. \textit{Brotherhood of Locomotive Engineers v. Burlington Northern R. Co.}, 838 F.2d 1087 (9th Cir. 1988), \textit{vacated}, 109 S. Ct. 3207 (1989). The employees argued that drug testing was not a mandatory subject of bargaining and, therefore, such disputes are not labor disputes at all. 838 F.2d at 1089-90.

\textsuperscript{146}. \textit{Johnson-Bateman Co.}, 295 N.L.R.B. No. 26 (Jun. 15, 1989). Sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act, in conjunction with § 8(d), mandate employers and bargaining representatives to bargain in good faith with each other about wages, hours and other terms and conditions of employment. 29 U.S.C. § 158 (1982).

\textsuperscript{147}. \textit{295 N.L.R.B. No. 26}.

\textsuperscript{148}. \textit{Id.}

\textsuperscript{149}. \textit{Id.}

\textsuperscript{150}. 441 U.S. 488 (1979). In \textit{Ford Motor}, the Court found that in-plant food and beverage prices were subject to mandatory collective bargaining. \textit{Id.} at 495.

\textsuperscript{151}. \textit{Johnson-Bateman}, 295 N.L.R.B. No. 26. \textit{See also Ford Motor}, 441 U.S. at 498 (terms and conditions under which food is available to employees is germane to the working environment).

\textsuperscript{152}. \textit{Johnson-Bateman, 295 N.L.R.B. No. 26}.

\textsuperscript{153}. \textit{Id.} The Board relied upon its decision in Medicenter Midsouth Hospital, 221
also found that, like polygraph testing, drug testing was not a decision involving investments. Rather it was a change in the character of the workplace so that it could not be considered an entrepreneurial decision. Therefore, bargaining over the testing was mandatory.

C. Labor Arbitration Issues

When an employer requires drug testing or disciplines an employee for a positive test result or a refusal to submit to testing, a labor union may file a grievance on the employee's behalf. Most collective bargaining agreements call for arbitration; arbitrators must interpret these agreements to decide if the testing scheme or the disciplinary action is proper.

1. Implementation of procedures for drug screening

In Dow Chemical Co., an arbitrator decided that a random drug testing program was permissible at a petrochemical plant. In Dow, an employer expanded an existing substance abuse policy to permit random drug testing of employees at all levels. The grievance contended that the testing policy violated a provision of the parties' collective bargaining agreement.
tive bargaining agreement which forbade employer’s use of medical examination to be used to “affect adverse discrimination” against a worker.161 The arbitrator concluded that the agreement prohibited differential treatment of employees on the basis of the same medical restrictions but did not prohibit discipline based on positive test results.162 Furthermore, random testing did not by itself discriminate against workers.163

In assessing the reasonableness of the company’s random testing program, the arbitrator in Dow considered the nature of the industry and work environment and evidence of an extensive existing drug problem.164 The arbitrator concluded that a petroleum plant is a hazardous place to work165 and that a serious drug problem existed at the plant that testing only upon suspicion of drug use could not alleviate.166 Therefore, the arbitrator upheld the company’s random testing scheme.167

161. Id. at 1389.
162. Id.
163. Id.
164. Id.
165. Id. The arbitrator noted the presence of toxic chemicals and the seriousness of a recent explosion.
166. Id. at 1389-90. An undercover investigation unveiled some drug users and others came forward for an employee assistance program. Nearly 30 percent of employees in one part of the plant tested positive for or admitted to drug use. Id. Further, an expert witness testified that effects of drug use are not always readily discernible. Therefore, supervisors are unable to refer impaired employees to “for-cause” testing programs. Id.
167. Id. at 1390. The decision also upheld the company’s testing process. The arbitrator found that the testing process itself was accurate and sufficiently uniform as to all workers. Moreover, the workers proffered no evidence of excessive discretion in choosing test subjects. Finally, the need for effective testing outweighed any intrusions on employee privacy. Id. at 1391.

2. **Discipline for Positive Test Results**

In *Boone Energy*, an arbitrator found that a company was justified in instituting a substance abuse program after a clerical employee reported to work while under the influence of a controlled substance. The arbitrator concluded that the company had a right to conduct a nondiscriminatory search of employees and that employees' written consent permitted the company to obtain and analyze blood and urine samples. Despite this finding, the arbitrator refused to discharge grievants for positive test results because the company offered no evidence that the discharged individuals ever exhibited signs of on-the-job impairment. The decision reflected a belief that body fluid testing only demonstrates past exposure to drugs and not necessarily on-the-job use or impairment.

The arbitrator in *Roadway Express* found that, under the parties' collective bargaining agreement, the presence of marijuana in urine was sufficient to establish that a worker was under the influence of drugs. When the grievant, a truck driver, showed signs of impairment, the

169. *Id.* at 236.
170. *Id.* The company informed employees that they did not have to undergo a search or produce body fluid samples. However, the company advised employees that a failure to cooperate would require the company to conclude that they were using controlled substances. Hence, the company placed a burden on employees to prove otherwise. *Id.* at 234. The decision also found that the company employed reasonable chain-of-custody and labeling procedures. *Id.* at 237.
171. *Id.*
172. *Id.* See Zeese, *supra* note 44, at § 4.02[1][c], 4-22 to 4-23 (discussing the Boone case and other arbitration decisions involving urine testing).
173. 85 Lab. Arb. at 237. See Zeese, *supra* note 44, at § 4.02[1][c]. Other decisions reached similar results. See, e.g., Chase Bag Co., 88 Lab. Arb. (BNA) 441 (1986) (Strasshofer, Arb.) (employer improperly fired workers for reporting to job under the influence when test results were based solely on urine tests that did not reliably establish blood alcohol content at time each grievant came to work; arbitrator noted that the workers showed no sign of intoxication or impairment of work-related functions); Trailways, Inc., 88 Lab. Arb. (BNA) 1073 (1987) (Goodman, Arb.) (noting no connection between THC, a marijuana by-product, in the system and ability to work safely and efficiently); Union Oil Co., 88 Lab. Arb. (BNA) 91 (1986) (Weiss, Arb.) ("under the influence" implied impairment); Georgia Pacific Corp., 86 Lab. Arb. (BNA) 411 (1985) (Clarke, Arb.) (tests do not conclusively establish that an employee is under the influence of drugs).
174. 87 Lab. Arb. (BNA) 224 (Cooper, Arb.).
175. *Id.* at 230-31.
company tested him for drugs and alcohol.\textsuperscript{176} The company fired the driver after he tested positive for marijuana.\textsuperscript{177} The arbitrator upheld the discharge on the basis of the result, despite the Union's contention that the company failed to present additional proof of impairment.\textsuperscript{178}

3. \textit{Discipline for refusal to submit to test}

Arbitrators have held that the refusal to submit to a drug test is insubordination constituting grounds for discharge.\textsuperscript{179} In \textit{Jim Walter Resources},\textsuperscript{180} two employees failed to provide duly requested urine samples.\textsuperscript{181} They contended that they were suffering from "bashful kidney syndrome"\textsuperscript{182} notwithstanding management's furnishing of a variety of drinks for assistance. The arbitrator, noting the workers' ability to give samples to physicians the next day, upheld the company's decision to discharge the workers for insubordination.\textsuperscript{183}

\begin{enumerate}
\item[176.] \textit{Id.} at 227-28.
\item[177.] \textit{Id.} at 228.
\item[178.] \textit{Id.} at 230-31. \textit{See also} Amoco Oil Co., 88 Lab. Arb. (BNA) 1010 (1987) (Weisenberger, Arb.) (did not decide whether employer must present evidence of impairment). For additional decisions upholding discharge for positive drug test results, see B.F. Shaw Co., 90 Lab. Arb. (BNA) 497 (1988) (Talarico, Arb.) (revoked conditional employment on basis of positive test); NPL Corp., 88 Lab. Arb. (BNA) 1031 (1987) (Tripp, Arb.) (test results showed that employee had taken PCP shortly before administration of the test); Washington Metropolitan Area Transit Authority, 82 Lab. Arb. (BNA) 150 (1983) (Bernhardt, Arb.) (test after bus accident). For further analysis of these and other decisions upholding discharge, see \textit{Zeece}, supra note 44, at § 4.02[1][c]; Hébert, supra note 69, at 864-66.
\item[179.] \textit{Zeece}, supra note 44, at § 4.02[1][c], 4-23, citing Albert Einstein Medical Center, 303 Summary Lab. Arb. Awards (AAA) No. 7 (1983) and Shell Oil Co., 81 Lab. Arb. (BNA) 1205 (1983) (Brisco, Arb.). Sometimes such a ruling depends on whether an employee has received notice that refusal amounts to insubordination. Signal Delivery Services, Inc., 86 Lab. Arb. (BNA) 75 (1985) (Wies, Arb.); see \textit{Zeece}, supra note 44 at § 4.02[1][c], 4-23 through 4-24.
\item[180.] 88 Lab. Arb. (BNA) 1254 (1987) (Nicholas, Arb.).
\item[181.] \textit{Id.} at 1255. The arbitrator found that the company had a right to direct that the workers deliver the specimens. \textit{Id.}
\item[182.] \textit{Id.} The arbitrator described the employees' position as a "temporary emotional disorder." \textit{Id.}
\item[183.] \textit{Id.} at 1256. The samples were negative. \textit{Id.} at 1255. Other decisions have upheld discharge decisions in drug testing refusal disputes. \textit{See}, e.g., Concrete Pipe Products Co., 87 Lab. Arb. (BNA) 601 (1986) (Caraway, Arb.) (discharge for refusal to sign form acknowledging awareness of company's testing policy following written warnings for refusal to submit to test after on-the-job injury); American Standard, 77 Lab. Arb. (BNA) 1085 (1981) (Katz, Arb.) (discharge for refusal to submit to test after being advised of consequences of refusal). For further discussion of these cases, see Hébert, supra note 69, at 860-61.
\end{enumerate}
V. Analysis

As previously noted, the most significant difference between public sector and private sector drug testing is the availability to public employees of constitutional challenges.\(^{184}\) With few exceptions,\(^{185}\) only government action is required to invoke the Bill of Rights or similar state provisions. Criticism of this premise is usually based on a theory of government acting as employer instead of as sovereign.\(^ {186}\) This strongly resembles the governmental-proprietary distinction in sovereign immunity doctrine, a theory fraught with ambiguity and lacking ease of application.

A closer look at drug testing cases, however, reveals a similarity of reasoning between public and private sector decisions that transcends the labels of the causes of actions available to employees. For example, fourth amendment search and seizure claims and invasion of privacy tort claims both turn on reasonableness.\(^ {187}\) In *Jackson v. Liquid Carbonic*,\(^ {188}\) the court employed a balancing test identical to the formula employed in search and seizure cases to analyze a privacy claim by a private sector worker under a state statute.\(^ {189}\) Private sector emotional distress claims involve an element of outrage.\(^ {190}\) Similarly, a court must find a shocking violation of standards of decency for a substantive due process violation.\(^ {191}\) Due process plaintiffs have also alleged publi-

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184. *See supra* notes 51-52 and accompanying text. Private tort actions tend to be grounded in state law. This results in less uniformity of outcomes nationwide than in constitutional cases unless a state statute governs private sector testing procedures. Further, private, at-will employees do not enjoy the same procedural protections as public sector workers which is a function of the constitutional dimension of public sector actions.

185. *See*, e.g., the California constitutional privacy clause. *See supra* note 53 for text of the provision.

186. *See* Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988) (Guy, J., dissenting) (testing program of city in employer capacity should be judged in the same manner as a program in the private sector). The government as employer theory was rejected in O'Conor v. Ortega, 480 U.S. 709 (1987).

187. For analysis of fourth amendment claims, see *supra* notes 4-15 and accompanying text. *See supra* notes 57-69 and accompanying text for analysis of tort claims involving invasion of privacy.

188. 863 F.2d 111 (1st Cir. 1988).

189. *Id.* at 118. For further discussion of *Jackson*, see *supra* notes 64-68 and accompanying text.

190. *See supra* note 74 for discussion of this element of the tort claim in the *Satterfield* decision.

191. *See supra* note 50 for discussion of this aspect of due process.
cation of private facts\textsuperscript{192} in complaints reminiscent of invasion of privacy\textsuperscript{193} and defamation\textsuperscript{194} actions. State statutes may regulate private sector testing;\textsuperscript{195} public agencies promulgate testing procedures.\textsuperscript{196} Handicap discrimination statutes may apply to public and private employers.\textsuperscript{197} Arbitration and collective bargaining play roles in both areas of employment.\textsuperscript{198} For example, an arbitrator's analysis of the reasonableness of a private company's testing program involves a balancing test similar to the one applied in search and seizure cases.\textsuperscript{199}

Regardless of similarities and differences in actions challenging drug testing schemes, workers and employers in both the private and public sectors share common concerns. Employees of all types have an interest in privacy and job security while employers are concerned about profit and the safety of the workplace. Drug testing can make good business sense for both labor and management. Regardless of its admissibility in court,\textsuperscript{200} evidence that accidents decrease when compa-

\textsuperscript{192}. See supra note 50 for discussion of due process actions based on a press release.
\textsuperscript{193}. See supra notes 77-94 for discussion of the "disclosure" type of privacy action.
\textsuperscript{194}. See supra notes 88-94 and accompanying text for an example of acts constituting publication.
\textsuperscript{195}. See supra notes 124-34 and accompanying text for an analysis of these statutes.
\textsuperscript{196}. See supra note 23.
\textsuperscript{197}. See supra notes 111-23 for discussion of handing discriminatory statutes.
\textsuperscript{198}. For discussion of the labor law aspects of drug testing, see supra notes 135-84 and accompanying text.
\textsuperscript{199}. Both balance employer interests and worker privacy interests. See supra note 37 and accompanying text for description of the test in fourth amendment actions. See supra notes 165-68 and accompanying text for an arbitrator's finding that an employer interest in eradicating a burgeoning drug problem outweighed intrusions on employee rights because of safeguards within the testing program designed to protect employees.

City of Pomona, 90 Lab. Arb. (BNA) 457 (1988) (Rule, Arb.), agrees with the premise that arbitrators may make similar decisions in public and private sector disputes. In City of Pomona, the arbitrator refused to terminate an employee despite his insubordination in refusing a test. 90 Lab. Arb. at 459. The arbitrator's finding that the city should have obtained a warrant in order to test the officer could be analogized to a finding of lack of reasonableness in the private sector. The decision noted that an absence of individualized suspicion contributed to this result as did the absence of the officer from his beat due to temporary suspension. Id. at 459. The same logic could apply to a dispute in which a private sector employee refused to submit to a random drug testing scheme which was not sufficiently bolstered by employer interest in a drug-free workplace. This interest could be lacking if the company presented no evidence of an existing problem or of practical problems associated with drug use. Hence, an arbitrator may reinstate a private employee dismissed for refusal to submit to a test on the grounds that the testing scheme was unreasonable.

\textsuperscript{200}. See supra note 74 and accompanying text. This part of the article discussed
nies eliminate drug users from safety-sensitive positions will encourage employers to institute testing programs. Workers, too, clearly have an interest in job safety. Workers’ safety interests may override those of management because lower-level employees are more often present at accident sites.

Testing schemes can respect a worker’s privacy interest. If followed strictly and in good faith, the provisions of statutes201 and the directives of the Supreme Court202 provide adequate protection of workers’ interests, especially the interest in privacy when employers take samples.203 Lower courts and legislators must strive to ensure that those private employers directed neither by the fourth amendment nor a local enactment are accountable to workers.

It is true that urine specimens can indicate an employee’s medical condition apart from his or her drug use. However, our legal system affords protection to persons discriminated against because of pregnancy or medical problems.204 This protection provides sufficient checks on improper use of samples.

Limiting testing to certain employees whose jobs implicate safety concerns205 can prevent unnecessary intrusion upon employees’ rights without sacrificing a company’s safety interest. The tests, however, should not be limited to visibly impaired workers. Evidence exists that, at least in some contexts, such limits on testing render programs ineffective.206 Further, requiring on-the-job impairment or drug use before allowing a drug test is inconsistent with recent policy advocating

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Kelley v. Schlumberger Technology Corporation, 849 F.2d 41 (1st Cir. 1988), in which the First Circuit refused to admit evidence of a decrease in injuries at a workplace after the implementation of a drug testing program.

201. See supra notes 124-34 and accompanying text for discussion of state statutes regulating testing.


203. See supra note 202.


206. See, e.g., Dow Chemical Co., 91 Lab. Arb. (BNA) 1385 (1989) (Baroni, Arb.), in which an arbitrator agreed that testing only on individualized suspicion of drug use was inadequate. For further discussion of Dow, see supra notes 158-67 and accompanying text.
VI. Conclusion

The calculus of drug testing decisions is essentially a balancing of the interests of workers' and employers' concerns. In light of the United States' national war on drugs, the scales may tip in favor of the interests of employers. Consequently, more decisions upholding drug testing schemes should result. If employers conduct the battle against this threat to workplace safety with an eye toward employee dignity and privacy, perhaps the result will be a safer working environment in both public and private places of employment.

Ellen Hoelscher*

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207. President Bush echoed this policy in his September address. N.Y. Times, supra note 1, at A1, col. 6 and B7, col. 6. For further discussion of Bush's speech, see supra notes 1-2 and accompanying text.

* J.D. 1990, Washington University