Drug Testing in the Workplace: An Update

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Abstract

Drug testing is one of the most rapidly changing areas of employment law today. Although private employers are not bound by the same constitutional restrictions as public employers, they may still be sued on such grounds as invasion of privacy, defamation, and intentional infliction of emotional distress. Moreover, private employers holding federal contracts now must comply with both the Drug-Free Workplace Act *of 1988 and the* Drug-Free Work Force Act *of 1988. This paper discusses some of the leading case and statutory law in the drug-testing area.*

Introduction

As drug use has become an issue of outstanding social concern across the country, drug-testing has become used by many employers. Drug abuse may cost industry more than $25 billion per year in lost productivity, wages, and treatment costs, according to a study by the Research Triangle Institute (Englade, 1986). Drug-use by employees can have a widespread impact on a business. According to Peter S. Bensinger, former director of the U.S. Drug Enforcement Agency and now senior partner in the consulting firm Bensinger, Dupont & Associates,

> This impact is reflected in lost productivity on the job, unnecessary accidents and absenteeism, deteriorating job performance, highway accidents and deaths, family disruption, [and] loss of quality in products and services (Englade, 1986).

More specifically, compared with other employees,

> the drug abuser will have three and a half times as many accidents on the job, will be absent for a week or more two-and-a-half times as often, will file five times as many workmen's compensation claims, and cost employers three times as much in medical benefits. The drug-dependent employee has seven times as high a rate of garnishment of wages (Englade, 1986).

Drug tests have been greatly improved over the last few years, and are now more suitable for employee testing, since they are simple, inexpensive, and more reliable. Private sector employers are not bound by the same constitutional restrictions as are public employers. Public employees are protected by the Fourth Amendment (prohibiting unreasonable searches and seizures) and the Fifth Amendment (guarantying due process), while private sector employees are not. For a variety of reasons, many private employers test employees for drug use. Moreover, private employers holding federal contracts now must comply with both the *Drug-Free Workplace Act* of 1988 and the *Drug-Free Work Force Act* of 1988. Under the former, a private employer doing business with the federal government must have a policy which encourages a drug-free workplace. The employer must go even further under the *Drug-Free Work Force Act*, which requires testing for the use of illegal drugs by employers in sensitive positions. However, private employer – regardless of whether they are required to test or not – may still be sued on such grounds as invasion of privacy, defamation, intentional infliction of emotional distress. Furthermore, an employer choosing *not* to test may be liable for injuries to co-workers caused by drug-using employees and for workman's compensation for the impaired employees themselves.

While some 15 states have adopted legislation regulating drug and alcohol testing in the workplace, the type of legislation varies greatly between states. Some states' statutes allow testing of current employees only, while others permit the testing of both current and prospective employees. Tennessee, Florida, Connecticut, Oregon, Minnesota, Montana, and Rhode Island have adopted statutes which limit testing of employees to situations in which the employer has a reasonable suspicion that the employee is presently under the influence and that the employee's job performance is affected. Other states, such as Maine, Vermont, and Iowa require that the employer have probable cause to believe that the employee is under the influence, before testing is allowed. While many state statutes permit random testing, they generally restrict it to high-risk positions (as under case-law). Many other states are in the process of developing statutory law for substance abuse testing (ABA, 1990). Test results are generally held to be confidential either under statutes specific to drug testing or under general statutes protecting the confidentiality of medical records (ABA, 1990). As a result of such social and legal changes, today's business school graduates must be prepared to operate in a much more complicated environment than in the recent past.

Testing: Techniques and Issues

While hair testing is the latest innovation in the drug-testing area, the bulk of drug tests continues to rely on urinalysis. The most commonly used test is the Enzyme Multiplied Immuno-assay Technique (EMIT). If certain drug metabolites are present in the subject's urine, they will react with the enzymes. Although the test has a 95 percent reliability rate when proper procedures are followed, its accuracy has been questioned for a number of reasons. For example, the test may show positive when the subject has merely been exposed passively to marijuana smoke, without having smoked it himself. Further, the test can detect trace amounts of a drug taken up to seven days previously, and thus may not measure job impairment. Further still, a number of prescription and over-the-counter drugs will cause positive results, since they are structurally similar to the drugs which EMIT is designed to detect. Finally, since EMIT does not require a licensed laboratory facility for analysis, there are often problems with the chain of custody of the specimen, test techniques, the use of unqualified personnel to administer the test, and manipulation of the test results (Cowan, 1986).

Many employers have increased their degree of professionalism in their employee drug-testing by using a second test for confirmation if an initial test yields positive results. A number of courts have acknowledged that the practice of retesting adds credibility to the employer's program, and have recommended that the second test should be of a different type than the first. Other tests which are available include thin layer chromatography, gas chromatography, and mass spectrometry.

Thin Layer Chromatography (TLC) can detect a wide range of drugs, but requires laboratory analysis. Gas Chromatography (GC), also a laboratory technique, can separate and identify the components of a complex substance. It is more time-consuming and expensive than either EMIT or TLC, but is also more reliable. GC is the most commonly used laboratory test for analysis. Mass Spectrometry (MS) provides information on molecular weight, and is thus the most sensitive technique for the identification of a compound. Also a laboratory technique, it is usually used in conjunction with GC (Cowan, 1986).

After deciding which test or tests to use, an employer must decide whom to test. There are a number of alternatives. Perhaps the best start is pre-employment testing. By adopting this practice, the employer lets the new employee know from the outset that he will not tolerate drugs in the workplace. He also sends the same message to present employees (Lewis, 1986). Mass testing or routine urinalysis of all current employees may also be used, as part of annual medical examinations required by the employer. Naturally, whenever an employee is observed to exhibit erratic or unusual behavior in the workplace, a fitness-for-duty test should be required. Random testing – in which individuals or groups of employees are asked to submit urine specimens without proper notice – is perhaps the most questionable program on legal grounds (Lewis, 1986).

A number of employers have developed employee-assistance programs to deal with the alcohol- and drug-abuse problems of their employees. Once an employee is recognized to have a problem, a treatment program can be recommended and encouraged by the employer. It is then the employee's responsibility to resolve his problems. At that time, he is put on notice that the employer will observe his progress, and that he will be subject to random testing throughout any disciplinary proceedings.

Summary and Analysis of Current Case Law

Most of the litigation concerning employee drug-testing has involved the public sector, since there are few laws outlining what a private-sector employer can or cannot do. The Fourth Amendment is the main constitutional provision to be considered in connection with drug-testing in employment situations. It states that

> [t]he right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and warrants shall issue, but upon probable cause, supplied by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Schmerber v. California has held that the overriding function of the Fourth Amendment "is to protect personal privacy and dignity against unwarranted intrusions by the state." (*Mapp v. Ohio* held that this protection applies to the states through the Fourteenth Amendment.) The Supreme Court has further held in *Schmerber v. California* that the taking of blood constitutes a search, as there is an expectation of privacy in bodily fluids such as urine. A number of courts in various jurisdictions have since held that compulsory urine testing constitutes a search.[2] For example, in *Patchogue-Medford Congress of Teachers v. Board of Education* a teachers' union challenged a school district's drug-testing program which required all twenty-two teachers applying for tenure to submit to urinalysis for drugs. New York State's highest court found that such testing constituted a search. The U.S. Supreme Court determined in *Skinner v. Railway Labor Executive's Association* that drug testing of employees under federal regulations (which involved the testing of blood and breath) are reasonable Fourth Amendment searches. The *Skinner* balancing test was applied in *National Treasury Employees Union v. Von Raab*. In this case, a union representing individuals working at the U.S. Customs Service challenged its drug-screening program, which required urinalysis of employees seeking transfer or promotion to

positions which involved drug interdiction or required the use of firearms or the handling of classified materials. The *Von Raab* court found that there was a substantial governmental interest in the circumstances, which justified departure from the requirement of a warrant or individualized suspicion, and that employees who are directly involved in the interdiction of illegal drugs or who carry firearms have a diminished expectation of privacy in respect to the intrusions of a urine test. This court, however, found the evidence insufficient to support testing of individuals who handle classified information.

Courts have addressed the question of when such searches would be reasonable. *Carrol v. U.S.* has held that only unreasonable intrusions are prohibited under the Fourth Amendment. Reasonableness has been determined by balancing the invasion of privacy inherent in such testing against the need for such testing to promote legitimate government interest and the benefits that would incur from it, such as identifying workers who are not fit to perform their duties.[3]The *Skinner* court agreed with this and said that by utilizing the balancing test, a court can determine whether it is practical to require a warrant or some level of individuality of suspicion in the particular context in question. *Skinner* involved challenges by labor unions against Federal Railroad Administration (FRA) regulations which require blood and urine testing of operating employees involved in major accidents, and permit railroads to test employees who violate certain safety rules. The *Skinner* court rejected the union's argument that individualized suspicion is essential to a finding of reasonable testing under the Fourth Amendment, as governmental interest furthered by the intrusion of privacy would be placed in jeopardy by the requirement of individualized suspicion and that the privacy interests implemented by the search were minimal. Blood, breath, and urine tests were found by the *Skinner* court to be within the stated minimal intrusion standard and that the expectation of privacy by the covered employees was diminished by their participation in an industry regulated to insure safety.

Since urine testing often requires surveillance, in which those tested are forced to expose parts of their anatomies to a co-worker or supervisor, the invasion of privacy has been held to be greater by some courts than in the taking of blood (*Storms v. Coughlin*, 1985). In *Storms*, the court went further in saying that being forced under threat of punishment to urinate into a bottle held by another person is purely and simply degrading in a way that having blood extracted could never be. The dissent in *Skinner* agreed and said that compelling a person to submit to the piercing of his skin by a hypodermic needle so that his blood may be extracted significantly intrudes on the personal privacy and dignity against which the Fourth Amendment protects. The court in *Patchogue-Medford Congress of Teachers v. Board of Education* applied a balancing test, and said that, while the state has a legitimate interest in seeing that its employees are not impaired by illegal drug use, there comes a point where even these type of searches undermine the public's interest in maintaining the privacy, dignity, and security of its members.

In *McDonnell v. Hunter*, the court made it clear that an employer should not be permitted to allow random drug testing of its employees. The court set forth a three-part standard for an employer to consider:

(1) An employer must have a reasonable suspicion, based on observable facts, that an employee is under the influence of a controlled substance, before he can test that employee;

(2) An employer can, as part of a pre-employment or routine physical examination, test for drugs in the employee's urine; and

(3) Should an employer find an employee or applicant who is using drugs, periodic random testing of that individual is allowable, if it is part of a disciplinary action.

The court in *Jones v. McKenzie* went a step further than the *McDonnell* court, and found that a school bus attendant had her rights violated when she was terminated on the basis of a single, unconfirmed positive urinalysis. The court held that the test was arbitrary and capricious because it was conducted without probable cause or individual suspicion.

Several public-sector cases have focused on the issue of public safety and drug testing. In *Division 241 v. Suscy*, the union appealed a District Court decision which dismissed its challenge of the constitutionality of rules requiring bus drivers employed by the City of Chicago to submit to blood and urine tests following involvement in serious accidents, or if suspected of having used alcohol or narcotics. The court held that the state had a paramount interest in protecting the public by insuring that its drivers were fit to perform their jobs. The court found that the public interest outweighed any individual interest in this situation, since the safety of handicapped (and other) children was involved. It found that the drivers had no reasonable expectation of privacy with regard to submitting blood and urine under these circumstances. Testings were performed in hospitals and the concurrence of supervisory employees was required.

Similarly, in *Allen v. Marietta*, the court found that, while urinalysis was a search and seizure within the meaning of the Fourth Amendment, the government has the same right as a private employer to oversee its employees and to investigate potential misconduct. Thus, the court reasoned that because the government has a right to discover and prevent misconduct relevant to an employee's performance, the employee has no claim to a legitimate

expectation of privacy from searches. It was held that the city had a right to determine whether its employees were abusing drugs which would affect their performance. It is important to note that this case involved employees who worked around high-voltage electrical wiring, and that the city accordingly stressed that drug use by such employees was a threat to the safety of both other employees and the general public.

In *Shoemaker v. Handel*, the constitutionality of regulations requiring random drug-testing of jockeys was questioned. The court found that the purpose of the regulations was to increase the safety of the participants in the race, to enhance the public perception that horse racing is a wholesome industry, and to rehabilitate those persons found to be using drugs or alcohol. The court emphasized that horse racing is a highly regulated industry, and that jockeys, by their very participation, are consenting to any search.

Private Sector Cases

Although none of these cases addresses private-sector employees, drug-testing of such employees may be subject to various tort theories. An employee may bring suit against a private employer on grounds such as defamation, wrongful discharge, negligence, intentional infliction of emotional distress, false imprisonment, invasion of privacy, etc.

Defamation is defined by Prosser and Keeton as occurring when an employer discloses to a third party false information that would injure the plaintiff's reputation.

In *Houston Belt and Railroad Company v, Wherry,* the Court of Appeals affirmed a jury verdict for $200,000 which held that the evidence substantiated the finding that ``railroad employees had made statements accusing the former employee of having used drugs'' and ``that these statements were false.'' Satterfield v. Lockheed was an unsuccessful attempt to sue under this theory.

In *O'Brien v. Papa Gino's*, a discharged employee brought suit on grounds of wrongful discharge, defamation, and invasion of privacy. The Federal District Court of New Hampshire found for the plaintiff on defamation and invasion of privacy. O'Brien was confronted by his supervisor concerning allegations of drug use outside of work. He stated that he underwent a polygraph examination under threat of discharge, in order to dispel any suspicion, although the employer told the court that he did so voluntarily.

On appeal, the employer argued that O'Brien had contracted away any right to privacy with regard to drug use, based upon the policy in its personnel manual. The appellate court rejected this argument, stating that even if it read the employer's agreement with the employee ``so broadly as to give permission for polygraph examinations,'' it still would not ``negate the jury's finding that the particular investigative conduct was highly offensive and an invasion of plaintiff's privacy. Such a finding of egregious offensiveness in the particular case would indicate that the defendant's conduct exceeded the scope of any consent O'Brien had arguably given by accepting employment at Papa Gino's.''

Luck v. Southern Pacific Transportation Company is a recent leading private-sector case in the California court system. Luck, a computer programmer, sued Southern Pacific in state court in San Francisco after being discharged for failure to participate in a company-wide drug testing program. The suit alleged: (1) wrongful termination in violation of company policy, (2) a breach of the covenant of good faith and fair dealing, (3) an invasion of privacy, (4) misrepresentation, and (5) infliction of emotional distress (Marcotte, 1986).[4] Luck was awarded $485,042 on her claims.

Luck's attorney argued that Southern Pacific acted wrongfully, that the employer's conduct was ``oppressive and intrusive,'' and that the company's representatives' ``repeated demands and inquiry into her personal beliefs and attitudes and harassment to try to change her mind'' was deliberate and intentional, resulting in severe emotional distress.

In *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, employees challenged a company's drug testing program on the grounds that it violated state workmen's compensation statutes. Plaintiffs argued that there was evidence of a chilling effect on claims for job-related injuries, when employees who made such claims were required to undergo drug-testing in accordance with the employer's policy. Drug testing programs have also been challenged under union contract provisions (Lehr and Middlebrooks, 1985/1986).

Issues raised by drug-testing is causing rapid changes in unemployment law across the country. However, similar cases in different states are being decided differently. For example, a recent East Tennessee Chancery Court found that Ryan's Steak House's policy of requiring management level employees to submit to random drug screening as a condition of employment was valid. Ryan's policy allows termination of an employee regardless of whether their job performance is impaired and/or whether they are actually involved with drugs on the job (Coffey, 1990). This case involved a supervisor, who allegedly smoked marijuana while on vacation and failed a drug test given to all management employees upon his return. While Chancellor Brandt stressed the knowing and willful violation of the employer's policy, rather than effect of drug use, he did not address whether failing a drug test constituted misconduct. Prior decisions in Tennessee have

held that to find misconduct for Unemployment Insurance benefits drug use must be related to the workplace (*Lovvorn v. City of Chattanooga,* 1986). A similar decision was rendered by the Nevada Supreme Court in *Clevenger v. Nevada Employment Security Department.* In this case, an explosives technician was required to submit to screening for controlled substances in accordance with the employer's policy, after being involved in an occupational accident. The Oregon Court of Appeals held in *Glide Lumber Company v. Employment Division,* however, that ``the claimant's off-duty drug use, which resulted in his discharge after it was detected in a random drug test, was not misconduct connected with work and therefore did not disqualify him from receiving unemployment benefits under Oregon Statute 657.176 (2) (a).'' An increasing number of unemployment appeals hearings involve drug use, as more employers are testing for drugs (Wall, 1991).

Recommended Management Response

In order to develop a management plan for drug-testing, it is important to have a good understanding of the case law in this area. It is clear from various studies of drug problems in employment situations that they are costing private industry and the taxpayer large sums of money. Many employers have responded by implementing a drug testing program. The cost-effectiveness of these programs remains to be seen, as little data has been gathered so far.

A number of costs will be incurred by an employer implementing a drug-testing program. They include: (1) actual administration of the program (testing procedures and analysis); (2) training of management staff on identification of drug users; (3) hiring of outside investigators; (4) hiring of counsel to advise the employer on how to proceed and any possible legal problems that the employer should be aware before proceeding; (5) litigation costs, which include arbitration costs, and possible award of damages against the company in a civil suit; (6) possible increase of unemployment taxes; (7) possible increased insurance liability; and (8) the cost of hiring and training replacement workers (Lewis, 1986).

An employer must weigh the costs of implementing a drug-testing program against the costs of absenteeism, workman's compensation claims, deteriorating job performance, and lost productivity attributable to employee drug use. Once a employer has decided to proceed with a program, a number of guidelines can be deduced from the above mentioned case law. Unless specifically prohibited by case or statutory law in the particular jurisdiction, these are:

(1) An employer can require a job applicant to submit to a drug test as part of the application for employment. This warns applicants, as well as current employees, that an employer will not tolerate drug use. (Lewis, 1986).

(2) An employer can require a drug test as part of an employee's routine annual physical. The physician can be requested to analyze the blood test for drugs (*McDonnell v. Hunter,* 1985). In this way, the employer can avoid any additional intrusion on the employee's privacy, as a separate test need not be administered.

(3) An employer can require that an employee submit to random drug testing during a specified period of time as part of disciplinary action (*McDonnell v. Hunter*, 1985).

(4) Employers are allowed to randomly test those whose work directly effects the safety of others or the general public.[5]

(5) In the case of a positive result, an employer should always use a second, confirming test. A different type than the first should be used if possible (*Jones v. McKenzie,* 1986).

(6) An employer should be sure that the personnel administering drug tests are trained to do so, and that precautions are taken concerning chain of custody of specimens, etc (Lewis, 1986).

(7) An employer is well-advised to consult legal counsel before implementing any drug- testing program, as this is an area of law which is changing rapidly (Lewis, 1986).

(8) Supervisors and management must be given adequate training on recognition of drug related behavior and also concerning possible tort liability on such tort actions as defamation, invasion of privacy, false imprisonment, etc. (Lewis, 1986).

Drug abuse has become a major problem in this country, and official antidrug campaigns have intensified, focusing national attention on the legality of drug testing. Today's employer is well-advised to keep abreast of this rapidly changing area of the law. ❧

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Footnotes

1. Jones v. McKenzie, (1986); McDonnell v. Hunter, (1985); Division 241, Amalgamated Transit Union (AFL-CIO) v. Suscy, (1976); Caruso v. Ward, (1986), Storms v. Coughlin, (1984); Allen v. City of Marietta, (1985).

2. Bell v. Wolfish, (1979); New Jersey v. TLO, (1985); Katz v. U.S., (1967); Terry v. Ohio, (1968); Illinois v. Lafayette, (1983); Patchogue-Medford Congress v. Board of Education, (1986); Caruso v. Ward, (1986); Allen v. City of Marietta (1985).

3. San Francisco was the first city to ban routine employee drug tests.
4. Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy; Allen v. City of Marietta; Shoemaker v. Handel.

❋❋❋ References ❋❋❋

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3. *Association of Western Pulp and Paper Workers and Local No. 1, Association of Western Pulp and Paper Workers v. Boise Cascade Corporation* (US District Court for the District of Oregon) 644 F. Supp. 183; 123 L.R.R.M. 3097, September 11, 1986.
4. *Bell v. Wolfish, 441 U.S. 520 (1979).*
5. *Capua and Tompkins v. City of Plainfield* (US District Court D. New Jersey) 643 F. Supp. 1507, September 18, 1986.
6. *Caruso v. Ward,* N.Y.S. 2d (1986).
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16. *Illinois v. Lafayette,* 463 U.S. 640 (1983).
17. *International Brotherhood of Electrical Workers, Local 1900 v. Patomac Electric Power Company* (US District Court, District of Columbia) 634 F. Supp 3287 (March 25, 1986).
18. *Jones v. Mckenzie* (US District Court), 628 F. Supp 1500 (D.D.C. 1986) District of Columbia, February 25, 1986.
19. *Katz v. U.S.,* 389 U.S. 347 1967).
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