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Urinalysis in Public Employment

In the public employment context, compulsory urinalysis has been held unconstitutional in the absence of individualized suspicion.[84] While these cases may be distinguished from *Odenheim* on the obvious ground that adults were involved, striking down the proposal does not imply that students and adults are on equal constitutional footing. Indeed, the concerns addressed by compulsory urinalysis for public employees are quite different from those embodied in the Becton High School proposal. In the cases where urinalysis of public employees has been upheld, in addition to individualized suspicion based upon objective fact, there was also an immediate, direct safety concern.[85] Such concern is far more attenuated in the case of students.

Sniffing Dog Cases

Finally, pre-*T.L.O.* cases involving the use of sniffing dogs by school authorities to detect drugs provide a precedent for the unconstitutionality of the drug screening proposal. In *Horton v. Goose Creek Independent School District*,[86] the Fifth Circuit held canine inspection of students' persons a search under the fourth amendment, which is not justified by a need to prevent abuse of drugs and alcohol when there is no individualized suspicion.[87] The court saw the school as a special situation under the fourth amendment and applied a reasonableness

84. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986) (federal customs workers); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986) (fire fighters); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (police officers and fire fighters); Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) (school bus attendant); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) (prison employees); Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 843 (1986) (teachers); Caruso v. Ward, 133 Misc. 2d 544, 506 N.Y.S.2d 789 (Sup. Ct. 1986) (organized crime bureau officers); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) (police officers and fire fighters).

85. Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (employees who worked in hazardous high voltage area observed using drugs by undercover agent and statement; correlation between those employees and "unexplained" accidents); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (public bus drivers required to submit to blood or urine tests following involvement in a serious accident or when suspected of being intoxicated or under the influence of drugs); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985) (regulation that required police to submit to urinalysis when "suspected of drug use" held facially constitutional).

The regulation in *Turner* also required police to submit to urinalysis at the discretion of a member of the Board of Police and Fire Surgeons. This part of the regulation was not at issue in the case, but the court wrote that it was not inconsistent with the court's view that the regulation contemplated reasonable, objective suspicion.

Cases upholding the dismissal of public employees for refusal to submit to urinalysis also involved both individualized suspicion and strong safety concerns. Everett v. Napper, 592 F. Supp. 1491 (N.D. Ga. 1984) (fire fighter implicated in department investigation of drug use); King v. McMickens, 120 A.D.2d 351, 501 N.Y.S.2d 679 (1986) (corrections officers frequented known drug location).

86. 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 464 U.S. 1007 (1983).

87. *Accord* Jones v. Latexo Indep. School Dist., 499 F. Supp. 223 (E.D. Tex. 1980)

standard to the search. Following New York precedent,[88] the court held that the lack of individualized suspicion made the search unreasonable and unconstitutional.

Doe v. Renfrow[89] held that canine inspection of students' persons is not a search. This decision has been widely criticized.[90] The court relied on the *in loco parentis* doctrine, which *T.L.O.* explicitly rejected,[91] and on precedent holding that canine inspection of *property* is not a search.[92] In any event, *Renfrow* does not provide support for the constitutionality of urinalysis because the cases uniformly hold that taking a urine sample is a search. The *Horton* rationale, on the other hand, applies with equal force to urinalysis. Whether a sniffing dog, a urine test, or some other means is employed, students should not be subject to a highly intrusive procedure without individualized suspicion on the ground that schools have an interest in combatting a general drug problem.

B. Compulsory Urinalysis Is Not Reasonable in Its Scope

The scope of a search is not a completely separate consideration from the initial justification for it. As discussed above, courts will uphold a search that lacks individualized suspicion where the search is not highly intrusive (or, in other words, is limited in scope). Leaving aside the issue of individualized suspicion, a search is reasonable in its scope under the *T.L.O.* standard when the measures adopted are 1) "reasonably related to the objectives of the search,"[93] and 2) "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[94]

88. Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (strip search of entire class of fifth graders to find allegedly stolen $3 held unreasonable).

89. 475 F. Supp. 1012 (N.D. Ind. 1979), *rev'd in part*, 631 F.2d 91 (7th Cir. 1980) (per curiam), *cert. denied*, 451 U.S. 1022 (1981).

90. *E.g.*, Justice Brennan's dissent from the denial of certiorari in *Renfrow*, 451 U.S. 1022; Note, *The Constitutionality of Canine Searches in the Classroom*, 71 J. Crim. L. & Criminology 39 (1980); Comment, *Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?* 24 St. Louis U.L.J. 119 (1979).

In Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 477-78 (5th Cir. 1982) *cert. denied*, 464 U.S. 1207 (1983), the court offered the possible distinction that in *Renfrow* there was no evidence the dogs actually touched the students, which could explain why the *Renfrow* court considered dog sniffing a minimal intrusion. A rationale of "public smell," analogous to the "plain view" doctrine (*see supra* note 53), could also explain the *Renfrow* result. *See Horton*, 690 F.2d at 477. Neither explanation, however, could apply to urinalysis.

91. *See supra* text following note 59.

92. The majority view is that dog sniffing of objects is not a search, *see Horton*, 690 F.2d at 476, but *Renfrow* is the only case to hold dog sniffing of people is not a search. This reflects the greater protection afforded by the fourth amendment to persons rather than things. *See supra* text accompanying note 52.

93. 469 U.S. at 342.

94. *Id.*

In *Odenheim*, the trial judge found that the Becton High School proposal was not reasonably related in scope to the circumstances offered to justify it.[95] Like other courts,[96] the judge suggested alternative measures more reasonably related in scope to the school district's objectives. For instance, a New Jersey statute already permits school officials to examine students suspected of drug use.[97] This law requires all school personnel to report any student who appears to be intoxicated or under the influence of drugs, and school personnel are shielded from any resulting civil liability.[98] Based on statistics indicating that only 5% of students sought counseling or information about drugs last year,

95. 211 N.J. Super. at 61, 510 A.2d at 713.

96. *See, e.g.*, Hunter v. Auger, 672 F.2d 668, 676 (8th Cir. 1982); Delaware v. Prouse, 440 U.S. 648, 663 (1979).

97. N.J. STAT. ANN. § 18A:40-4.1 (West Supp. 1986) provides:

> Whenever it shall appear to any teaching staff member, school nurse or other educational personnel of any public school in this State that a pupil may be under the influence of a controlled dangerous substance as defined in P.L. 1970, chapter 226, section 2 (C. 24:21-2) or any chemical or chemical compound which releases vapor or fumes causing a condition of intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system including but not limited to glue containing a solvent having the property of releasing toxic vapors or fumes, as defined in P.L. 1965, chapter 41, section 1, (C. 2A:170-25.9) taken for purposes other than the treatment of sickness or injury as prescribed or administered by a person duly authorized by law to treat the sick and injured human beings, such as teaching staff member, school nurse or other educational personnel shall report the matter as soon as possible to the school nurse or medical inspector, as the case may be and to the principal or, in his absence, to his designee. The principal or his designee, shall immediately notify the parent or guardian and the superintendent of schools, if there be one, or the administrative principal and arrange for an immediate examination of the pupil by a doctor selected by the parent or guardian, or if such doctor is not immediately available, by the medical inspector, if he is available. If such doctor or medical inspector is not immediately available, the pupil shall be taken to the emergency room of the nearest hospital for examination accompanied by a member of the school staff designated by the principal and a parent or guardian of the pupil if available. The pupil shall be examined as soon as possible for the purpose of diagnosing whether or not the pupil is under such influence. A written report of said examination shall be furnished within 24 hours by the examining physician to the parent or guardian of the pupil and to the superintendent of schools or administrative principal. If such diagnosis is positive, the pupil shall be returned to his home as soon as possible and appropriate data shall be furnished to the Department of Health pursuant to the "Controlled Dangerous Substances Registry Act of 1970", P.L. 1970, chapter 227 (C. 26:2G-17, et seq.). The pupil shall not resume attendance at school until he submits to the principal a written report certifying that he is physically and mentally able to return thereto, which report shall be prepared by his personal physician, the medical inspector or the physician who examined him pursuant to the provisions of this act.

98. N.J. STAT. ANN. § 18A:40-4.2 (West Supp. 1986). In addition, Wood v. Strickland, 420 U.S. 308 (1975), held that school officials are entitled to good faith immunity from civil liability

it appears more reasonable to examine select students rather than the entire student population.

In *Anable v. Ford*,[99] the first prong of the *T.L.O.* test was satisfied because there was individualized suspicion of the public high school student who was required to undergo urinalysis.[100] The measure failed, however, to satisfy the second prong of *T.L.O.* for two reasons. First, the court found that the objective of the search was to determine whether the student had used marijuana *while at school*.[101] The court wrote that the school's interest as described in *T.L.O.*[102] did not permit regulation of off-campus student conduct unrelated to the maintenance of discipline in the classroom.[103] Since urinalysis does not determine when a substance was used, the measure adopted was not reasonably related to the objective of the search.[104] Second, the court found that requiring a student to disrobe from the waist down while an adult official watched the student urinate into a tube was excessively intrusive.[105]

Like the measure at issue in *Anable*, the Becton High School proposal failed to satisfy the second prong of *T.L.O.* and, on that ground alone, was unconstitutional. At first blush, it may seem that the second prong posed less of an obstacle to the proposal than the first; after all, the taking of a urine sample need not be as intrusive as it was in *Anable*.[106] It is also possible that another court could take a broader view of the objective of a search for evidence of drug use than did the *Anable* court, so that urinalysis would appear

99. No. 84-6033, slip op. (July 12, 1985), *modified*, slip op. (W.D. Ark. Sept. 5, 1985).

100. There was circumstantial and testimonial evidence that the student plaintiff had smoked marijuana in the girls' room.

101. *Anable*, slip op. at 41 (July 12, 1985).

102. *See supra* text accompanying note 61.

103. *Anable*, slip op. at 40-41 (July 12, 1985).

104. [T]he court concludes that use of the test is not reasonably related to the maintenance of order and security in the schools nor to the preservation of the educational environment and processes. To the extent that the test and policy attempts [sic] to regulate out of school conduct in no way affecting the school setting or the learning process, the test and policy are improper.

> This is not to imply that such an objective is not laudable. Certainly it would be beneficial to the vast majority of students who do not use drugs or alcohol, even at home or on the streets, to segregate users from the halls of education . . . . Nonetheless, such conduct is within the realm of parents and law enforcement officials, not teachers and educational administrators.
>
> Suffice it to say that use of the Emit immunoassay test, however noble its purpose, reaches beyond the permissible boundaries of authority of school officials.

Id. at 41.

105. *Id.* at 41-42.

106. The test taker may be caught in a catch-22. Less supervision of the taking of the urine sample increases the opportunity for the subject to provide a "clean" sample, which obviously compromises the reliability of the test result. *See supra* note 117 and accompanying text. For example, in Lowcrow v. City of Chattanooga, 647 F. Supp. 875, 877 (E.D. Tenn. 1986), the fire department claimed that pat down searches of fire fighters were justified because some allegedly carried clean urine samples in balloons in their pants.

a reasonable measure. It is arguable, for instance, that student drug use off-as well as on-campus affects the learning environment in the classroom. However, even without the close supervision that occurred in *Anable*, it seems impossible to characterize the taking of a urine sample as "not excessively intrusive," considering the court decisions holding urinalysis to be highly intrusive and the availability of less intrusive measures. Moreover, courts may well be receptive to a concern for the psychological effects of urinalysis on impressionable adolescents, given the Supreme Court's recognition of the importance of protecting the rights of students.[107] Certainly drug use is a serious infraction, but where the possibility of discovering a violation is highly speculative, it does not seem worth subjecting all students to the indignity of urinalysis in order to discover the drug users.

VIII. Due Process

The *Odenheim* judge ruled on the basis of state law that the Becton High School proposal violated due process.[108] However, the students' due process claim is also meritorious under federal law.

The first step in a due process case is to determine whether the state has deprived the claimant of a constitutionally protected liberty or property interest.[109] In *Goss v. Lopez*,[110] the Supreme Court held that suspensions of ten days or less entitle students to due process because such suspensions deprive students of their state-created property interest in public education and their liberty interest in reputation. Since the Becton High School proposal permitted exclusions of indefinite duration, there is an even stronger claim that protected property and liberty interests were implicated.[111]

107. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

108. Odenheim v. Carlstadt-E. Rutherford Regional School Dist., 211 N.J. Super. 54, 61-62, 510 A.2d 709, 713 (Ch. Div. 1985).

109. The fourteenth amendment provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

110. 419 U.S. 565 (1975).

111. It could be argued that the confidentiality provisions in the proposal, *see supra* text accompanying notes 25-26, prevented any damage to a student's reputation. In *Goss*, 419 U.S. at 574-75 (footnote omitted), the Court wrote:

> School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

However, an indefinite exclusion from school, by itself, is far more likely to cause a student reputational damage than is a 10 day suspension. A long gap in a student's education is quite difficult to hide. *See also* Ingraham v. Wright, 430 U.S. 651 (1977) (holding that the use of corporal punishment in public schools implicates a protected liberty interest, but that due process does not require notice and an opportunity to be heard prior to the punishment).

The next step in a due process case is to determine "what process is due."[112] In *Goss*, the Court held that due process entitled the students to written notice of the charges against them and the opportunity to participate in an informal hearing, but added: "Longer suspensions or expulsions for the remainder of the school term or permanently, may require more formal procedures."[113] In a later case involving dismissal of a student for academic (as opposed to disciplinary) reasons,[114] the Supreme Court held that no hearing was required because a decision to dismiss for academic reasons is more subjective than a decision to dismiss for disciplinary reasons, where a hearing may help to resolve disputed facts. Regardless of whether exclusion of a student on the basis of a positive test result is characterized as a medical or as a disciplinary measure (discussed in Parts III and IV), some type of hearing is appropriate because whether a student is using drugs is a factual issue. The Becton High School proposal did provide notice and an opportunity to participate in an informal hearing to students who tested positive, so the issue becomes whether more was required.

In *Mathews v. Eldridge*,[115] the Supreme Court articulated an approach for determining what procedural safeguards are required in a particular setting. Three factors are to be considered: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[116]

Consideration of the *Mathews* factors supports the need for a more formal hearing than that allowed by the Becton High School proposal, so that students or their representatives may introduce evidence and call witnesses as to the inaccuracy of the test, extraneous factors that may have influenced the result, the student's non-involvement with drugs, and other relevant information. The interest affected by a student's indefinite exclusion from school is a strong one, as the Supreme Court recognized in *Goss*. The risk of an erroneous deprivation of that interest is significant because of the real possibility of an inaccurate test result when, as under the proposal, no confirmatory test is

112. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

113. 419 U.S. at 584.

114. Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (respondent dismissed from medical school because of her poor performance in the clinical program).

115. 424 U.S. 319 (1976) (evidentiary hearing held not to be required before termination of disability benefits).

116. *Id.* at 335.

performed.[117] A more formal hearing is likely to present a more accurate

117. Although the technology of urinalysis is beyond the scope of this Note, some background on the common tests for marijuana use is useful. The major methods of urinalysis for the detection of marijuana are the enzyme immunoassay technique (EMIT), radioimmunoassay, and gas chromatography/mass spectrometry. *See* Schwartz & Hawks, *Laboratory Detection of Marijuana Use*, 254 J. A.M.A. 788, 789-90 (1985). The EMIT test is most widely used because of its relatively low cost and simplicity. The manufacturer considers the EMIT test 97-99% accurate, *see* Syva Co., "Facts About EMIT Assays for Drug Testing" (undated), but some studies have found a lower accuracy rate, *see, e.g.*, O'Connor & Rejent, *EMIT Cannabinoid Assay: Confirmation by RIA and GC/MS*, 5 J. ANALYTICAL TOXICOLOGY 168, 171-72 (1981) (reporting an 83% confirmation rate of positive EMIT results). A test could produce a false positive because of a mix-up in the urine samples (the chain of custody problem), improper performance of the test, passive inhalation of marijuana smoke, *see* Schwartz & Hawks, *supra*, at 790, 791, or cross-reactivity to a legal substance (i.e. certain foods, over-the-counter medications, and prescription drugs), *see* Whiting & Manders, *Confirmation of a Tetrahydrocannabinol Metabolite in Urine by Gas Chromatography*, 6 J. ANALYTICAL TOXICOLOGY, 49, 51 (1982). The problem of false negatives, though less interesting from a legal perspective, also raises concern for the accuracy of urinalysis. *See* Hansen, Caudill & Boone, *Crisis in Drug Testing: Results of CDC Blind Study*, 253 J. A.M.A. 2382 (1985) (reporting a high false negative error rate that calls into question the quality of service provided by drug testing laboratories). The consensus of the scientific community is that a positive result on an immunoassay test should be confirmed by an alternate technique, particularly the more expensive and time-consuming gas chromatography/mass spectrometry method. *See* Hansen, Caudill *supra*, at 790; Whiting & Manders, *supra*, at 49, 51 (offering a new confirmation method). Even the manufacturer of the EMIT test recommends confirmation by the gas chromatography/mass spectrometry method. *See* Syva Co., "Urine Drug Tests Reference Chart" (undated). This position reflects the concern of the scientific community that an individual not face disciplinary action on the basis of a single test result, notwithstanding the overall reliability of the test:

> Dismissal, denial of employment, or any adversary or punitive action against a person should not be based solely on a urine specimen positive for cannabinoids by a presumptive screening method, such as the EMIT or radioimmunoassay methods. Confirmation of the presumptive positive by a well-documented reference method such as gas chromatography/mass spectrometry is mandatory in such instances . . . . This is not to imply that the EMIT and radioimmunoassay test results are unreliable, but that any technical process such as a chemical assay and its interpretation should be dealt with by well-trained personnel. False-positive EMIT or radioimmunoassay test results are rare *when* properly trained personnel perform the assays under properly controlled situations, but the consequences of a false-positive can be considerable and maximum certainty of accuracy in analysis and interpretation of results are of paramount importance in such cases.

Schwartz & Hawks, *supra*, at 791 (quotation omitted).

Most courts are in accord with the scientific community that an unconfirmed positive result on an immunoassay test is insufficient proof of drug use, and therefore should not be the basis for disciplinary measures. *See* Jones v. McKenzie, 628 F. Supp. 1500, 1505-07 (D.D.C. 1986) (termination of school bus attendant on the basis of an unconfirmed EMIT test held arbitrary); Wykoff v. Resig, 613 F. Supp. 1504, 1509-11 (N.D. Ind. 1985) (chronicling caselaw in the context of prisons); Higgs v. Wilson, 616 F. Supp. 226, 230-32 (W.D. Ky. 1985) (inmates granted preliminary injunction against urinalysis program that permitted disciplinary action on the basis of an unconfirmed EMIT test). *But see* Jensen v. Lick, 589 F. Supp. 35 (D.N.D. 1984) (upholding prison program that only used the EMIT test). Urinalysis programs that include confirmatory tests have been upheld, even where the confirmation is not done by an alternate technique. *See Wykoff*, 613 F. Supp. at 1512 (confirmation of EMIT test by thin layer chromatography method held sufficient to support discipline of prisoner, but all future tests ordered to be confirmed by a second EMIT test or its equivalent); Perazno v. Coughlin, 608 F. Supp. 1504 (S.D.N.Y. 1985) (double EMIT testing found reliable enough to defeat prisoners' motion for preliminary injunction against use of test result in disciplinary proceedings). *But see* National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 389-90 (E.D. La. 1986) (plan to test federal customs workers by immunoassay *and* gas chromatography/mass spectrometry held so unreliable as to violate due process); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (the court found it "troublesome" that any sample which tested positive was simply retested with the same apparatus, refused to grant a preliminary injunction against the testing, but held that an issue of substance was raised as to the test's reliability). Courts would do better to stick more closely to the scientific approach. Confirmation should be by an alternate method. At the same time, 100% accuracy (which the *Von Raab* court apparently demanded) should not be required. A positive result by itself is not reliable, but it may become so when accompanied by a confirmatory test and/or a basis for suspicion:

> [D]efendants are not prohibited from testing for drugs with the EMIT test. They need only confirm the test with other evidence—either another alternate method test, testimony that the accused was seen with contraband, testimony of symptoms of a person who has used contraband, evidence that drugs were found in his cell, or other demonstrable or circumstantial evidence that the accused inmate used the drug.

Higgs, 616 F. Supp. at 232; *see also* 28 C.F.R. § 550.42(c) (1986) (federal Bureau of Prisons requirement that each positive urine test be "validated to substantiate the positive result"); Comment, *Admissibility of Biochemical Urinalysis Testing Results for the Purpose of Detecting Marijuana Use*, 29 WAKE FOREST L. REV. 391, 412 (author concludes "urinalysis drug testing programs should use the more expensive mass spectrometer test").

118. 419 U.S. at 579.

119. *Id.* at 582.

120. *See, e.g.*, Gardenshire v. Chalmers, 326 F. Supp. 1200, 1204-05, *dismissed*, 429 F. Supp. 1 (D. Kan. 1971) (presence of firearm in connection with events leading to criminal charges of attempted murder); Buck v. Carter, 308 F. Supp. 1236, 1240 (W.D. Wis. 1970) (arrested

picture of the student's involvement with drugs. On the state's side of the equation, certainly the school has a great interest in providing a drug-free learning environment and preparing students to lead productive lives. To some degree, however, the interests of the student and the school district are coincident. As the Supreme Court wrote in *Goss*: "[I]t disserves both [the student's] interest and the interest of the State if his suspension is in fact unwarranted."[118] No doubt the requirement of a more formal hearing would be more expensive and cumbersome for the school. On balance, however, the devastating consequences of an erroneous exclusion from school for an indefinite period seem to outweigh the cost to the school of proceeding more carefully with the imposition of such a serious measure.

An additional problem with the Becton High School proposal was that it permitted exclusion of a student *before* the student was afforded an opportunity to be heard. In *Goss*, the Supreme Court held that a hearing must occur before the student's removal from school, except where the school must take immediate action to prevent physical danger or extreme disruption.[119] Consistent with pre-*Goss* caselaw,[120] this "emergency" exception has been narrowly

applied,[121] and a positive test result on a urine sample, without more, can hardly be seen as an emergency.[122] This defect could easily be cured by providing a pre-exclusion hearing, just as the risk of erroneously excluding a student could be reduced to a minimum by requiring a confirmatory test and more formal hearing procedures. The cumulative effect of these problems, however, raises doubt as to whether any compulsory urinalysis program could satisfy the requirements of due process and still be financially and administratively feasible. A far simpler way to confront the problem of drugs in schools is to urge school teachers and administrators to be alert for signs of drug or alcohol use and to report any students who appear to be under the influence of drugs or alcohol.

IX. Summary and Conclusion

Compulsory urinalysis of the student body of a public school cannot survive constitutional scrutiny. The characterization of urinalysis as a medical procedure is a disingenuous attempt to avoid compliance with the fourth amendment. It is clear that urinalysis is a search and seizure within the meaning of the fourth amendment, and therefore must be reasonable. Compulsory urinalysis of public school students does not meet the reasonableness standard for school searches set by the United States Supreme Court in *New Jersey v. T.L.O.*.

Compulsory urinalysis of public school students fails to satisfy the first prong of *T.L.O.*, that a search be justified at its inception. While *T.L.O.* left open the question of whether school searches must comply with a standard of individualized suspicion, compulsory urinalysis is unprecedented because it is a highly intrusive blanket measure. In sensitive areas such as borders and airports, searches that have not been held to a standard of individualized suspicion involved minimal intrusion on the privacy interest of the persons searched. Although courts have differed on whether urinalysis is more or less intrusive than body cavity searches or searches that penetrate beneath the body's surface, no court has considered urinalysis to be a minimal intrusion.

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attack and firing of gun); Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 420 (W.D. Wis. 1969), *appeal dismissed as moot*, 420 F.2d 1257 (7th Cir. 1970) (violence and strong indication that it would be repeated).

121 Picozzi v. Sandalow, 623 F. Supp. 1571, 1578 (E.D. Mich. 1986) (law students suspected by police of setting dormitory room on fire).

122 In White v. Salisbury Township School Dist., 588 F. Supp. 608, 613 (E.D. Pa. 1984) (hearing conducted one day after suspension became effective held permissible where delay was attributable to school district and all parties agreed on postponement), the court wrote in dictum that under *Goss* the school district could have immediately removed the student plaintiffs who were arrested by the police on school grounds for drug use and possession, after receiving the official police report. Since this scenario involves a law enforcement action based upon objective evidence, it is readily distinguishable from the situation where a student is suspected solely on the basis of a urine test.

Only in the case of prisoners has a search been upheld that is both highly intrusive and without individualized suspicion, but the *T.L.O.* Court expressly stated it was not willing to equate prisoners and students. Nor does court approval of urinalysis programs in the public employment context imply that compulsory urinalysis of students, who enjoy less protection under the fourth amendment than adults, is acceptable. Urinalysis of public employees has been upheld when there is both individualized suspicion and an immediate safety concern. Finally, cases involving the use of sniffing dogs in public schools provide precedent for the unconstitutionality of compulsory urinalysis of public school students.

Compulsory urinalysis of public school students also fails to satisfy the second prong of *T.L.O.*, that a search be reasonable in its scope. As one court has found, school officials are properly concerned with students' activities while at school, but urinalysis cannot be so limited. Moreover, if school officials may conduct a blanket search of students' bodily fluids to determine which students use drugs, it is difficult to imagine what meaning could be attached to the *T.L.O.* requirement that a search not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Due process does not pose an insuperable obstacle to compulsory urinalysis of public school students. However, if a student may be excluded from school for a non-trivial period of time on the basis of a single positive test result, there is a significant risk that the student may be erroneously deprived of protected property and liberty interests. The procedural safeguards that would then be appropriate could pose heavy financial and administrative burdens on a school.

While the Becton High School controversy has been resolved, the problem of how to fight drug use in public schools is likely to be around for quite some time. No matter what courses of action are decided upon, they must comport with the Constitution. It is easy to teach students that they have constitutional rights, but more important to demonstrate to them that their rights operate in everyday life and may not be suspended in order to reach easy solutions to social problems.

DEVELOPMENT IN THE LAW

WILLAMETTE LAW REVIEW

23:2 Spring 1987

JAR WARS: DRUG TESTING IN THE WORKPLACE

INTRODUCTION

I. MAGNITUDE OF THE PROBLEM

Use and abuse of drugs and alcohol[1] now touches every sphere of American life.[2] A large proportion of American adults use marijuana, cocaine, or some other illegal drug.[3] Substantially larger numbers abuse alcohol.[4] Inevitably, the substance abuse crisis has reached the American workplace, generating intense concern among both employers and employees.[5]

In 1962, less than four percent of Americans had used an ille-

1 For the sake of clarity in this discussion, the term "substance" encompasses illegal drugs, non-prescribed legal drugs, and alcohol. The term "drug" excludes reference to alcohol.

2 McBee & Peterson, *How Drugs Sap the Nation's Strength*, U.S. NEWS & WORLD REP., May 16, 1983, at 55. The distinction between use and abuse of drugs and alcohol is not clear. Many employers would define abuse in terms of impaired work ability. Such a definition is not completely accurate, however, because some drugs, including cocaine, may initially enhance work performance. Abuse cannot be defined in terms of illegality, either, because there is wide abuse of legally obtained prescription drugs and alcohol. For purposes of this discussion, abuse will be considered use of drugs or alcohol that impairs health, work, or behavior. *Alcohol and Drugs in the Workplace*, Lab. Special Projects (BNA) 1, 1, 16-17 (1986) [hereinafter BNA].

3 Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB. L.J. 42, 43 (citing N.Y. Times, Mar. 21, 1983, at A1, col. 2-3).

4 BNA, *supra* note 2, at 13.

5 McBee & Peterson, *supra* note 2, at 56.

A third approach to the substance abuse problem combines elements of discipline and rehabilitation. There are two reasons why an employer might choose this option. First, many drug counselors now view disciplinary consequences as an important, perhaps essential incentive for the employee to reject drug use permanently.[202] Second, some employers have expressed concern that a few employees now are permitted to overuse EAPs or other health care services, undergoing treatment repeatedly without ever truly solving their drug or alcohol problems.[203] Obviously, the employer usually cannot recover the large economic investment the company has made in these employees.

In summary, employers increasingly have sought to develop comprehensive company policies for combatting the use of drugs and alcohol in the workplace.[204] These policies typically combine many different strategies. For example, the Associated Builders and Contractors, a national affiliation of contracting companies, has developed a manual to help its members attack the substance abuse problem.[205] Among the options discussed in this manual are the various methods for detecting drug abuse, pre-employment drug screening, and EAPs. The manual also stresses that it is important for companies to clearly enunciate company policies regarding substance abuse.[206]

Substance abuse in the workplace has become a problem of sufficient magnitude that few businesses can afford to ignore it. What remains to be seen is which responses to employee substance abuse problems are most appropriate under a given set of circumstances. Legal, practical, and ethical considerations associated with

202. Geidt, *supra* note 54, at 181.

203. BNA, *supra* note 2, at 49-50. Company officials at Hughes Aircraft Company decided that unlimited coverage for drug and alcohol abuse treatment enabled substance abusers to continue their habits indefinitely. The manager of the company's employee counseling service said that "[a] very small number of people were eating us alive on claims." The company responded to the problem by placing a once-a-lifetime cap on treatment coverage. *Id.*

Other employers' responses to employees who suffer relapses after EAP treatment vary depending on the severity of the relapse, the stipulations in union contracts, stated disciplinary mandates, and the terms of the EAP itself. Many employers have instituted "last chance" policies, in which the employees at some point are given an early ultimatum that they must rehabilitate themselves or face termination. *Id.* at 45.

204. *Id.* at 22.

205. *Id.* at 25.

206. *Id.*

substance abuse have combined to create a delicate and complicated problem in employee relations.

KAYE MCDONALD SUNDERLAND
CONI S. RATHBONE

THE CONSTITUTIONAL ISSUES OF DRUG TESTING IN THE WORKPLACE

With the recent deluge of litigation over drug testing, courts are deciding the constitutionality of such testing under a variety of constitutional challenges. Plaintiffs are challenging employer drug testing schemes under the fourth amendment's protection against unreasonable search and seizure,[207] which encompasses the employee's expectation of privacy interest,[208] and the fifth amendment's express protection against self-incrimination.[209] Employees also are asserting rights to due process[210] under both the fifth and fourteenth amendments.[211] The constitutionality of drug testing schemes must be discussed in accordance with the sector of employment involved: private, public, or military.[212]

207. U.S. CONST. amend. IV provides, in part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . ."

208. The expectation of privacy interest encompassed in the fourth amendment should be distinguished from the Constitutional right of privacy. The right to privacy is a penumbral right that arises from a combination of rights expressly provided for by the Constitution. Generally, the first, third, fourth, fifth, and ninth amendments have been held to imply the right to privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). A majority of the first ten amendments to the Constitution are applied to the states by the incorporation of the Bill of Rights into the fourteenth amendment. *See infra* text accompanying notes 224-48 for discussion of the constitutional right to privacy.

209. U.S. CONST. amend. V provides, in part, "nor shall any person . . . be compelled in any criminal case to be a witness against himself."

210. U.S. CONST. amend. V provides, in part, "nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1, provides, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

211. Other constitutional challenges raised, but not included in the body of this discussion, include the fifth amendment's protection from unlawful takings, the fourteenth amendment's equal protection clause, and the privilege and immunities clause found in the fourteenth amendment. These constitutional provisions have not specifically been determined to be individually available to the employee, public or private, where drug testing constitutionality is in question.

212. The treatment of constitutional challenges brought by military personnel differs in comparison to the same challenges brought by all other employees. The areas of search

cally, "the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[326] It should be noted that although *when* there is a property right that requires due process is determined by state or local law, *Loudermill* enforces the theory that *what* constitutes due process is conferred by constitutional guarantee, "not by legislative grace. . . . While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without procedural safeguards."[327]

In *Allen v. City of Marietta*, the court addressed the question of whether notice and hearing are always required *prior* to termination. The defendants in *Allen* did not receive any notice or opportunity to be heard prior to their termination. An employment policy specifically stated that employees were subject to "immediate dismissal" for certain conduct.[328] The court interpreted the policy to mean that a pre-termination hearing was not required.[329] It was only after dismissal that the city provided the defendants with notice of the charges and the opportunity to be heard in order to clear their names. Nevertheless, the court held that such post-termination dismissal procedures satisfied the dismissed employees' due process guarantees.[330]

The *Allen* decision exemplifies the exceptional situation where the employment policies specifically allow for dismissal, followed by due process guarantees.[331] The *Allen* decision thus represents an exception to *Loudermill*'s general rule that some kind of hearing is required prior to termination where the employee has shown a property interest. More generally, however, the type of due process guarantees required depend on the nature of the employment contract and the existence of a property interest in continued employment.

If, on the other hand, the terms of employment are other than

326. *Id.*; *see also* Arnett v. Kennedy, 416 U.S. 134, 170-71 (1974).
327. *Loudermill*, 470 U.S. at 541.
328. *Allen*, 601 F. Supp. at 493.
329. *Id.*
330. *Id.*
331. It should be noted that the employees each were given the policies. Had the defendants read the policies, they might have gleaned that such denial of due process "prior" to dismissal was available to the employer.

that the employee can be dismissed only for cause, the employee would probably not be held to possess a property interest in continued employment. When the employee does not validly retain a property interest in his or her employment it is questionable whether the employee would be guaranteed the due process rights of notice and opportunity to be heard. Thus, the due process guarantees of notice and a hearing would not necessarily be available to contesting employees where no property right was found to exist in the employee's job.

CONCLUSION

The constitutionality of any drug testing scheme depends on several factors. First, one must consider whether the employee is public, private, or military. The rights guaranteed to the public employee are much broader than those guaranteed to the private employee. Second, one must consider what type of constitutional deprivation he or she wishes to assert. Then, based on the specific right asserted, additional tests must be made to determine whether the particular employee will be guaranteed that specific right. The determination whether an employee may assert constitutional guarantees involves complex analysis and should be completed with careful evaluation.

SALLY ANNE COOPER

STATUTORY AND OTHER LIMITATIONS TO DRUG TESTING

Absent constitutional protections, other sources of law may protect employees. This section discusses possible statutory and common law limitations on drug testing. The discussion includes an examination of federal statutory provisions, state constitutional provisions, state and local laws, and common law tort remedies. The section concludes with an examination of collective bargaining agreements.

I. FEDERAL STATUTORY PROVISIONS

A. *Vocational Rehabilitation Act of 1973*

The Vocational Rehabilitation Act of 1973 (hereinafter the Act) prohibits discrimination against handicapped persons solely

statutory right or privilege. It should be noted, however, that some jurisdictions may already have rejected the validity of the public policy theory because they reject it in regard to polygraphs.[400]

E. Negligence

Perhaps the broadest area of remedy for employees under the common law is an action in negligence. Here, an employee could allege that an employer breached the duty of reasonable care owed him or her by negligently administering a drug test. Of course, the plaintiff also would have to show that the breach caused a resulting injury, such as suspension or termination.[401]

Plaintiffs have successfully used negligence theories in suits alleging negligent administration of polygraph examinations. In New York, a plaintiff was discharged after undergoing two polygraph examinations during a theft investigation conducted by his employer.[402] The plaintiff alleged that the polygraph tests were negligently administered and resulted in the plaintiff's damages. The court held that the plaintiff had stated a cause of action because the defendant breached its duty of care to properly administer the tests, and that it was reasonably foreseeable that the negligence would result in plaintiff's discharge.[403] Presumably, an employee who could establish the existence of the same elements in a drug testing situation would stand a good chance of prevailing.

V. Collective Bargaining Agreements

A final important source of protection for employees opposed to drug testing may be found in the employee's collective bargaining agreement. The National Labor Relations Act requires an employer to bargain with employees concerning conditions of employment. It also prohibits the employer from making unilateral changes to a subsequent agreement.[404] It is likely that, because of their similarity to polygraph examinations, drug tests would also be classified as mandatory bargaining subjects.[405] Thus, before establishing a drug testing program, an employer would be required to bargain with the employee's union in contract negotiations.

Perhaps the most publicized use of drug testing clauses in collective bargaining agreements has occurred in the area of professional sports. Recently, an arbitrator decided that the National Football League could not require drug testing beyond that agreed to in the collective bargaining agreement with the National Football League Players Association. The award set aside the fines imposed upon about two hundred players who had refused to submit to additional testing.[406]

VI. Conclusion

If an employee cannot find adequate remedies against mandatory drug testing in the Constitution, other remedies may be available. The employee, for example, may be protected by the Federal Vocational Rehabilitation Act or by Title VII. In some states, the employee may be protected by the state constitution's privacy clause, or by a state statute or local ordinance. The employee may also find remedies in the common law. Finally, if he or she is employed under a collective bargaining agreement, the employee may be able to require that the employer negotiate before a drug testing program can be imposed.

Bryan D. Lane

Other Considerations: Workers' Compensation, Unemployment Compensation, and Chain of Custody

I. Workers' Compensation

Controlled substance abuse in the work place raises two serious issues regarding workers' compensation. The first issue is whether an employee who suffers a work-related injury while under the influence of a controlled substance is entitled to worker's compensation benefits. The second issue is whether an employee who turns to substance abuse as a result of work-related stress is entitled

400. *See* Montgomery v. Big B, Inc., 460 So.2d 1286 (Ala. 1984); Gibson v. Hummel, 688 S.W.2d 4 (Mo. Ct. App. 1985).

401. *See generally* W. Keeton, *supra* note 383, § 28.

402. Zamparotti v. United Parcel Serv., 125 Misc. 2d 405, 479 N.Y.S.2d 470 (N.Y. Sup. Ct. 1984).

403. *Id.* at 409, 479 N.Y.S.2d at 474.

404. 29 U.S.C. §§ 151-69 (1982 & Supp. II 1984).

405. *See* Medicenter, Mid-south Hosp., 221 N.L.R.B. 670, 675 (1975).

406. Portland Oregonian, Oct. 4, 1986, at C-3, col. 2.

person involved in the sample collection procedure should be a collection observer who is of the same gender as the employee providing the sample. Before a sample is collected, the administrator and the observer must verify the identity of the employee who will provide the sample. The administrator should note the verification and the identity of any prescription medication currently being taken by the employee in the sample ledger.[468]

After the proper information has been recorded in the sample ledger, including the employee's name and corresponding identification number, the administrator should issue two sample containers to the observer in the presence of the employee. The observer should then escort the employee to the collection site and provide the employee with the containers. The observer must watch the employee urinate into both containers and watch the employee secure each container with a lid. The observer should then accompany the employee back to the administrator.[469]

The administrator should take both sample containers from the employee, insure that the lids are tightly closed, and place a tamper-proof seal on each container. One numbered label, corresponding to the employee's number in the sample ledger book, shall be placed on each container. A numbered label should also be attached to two chain of custody sheets, one for each sample taken. The administrator, observer, and employee should all sign the sample ledger and the chain of custody forms. The administrator should then seal each sample in an envelope with a chain of custody sheet. One envelope should be immediately prepared and sent to the laboratory for testing, the second retained by the administrator in a secured location.[470]

Upon receipt of the sealed envelope, laboratory personnel should check the tamper-proof seal and compare the numbered label on the sample container to the number on the chain of custody sheet. If the seal is broken, or the numbers do not match, the sample should not be tested. Laboratory personnel should sign and date the chain of custody sheet if custody is transferred between persons. If possible, the same laboratory employee that opened the sealed envelope should conduct the appropriate tests on the sample. Any test results should be noted on the chain of custody sheet.

468. *Id.*
469. *Id.*
470. *Id.*

Samples that test positive should be retained in the laboratory in a frozen state until any action contemplated against the employee has been taken. Test reports for all samples must be returned to the employer as soon as possible. All samples testing positive should be reported to the employer by a copy of the chain of custody sheet which indicates that proper custody was maintained and that the sample tested positive.[471]

A proper chain of custody is essential to any employee drug testing program. The employer must protect itself and its employees by maintaining a chain of custody that is accurate and secure from the time the sample is collected until the sample is tested. Only if the employer and the employees are sure that there is no danger of samples being mixed up and that the results attributed to a particular person are indeed based on that person's sample will the drug testing program be accepted.[472]

KERRY M. L. SMITH

DRUG TESTING EMPLOYEES: THE EMPLOYER'S PERSPECTIVE

Employers have reacted aggressively to drug use and abuse among employees. A desire to identify drug-using employees has caused the current trend toward individual testing for the chemical presence of illegal or controlled substances. Employees are resisting this perceived threat to their employment and personal freedom and are resorting to legal avenues of relief, including post-termination actions for wrongful discharge.

The wrongful discharge cause of action evolved as a public policy limitation on the doctrine of employment at will.[473] Where

471. *Id.*
472. *Id.*
473. In any employment relationship where the procedure for discharge of the employee and the duration of employment are not specifically defined, the employee is considered an "at will" employee. *See* Vlasaty v. Pacific Club, 4 Haw. App. 556, 670 P.2d 827 (1983); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977). That is, the employee continues to work at the will of the employer, and the employer continues to receive the employee's services at the will of the employee. The doctrine of employment at will is court-developed, originating from a 19th century treatise on the subject of master and servant. *See* H. WOOD, MASTER & SERVANT 134 (2d ed. 1886). The general rule regarding employment at will is that either the employer or the employee may terminate the relationship at any time for any reason. *See* Delaney v. Taco Time Int'l, Inc., 297 Or. 10, 681 P.2d 114 (1984). However, where a valid employment contract specifies the dura-

WHAT ACLU HAS TO SAY ABOUT...

Drug Testing in the Workplace

On March 3, 1986, the President's Commission on Organized Crime proposed that all employees of the federal government, as well as all employees of private companies that contract with the federal government, be regularly subjected to urine tests for drugs as a condition of employment. Although this proposal has been widely criticized, and several members of the Commission have disavowed it, it symbolizes a trend toward forcing employees to submit to urine tests or else lose their jobs. Indeed, 25 percent of major American companies have now instituted such programs, presumably to remedy impaired job performance that results from drug abuse.

The American Civil Liberties Union opposes indiscriminate urine testing because we believe it is unfair and unreasonable to force millions of American workers who are not even suspected of using drugs, and whose job performance is satisfactory, to submit to degrading and intrusive urine tests on a regular basis. It is unfair to treat the innocent and the guilty alike.

Here are some frequent questions posed by members of the public about our stand on drug testing:

Don't employers have the right to expect their employees not to be high on drugs on the job?

Of course they do. Employers have the right to expect their employees not to be high, or stoned, or drunk, or sound asleep. Job performance is the bottom line; if you can't do the work, you get fired. But urine tests don't measure job performance. Nor do they measure current impairment or intoxication. The only thing such tests are capable of detecting are the metabolites of various substances ingested some time in the past.

Can urine tests determine when a particular drug was used?

No. Urinalysis cannot determine *when* a particular drug was ingested, and the metabolites of some drugs will show up in urine weeks after ingestion. An employee who smokes a marijuana joint on a Saturday night may test positive the following Wednesday, long after the drug has ceased to have any effect. Why is what happened Saturday the employer's business? And how does it differ from employees who have a drink over the weekend or in the evening? What has that to do with their fitness to work? While employers do have the right to regulate their employees' activities during the workday, they do not and should not have the right to regulate their employees' off-the-job recreational activities. Millions of executives regularly have a drink or two at lunch, and it has never been deemed necessary to test them. Why test workers for their activities on weekends or on vacation?

If you don't use drugs, you have nothing to hide. Why object to testing?

Innocent people do have something to hide: their privacy. This "right to be left alone" is, in the words of the eminent Supreme Court Justice Louis Brandeis, "the most comprehensive of rights and the right most valued by civilized men." Urine tests are an unprecedented invasion of privacy. In addition to evidence of illegal drug use, the tests can disclose numerous other details about one's private life. Urinalysis can tell a company whether an employee or job applicant is being treated for a heart condition, depression, epilepsy, diabetes or schizophrenia. It can also reveal whether an employee is pregnant.

Innocent people also have reason to be concerned because the method of urinalysis most commonly used in drug testing (the "EMIT kit") is inherently unreliable. The EMIT kit gives a false positive result at least 10 percent and possibly as much as 30 percent of the time. Experts understand the test's unreliability. At a recent conference, 120 forensic scientists were asked, "Is there anybody who would submit urine for cannabinoid [marijuana] testing if his career, reputation, freedom or livelihood depended on it?" Not a single hand went up.

The EMIT test confuses substances. For example, over-the-counter cough medicines can show up as heroin. Certain antibiotics show up as cocaine; as many as seven different legal substances may show up as marijuana. It is universally advised by doctors and toxicologists that the EMIT kit should *never* be used as definitive evidence that a person has or has not taken a particular drug.

Companies that manufacture EMIT kits warn employers to follow up any positive result with additional, more sophisticated confirmatory tests. But such confirmatory tests are expensive, and in practice many employers do not use them. Millions of people across the country risk not being hired or losing their jobs and their reputations because of the EMIT kit test.

Still, isn't indiscriminate testing the best way to catch the users?

It may be the easiest way to identify drug users, but it is also by far the most un-American. There is a long tradition in the United States that general searches of innocent people are unfair. This tradition began in colonial America, when King George's soldiers searched everyone indiscriminately in order to uncover those few who were committing offenses against the Crown. These general searches were deeply hated by the early Americans, and were a leading cause of the Revolution. After the Revolution, and fresh from the experience of the unfairness of indiscriminate searches, the Fourth Amendment was passed. It says that you cannot search everyone, innocent and guilty alike, to find the few who are guilty. You must have good reason to suspect a particular person before subjecting him or her to intrusive and degrading body searches.

But mandatory, general drug testing programs threaten to turn these traditional principles upside down. Compulsory blood and urine tests are bodily searches according to the U.S. Supreme Court. The lower courts have already struck down mandatory testing programs in several government workplaces as violative of the Fourth Amendment because they were not based on particularized suspicion. And although the Fourth Amendment doesn't legally limit the power of private employers, the same principles of fairness ought to apply. Tests should be limited to those workers who are reasonably suspected of using drugs (including alcohol) in a way that impairs job performance.

over

Aren't there exceptions to the rule? Shouldn't workers such as airline pilots, who can endanger the lives of others if they aren't functioning properly, be subject to drug testing?

Obviously people who hold the lives of other people in their hands should be held to a higher standard of job performance. But urine testing won't do that. Urinalysis cannot measure current impairment or intoxication. It would be far more meaningful to require all airline pilots to undergo a brief neurological exam for impaired visual acuity or motor coordination before stepping into the cockpit. No one could object to that. But urine testing is simply irrelevant to the issue of job impairment, and people in high risk occupations should be subjected to urinalysis on the same basis as anyone else—only to confirm a reasonable suspicion, based on observation, that a particular individual is job impaired because of drug abuse.

What about the high economic costs to industry of drug use? Shouldn't employers be permitted to institute drug testing as a way to protect their investment?

The economic costs to industry of drug use are cited to justify mass drug testing in the workplace. Billions of dollars, we are told, are lost through low productivity and absenteeism. Some experts question these estimates as extrapolations and projections that have no convincing data base. Moreover, the economic costs of alcoholism and heavy cigarette smoking are without doubt higher, since so many more people use alcohol and smoke. But no one has yet suggested tests to discover the extent to which workers are drinking or smoking in the evenings or on weekends.

The people who most often cite the high economic costs to industry caused by drug use are the same people who are reaping huge profits from urine testing—manufacturers of the urine test, chemical laboratories and professional drug abuse consultants. Their pronouncements ought to be viewed with skepticism.

If urine testing is out, is there anything left that can be done about the drug "epidemic"?

Urine testing doesn't prevent drug use, or cure addiction. Education and voluntary rehabilitation are the only approaches that do. A well-funded, well-coordinated public education effort, such as the anti-smoking campaign, would do more to bring drug use under control than the most massive program of testing. Such efforts work. Since 1965, the proportion of Americans who habitually smoke cigarettes has gone down from 43 percent to 32 percent. Those who have studied this decline attribute it to public education. Certainly, it cannot be attributed to forced testing or employer sanctions.

In a number of schools, drug education courses have succeeded in teaching teenagers that it is all right to say "no" to drugs. We cannot stop everyone from using drugs, but we can encourage people to be more intelligent and prudent in their attitudes and behavior toward drugs, just as we do with alcohol and cigarettes.

Have any courts ruled that mandatory urine testing of government employees is a violation of the Constitution?

Virtually every court that has heard a constitutional challenge to testing by government agencies and employers has found that some degree of individual suspicion is necessary. These courts have prohibited programs that included "random" or "blanket" drug testing. A state court judge in New York ruled that a local board of education could not subject all teachers being considered for tenure to urinalysis because "an invasive bodily search may be constitutionally made only when based upon reasonable suspicion based on supportable objective facts." A federal judge in Iowa ruled that random tests of prison guards were unconstitutional unless conducted on the basis of "reasonable suspicion."

But if the Constitution doesn't apply to private employees, how can the privacy rights of private employees be protected?

Only by special federal or state laws or by union contracts. At this time employees of private companies have virtually no protection against the mandatory drug testing programs that have now been adopted by 25 percent of the Fortune 500 companies. The ACLU believes it is grossly unfair that government workers are protected in their right to privacy while their counterparts in private industry are not. Labor unions should push to include a ban on blanket testing in collective bargaining agreements, and the rights of non-union employees can only be protected by pressing for the passage of federal, state or local legislation.

Because of the efforts of the ACLU and other concerned organizations, the City of San Francisco, for example, has enacted a model law which protects workers in private industry from indiscriminate drug testing. The new law says that no employer doing business in San Francisco "may demand, require, or request employees to submit to, to take or to undergo any blood, urine, or encephalographic test in the body as a condition of continued employment" unless three conditions are met:

1. the employer has reason to believe the employee's faculties are impaired on the job;
2. the employee's impairment presents a clear and present danger to his own safety or the safety of others;
3. the employer gives the employee the opportunity, at the employer's expense, to have the sample tested by an independent laboratory and gives the employee an opportunity to rebut or explain the results.

This law strikes the delicate balance between an employee's fundamental right to privacy, and the legitimate business needs of the employer.

The American Civil Liberties Union, founded in 1920, is the nation's only organization working full-time to defend the entire Bill of Rights. For information on how to join the ACLU, or to learn more about the ACLU's positions on other issues, contact the national ACLU or your local affiliate.

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WHY DRUG TESTING IS A BAD IDEA

BY LEWIS L. MALTBY

SILVERFAIR

Lewis L. Maltby is vice-president and general counsel at Drexelbrook Engineering Co., a 300-employee, closely held company based in Horsham, Pa.

The call keeps going out for mandatory drug testing of people in jobs ranging from truck driver to basketball player to investment banker. And nowhere is the call heard more often than in industries whose products or services affect the public's safety. My business, Drexelbrook Engineering Co., is one such compa·

For 25 years we have designed and manufactured electronic systems that measure and control the levels of hazardous chemicals, and our equipment is installed in plants all over the world. If it doesn't work properly, toxic-chemical tanks can overflow—and people die. The tragedy in Bhopal, India, is an example of what can happen when this type of equipment malfunctions. A single Drexelbrook employee working under the influence of drugs could cause such a disaster.

But we don't do drug testing, and we're not going to. When our top management considered the idea, we concluded that drug testing was not in the best interests of the company, would not make the products any safer, and would actually hurt our performance and profits.

To our way of thinking, drug testing is not a serious workplace safety program. A sound program for dealing with the hazards posed by impaired workers would confront the most serious problem—alcohol abuse. Yet no one proposes that all employees be subjected to breathalyzer tests to keep their jobs.

Drug testing also suffers from accuracy problems. The most common type of testing, immunoassay, has been shown to have false positive results: "clean" samples are mistakenly labeled as "dirty" 20% to 30% of the time. While more accurate and more expensive tests are available, they don't solve the problem either. It's difficult to pin down estimates of the number of drug-impaired workers in an average company, but 5% is a generally accepted figure. Say you have 100 employees, and 5 are drug abusers. Even with a test that's 99% accurate, 6 people could be fired for drug abuse, one of whom is innocent. A serious program cannot afford to be wrong that often, especially when someone's job is at stake.

But the fundamental flaw with drug testing is that it tests for the wrong thing. A realistic program to detect workers whose condition puts the company or other people at risk would test for the condition that actually creates the danger. The reason drunk or stoned airline pilots and truck drivers are dangerous is their reflexes, coordination, and timing are deficient. This impairment could come from many situations—drugs, alcohol, emotional problems—the list is almost endless. A serious program would recognize that the real problem is workers' impairment, and test for that. Pilots can be tested in flight simulators. People in other jobs can be tested by a trained technician in about 20 minutes—at the job site.

Instead of testing for what really matters—impairment—drug testing looks for the presence of drug metabolites in the employee's urine, which remain in the body for up to two months. So an employee who fails a drug test may not be impaired at all. Firing good, sober employees for something they might have done last

A single Drexelbrook employee working under the influence of drugs could cause a disaster as tragic as occurred in Bhopal. But we don't do drug testing.

Saturday night does not increase safety.

Drug testing may even *decrease* safety. Any experienced manager knows that a safe quality product and a safe work environment do not come from a demoralized, unhappy work force. But this is exactly what drug testing produces.

To begin with, it's an act of distrust on the part of management. It requires the vast majority of employees to prove their innocence when there's no reason to suspect they've done anything wrong. It also violates their rights by reaching out from the employer's legitimate sphere of control at the workplace and telling employees what they can and can't do on their own time in their own homes.

Beyond this, experience has shown that the only way to prevent cheating on the tests is to make employees strip from the waist down and have someone watch at close range while they urinate into bottles. Drug-abusing employees who are not watched can substitute clean urine samples for their own, conceal small catheters of urine on their bodies, and dilute urine with tap water (to reduce drug concentration to below the cutoff point). The ultimate dodge, which no one knows how to prevent, is to slip a small amount of soap or salt into the sample. As Dr. William F. Hushion, medical director of Philadelphia Electric Co., put it after years of testing

experience, "Any drug-testing program that doesn't include close observation is a joke."

The effect of all this on employee morale is obvious. How would you feel about being subjected to a strip search to prove your innocence—even at home—and being fired if you objected? Would you want your life resting on the performance of an employee who felt that way?

The failure of drug testing can be seen in its rejection by those whose profession is helping addicted workers. I have spoken at numerous conferences on drug testing, and a representative from an employee-assistance program is always included among the speakers. These people have been helping employees with substance-abuse problems for years—and have done so very effectively. And many of them actively oppose testing. Some go so far as to refuse to accept referrals from testing programs. What kind of program is drug testing when it is opposed by those whose profession is helping abusing employees?

At this point, you may be saying, "I didn't realize there were all these problems with drug testing, but we have to do something." That's right, you do have to do something. Our company doesn't tolerate drug abuse, and I'm certainly not advocating that others tolerate it, either. Let me tell you about our program to combat workplace drug abuse.

We practice good management. We always say that people are our most important asset, and at Drexelbrook, we try to put that idea into practice.

We begin by trying to create a positive atmosphere. We want every employee to give us 100% every day. And we want each of them to make every decision with the best interests of the company at heart. By and large, we get that. But that kind of commitment doesn't come easily. We have to earn it.

One way we earn it is by treating our employees as adults. We trust them to do their jobs right and don't subject them to a lot of unnecessary rules. We trust our employees to know what working hours and style of dress are required for them to get their jobs done. Another way we earn that commitment is by respecting their rights. We scrupulously avoid prying into our employees' private lives. Finally, we care about them.

When they have problems at work or outside the workplace, we try to help. Sometimes we help by having our financial people arrange a personal loan at our bank. Sometimes we help by having our legal department straighten out a problem with an employee's landlord. Mostly we help just by listening and caring.

This approach to employee relations is not philanthropy—it's good business. Our employees routinely go above and beyond the call of duty to help our customers. Our service manager, for example, installed a ship-to-shore radio in his sailboat at his own expense, so he could keep in touch with the company—and any problems—while he was on his vacation.

We are also very selective in our hiring. Even with applicants for entry-level jobs, we conduct at least two in-depth interviews with different interviewers. We check references—thoroughly. And often not with the personnel department—all they ever give us is name, rank, and serial number—but with the candidate's previous supervisors. And we try to screen out the drug abusers. Not by anyone telling us directly, of course, but by learning about which applicants had chronic absenteeism, inconsistent quality, and bad work habits at their former jobs. And we find out with much more accuracy than we could with a hit-or-miss drug test.

Ultimately, drug testing is a seductive gimmick that promises instant relief from the awesome responsibilities of management.

After we hire people, we tell them what performance we expect from them—and then pay attention to their results. Most of our supervisors have taken a 36-week, intensive management-training course to help them in this. If an employee's performance consistently falls short of our expectations, then the supervisor sits down with him or her and discusses the problem. When employees are open with supervisors—as is often the case—and the problem is drugs or alcohol, we help get them into a treatment program.

That's our program—and it works. By doing good interviewing and reference checking, we almost never hire an employee with a drug or alcohol problem. We have had employees who developed such problems, but our supervisors noticed their declining job performance, confronted them, and got them into treatment.

Overall, I estimate the rate of abuse at our company to be only about 1%. We have installed more than a quarter of a million systems around the world, handling some of the most hazardous materials known, and have never been involved in an industrial accident.

Our experience is confirmed by a recent American Management Association survey of 1,000 companies that found the most effective program to fight workplace drug abuse combines employee education with trained supervisors who know how to identify and constructively confront employees who fail to meet performance standards.

The fact is, most companies don't do drug testing. And, according to the American Management Association study, a third of those who do think there is no value in it.

Why, then, is there so much talk about drug testing? The answer, I believe, lies largely in politics and the power of the media. Despite the fact that workplace drug abuse is far less prevalent than alcohol abuse—which industry has survived, if not solved, for years—the media have portrayed it as an epidemic that is sweeping the country and will destroy our economy unless immediate emergency measures are taken. In this emotional climate, is it any wonder that a manager who is already beleaguered, as we all are, can be convinced by a good salesperson who promises instant solutions with a simple, inexpensive test?

The truth, of course, is that managing people is never easy. Experienced managers for years have recognized that handling people is the most challenging part of their jobs, and that there are no shortcuts. And this, ultimately, is what drug testing is—a seductive gimmick that promises instant relief from the awesome responsibilities of management. The testing itself becomes a drug.

This is the choice managers face. They can fight workplace drug abuse with drug testing. It's easy, it's simple, and it's cheap. But it just doesn't work. Drug testing provides inaccurate and irrelevant information and alienates the vast majority of good employees, who resent being subjected to a strip search to keep their jobs. Or, they can fight substance abuse by choosing their people carefully, watching their performance, and getting involved when performance starts to slip. It's difficult, it's time-consuming, and it's expensive. But it does work. And not just in preventing workplace drug abuse, but in creating a safe and productive workplace.

TAYLOR LABORATORIES, INC.

CHEMICAL TESTING & MARKETING
724A SIGINAKA WAY SITKA, ALASKA 99835
(907) 747-6364

John Hartle
c/o John Sund
P.O. Box V
Juneau, Alaska 99811

October 11, 1987

Dear Mr. Hartle:

Thank you for your office's request for my credentials. I have attached a short resume. One local reference for you is Chuck Fry, with the Department of Corrections, Juneau: 465-3376. If you would like other references, please let me know.

I look forward to testifying telephonically on October 24th on the accuracy of drugs of abuse testing.

To let you know a little bit about our laboratory services, our tests are run under the supervision of a degreed chemist, or by a Medical Technologist or Medical Laboratory Technician certified by the American Society of Clinical Pathologists. Positive results are rerun to insure result validity. Controversial results are confirmed with a second laboratory technique in our own laboratories. I believe we are the only laboratory in the state offering confirmation tests for drugs of abuse urinalyses. Our results have been accepted upon challenge in Alaska Superior Court. We participate in the URINE TOXICOLOGY PROFICIENCY TESTING SERVICE of the American Association of Bioanalysts.

Sincerely,

Lawrence Taylor, Jr., President

enclosure

RESUME October 11, 1987

Lawrence Taylor, Jr.
P.O. Box 336
Sitka, Alaska 99835

Company Name: Taylor Laboratories, Inc., Sitka, Alaska
Dates of Employment: May 11, 1985 - present
Titles Held: President
Accomplishments:

1. Founded Taylor Laboratories May 11, 1985.

2. Incorporated Laboratories December 30, 1986.

3. Accepted as expert witness for cannabinoid and cocaine determinations upon challenge in Alaska Superior Court June 20, 1986.

4. Started Asbestos Analysis Division October, 1986. Participant in AIHA-PAT Program for fiber counting and the EPA Bulk Analysis Quality Assurance Progra..

5. Started Food and Water Quality Division, a consultation service, February, 1987.

The following employment was coincident with the above occupation from May 11, 1985 - present

Company Name: Alaska Pulp Corporation, Sitka, Alaska
Dates of Employment: May 22, 1974 - present
Annual Sales Volume: 188,000 tons ($75.2 million)
Titles Held: analytical chemist, process engineer (acid plant & digesters), tour foreman, process engineer (bleach plant, power house, and acid plant), process engineer (mill wide)
Education:

University of Alaska, Fairbanks, Alaska	1974 BS	Chemistry
University of Alaska, Fairbanks, ALaska	1974 BS	Biology
Haverford College, Haverford, Pennsylvania	1969 BA	Sociology

DAVID G. EVANS
ATTORNEY AT LAW
35 COLD SOIL ROAD
LAWRENCEVILLE, N.J. 08648

(609) 896-3923

ALASKA HOUSE JUDICIARY COMMITTEE

HEARING ON DRUG TESTING

OCTOBER 24, 1987

TESTIMONY OF DAVID G. EVANS, ESQ.

Mr. Chairman and members of the Committee, in the last seventeen years my experience has included studying, teaching, and writing on the legal aspects of alcohol and drug problems. Two books of mine have been published on these subjects and I have held faculty positions at Rutgers University and John Jay College of Criminal Justice teaching courses on the legal and criminal justice aspects of substance abuse. Since 1981, I have been the Chairman of the Alcoholism and Drug Law Reform Committee of the Individual Rights and Responsibilities Section of the American Bar Association.

In my academic and legal practice experience working on these issues, no issue has been as controversial as drug testing, nor has one spawned so much litigation.

My task today is to see if there is a middle ground to this controversy. How can the concerns of people of good will on both sides be brought together?

First of all, should there be a middle ground? Why don't we just ban drug testing? The opponents of drug testing argue that it is an invasion of privacy, testing is inaccurate, that asking someone to undergo testing presumes guilt, testing doesn't measure work performance, adulteration of test specimens is easy to do, and there are problems with due process, equal protection, and other fundamental rights. If they agree with testing at all, it is only for grounds such as "reasonable suspicion." In addition, some

opponents argue that drug use is a personal matter, it should be legalized, and it should only be an employer's concern when the employee has impaired work performance.

The proponents of testing argue that drug abuse is a major health and economic problem and that testing is a valuable tool to help dry up the demand for drugs. They claim that most American workers do not use drugs and want a drug-free workplace. The proponents claim an equal concern about individual rights, but they assert that a properly planned and administered drug testing program can protect privacy, insure due process, and provide equal protection. They argue that the testing technology is highly accurate, especially when initial screening tests are confirmed, and that the tests provide objective, scientific evidence of drug use.

In studying this controversy by following the press reports, and reading the state and federal court cases and legislation, and having written three articles on the subject, my conclusion is that drug testing is here to stay, however, for its ultimate success, drug testing must be protective of individual rights. All testing programs, public and private, should be established in a manner that protects test accuracy, due process, equal protection, confidentiality, and offers a chance of rehabilitation for the drug and alcohol abusing employee. Testing should be used to protect and

help people. It is not a device for "witch hunting" or for pursuing prejudice. Drug testing should provide freedom from fear and not add to it.

Is there a middle ground? Let me discuss some of the major legal issues that must be considered, and then provide drug testing guidelines that are protective of individual rights and seek this middle ground.

The Fourth Amendment - Search and Seizure - Privacy

Most lawsuits resulting from drug testing are based in whole, or in part, on an alleged violation of an employee's Fourth Amendment right to be free from unreasonable searches. Drug tests are generally regarded as searches, however, this is still being litigated.

These situations usually only apply to governmental employment or action. A private employer's drug testing program usually cannot violate an employee's constitutional right to be free from unreasonable searches unless the government is involved in some respect.

Courts generally hold that only public or government regulated industry employees have rights to a "reasonable" search by the employer. What is considered reasonable? First of all, absent justifying circumstances such as a substantial safety hazard, some incident or "individual suspicion" is usually necessary.

The employer must have some reason to suspect an employee has used or is under the influence of alcohol or drugs. This suspicion should be based on specific objective facts and "reasonable" inferences drawn from those facts. This "reasonable suspicion" must be supported by circumstances strong enough to warrant a belief that the employee has, more likely than not, been using drugs at work or has been impaired by off-the-job use. If an employee is to be selected for testing on the basis of some reasonable suspicion, the standards for this suspicion should be fair and reasonable. Ideally, supervisors should be trained to identify work performance problems or other signs of drug use and to document these observations.

What are some criteria for establishing "reasonable suspicion."

1. A pattern of absenteeism, lateness, unusual or erratic actions, or deteriorated work performance.
2. Appearance of being under the influence - slurred speech, staggering, odor of alcohol, etc.
3. Arrest, conviction, or investigation concerning a drug related criminal offense.
4. Reliable information supplied by company personnel or others.

Freedom from all searches and seizures is not absolute. It must be subjected to a balancing test of reasonableness. The reasonableness of a search must be evaluated in the context of the place and nature of the employment and the employee's reasonable

expectation of privacy. For example, there may be compelling reasons to test that override the need for individualized suspicion. Public safety, and other important public or employer interests, may permit random searches or employee testing even in the public sector. Such searches must be logically and factually justified and administered neutrally, with appropriate procedural safeguards.

Private industry is generally not as constrained by the Fourth Amendment, however, if private employer searches are unreasonably intrusive or clearly unfair, an employee may be able to sue under tort, contract, or state privacy law. The law may balance the employee's right to privacy and/or contract rights against the right of the employer to conduct business and enforce work performance standards.

Government and private employers should establish drug testing programs with protection of employee privacy in mind. Unless there is a safety, security or similar need, drug testing should be conducted on a "reasonable suspicion" basis. Drug tests can, thus, be used to enforce legitimate work performance standards and work rules.

A privacy issue that often arises concerns whether specimen donation must be observed to insure it is not adulterated. Observation may not be necessary. There are some methods of avoiding

adulteration of a urine specimen without having to observe the urine donation.

1. Use a secure rest room for the specimen donation.
2. Put a coloring agent in the toilet water.
3. Disconnect the hot water faucet.
4. The donor should remove outer clothes and personal possessions not necessary.
5. Measure the specimen's temperature, PH, and specific gravity.
6. Follow proper chain of custody procedures.

Due Process

The U.S. Constitution requires the government to provide a person with "due process" before depriving him/her of "life, liberty, or property." Due process means that the government must provide a fair decision-making process before taking measures that affect these rights. While enforcement of this constitutional right is meant to protect against governmental interference, the concept of "due process" is so firmly rooted in our country by custom and contract that even private employers should strive to use fair procedures at all times in dealing with employees.

When employees claim that drug testing violates due process, they usually argue that the test are inaccurate, not related to work performance, or that the employees were not given a chance to contest the test results or ensuing discipline.

When looking at accuracy arguments, it is important to note that courts have consistently upheld the accuracy of drug tests that are properly performed, especially when they are confirmed.

On the issue of work performance, employees may argue that drug tests show only that an employee has ingested a substance at some time and do not show current impairment, therefore, the test cannot be used as proof of impaired work performance. These employees argue that it would be unfair to discipline someone unless she/he is impaired on the job. This argument, however, breaks down if one uses the reasonable suspicion standard, or a job-relevant work rule that forbids employees from using drugs. If an employee exhibits poor work performance or appears to be under the influence of alcohol or other drugs, the test can be used as further evidence that work is affected. Most testing programs are based on such work performance standards.

The first step in addressing due process is to ensure that a testing policy should include advance notice to employees of the consequences of a positive test result. This can best be achieved by developing a company policy which is given widespread publicity within the company thrcugh printed notices and training. The company drug testing policy must be clearly written and consistently enforced.

If an employee has a confirmed positive test result, she/he should be allowed to discuss this with his/her superiors or, if appropriate, have a hearing before any possible disciplinary action is taken. Employers should examine the employee's explanation or evidence to determine if it is legitimate.

Equal Protection

In some instances, public employers have singled out one group of employees for testing. These employees can raise the issue of "equal protection"; i.e., that it is unfair to be singled out. Such procedures on the part of an employer are acceptable providing there is a good reason, and providing there is no focus on legally protected classes of people, such as women, minorities, or handicapped persons. To avoid problems, both public and private employers should base the selection of certain groups of employees on business needs, or specific evidence of work-related problems among a designated group of employees.

Self Incrimination

The Fifth Amendment to the U.S. Constitution prohibits the government from forcing a person to provide testimony which will tend to incriminate him/her. In a notable case, the court held that blood tests are not protected under the Fifth Amendment because they are not "testimony." Testimony requires communication via speech, writing or other means. This same principle applies to breath and urine tests in that providing a specimen is not generally regarded as self incrimination.

Pre-employment

Pre-employment screening tests are generally acceptable. However, all pre-employment testing should be done in a consistent, nondiscriminatory manner; i.e., given to all who apply or given to justified selected job categories.

If the test is positive, the employer should notify the applicant and given him/her a chance to contest the results.

The employer should have a written policy on pre-employment testing, and it should explicitly include procedures for confidentiality. If an employee is rejected for a positive test result, the result should be kept confidential.

Can one legally reject a drug user from employment? Isn't this discrimination under laws protecting the handicapped? An employer can reasonably require that potential employees not be drug users, as long as this policy has a legitimate business purpose and is enforced against all similarly situated applicants.

Off-the-Job or Off-Duty Problems

How should one deal with employees who use drugs on their own time, test positive, but are not intoxicated or "under the influence" at the time of the test? For example, depending on the level of use, the presence of marijuana can be detected in the body for days or weeks. Even in such cases, the nature of the job may allow some

action against the employee, if there are sound business reasons why particular employees should never use drugs. For example, the U.S. military, which performs extensive testing of its personnel, has a compelling national security reason prohibiting any drug use at any time by personnel.

In some private companies where there are safety or security concerns, it might be reasonable to require employees to never use any illegal drug because of the potential threat of accidents, blackmail, or corruption. In the case of public employees, however, you may need to have reasonable suspicion to ask the employee to take the test, unless there was prior agreement or some compelling reason that such tests were necessary.

An employer may have a right to take action for off-job or off-duty behavior if the behavior would demonstrably damage the company's reputation, affect the employee's attendance at work or subsequent job performance, or lead to the refusal or reluctance or inability of fellow employees to work with the employee.

Confirmation of Tests

Confirmation of test results is recommended. This avoids the time-consuming and expensive process of having to prove that the initial screening test was accurate. A policy of confirming tests leads to a level of fairness and certainty that reinforces decisions in discipline or termination.

It is recommended that initial positive results be confirmed by an alternative scientific method of equal or greater sensitivity. This ensures that the result is correct and can also detect any procedural errors.

Sometimes, an employee requests that the sample be sent to another laboratory for retesting. Since laboratories may differ in their procedures, it is important that the second laboratory uses a method with equal or greater sensitivity. Otherwise, the second laboratory may report a negative result, which will destroy the value of the initial test..

Random Tests

Due to the nature of a business or a particular job group, an employer may think it necessary to test employees on a random basis and not wait for individual suspicion to develop. Such random testing is subject to careful scrutiny by courts and arbitrators. In some cases, random testing for public employees has been allowed. Public and private employers would be well advised to justify the need for such random tests on the basis of specific workplace circumstances rather than a general concern about societal drug use.

If a public sector employee's job directly involves public safety, a random drug testing requirement may be upheld. In

these cases, the benefit of doubt may go to the concern for safety, because lives should not depend on advance subjective detection of the often subtle effects of alcohol and other drugs.

Random testing should not be used as a means for selecting employees arbitrarily for testing. The only fair method of selection for random testing is when each employee has an equal chance of being selected for testing. Use of some neutral selection method will assure that some degree of statistical randomness is achieved.

The purposes of random testing are early detection and deterrence. Employees who know they will be tested at random are expected to be more likely to avoid behavior which will compromise their jobs. Nevertheless, this selection method engenders more employee resistance or opposition than the other test methods. Thus, employers should not resort to random testing until other methods have been explored or exhausted.

Intoxication and Impairment

Testing has been attacked because it may only prove that an employee at some time ingested drugs. Impairment, intoxication, or time of last use cannot usually be determined from a drug test. This determination may not be necessary. If a testing program is based on reasonable suspicion it means there is other evidence of impairment. The test merely provides scientific proof to backup the other evidence. In addition, testing can determine a pattern

of drug use. If a person tests positive and is referred to counseling, additional tests will allow a better understanding of past and current use patterns. For example, in the case of marijuana, a positive test indicates that the person used marijuana in the past--which could be hours, days, or weeks depending on the specific use pattern and the cut-off level or sensitivity of the test. An infrequent user should be completely negative in a few days. Repeated positive analyses over a period of more than two weeks indicate either continuing use or previous heavy chronic use. In addition, on a pre-employment test, impairment is not an issue.

How can a testing program be established that is protective of employee rights? Programs should be developed following a process similar to the one described below.

The Process of Establishing a Drug Testing Program

1. Document the need for testing

Why have a testing program? Is it necessary to enforce work performance standards, or for employee and/or public safety, security, or public trust? Do you have illegal drug sales on company premises? Consider also pre-employment tests and employee assistance program treatment and monitoring.

2. Steps in developing a testing policy

- Involve representatives from the sections of the organization

likely to be involved in the program. Include labor, affirmative action, personnel, EAP, legal, security, medical, occupational health and safety, risk management, etc.

- Develop a policy which includes:
  a. statement of need for the program
  b. work performance standards
  c. rules regarding alcohol and drug use on and off duty and company premises
  d. confidentiality of test results
  e. method of testing - pre-employment, random, reasonable suspicion
  f. consequences of refusal to take a test
  g. consequences of positive tests as they relate to rehabilitation, discipline, discharge, job assignment or other actions
  h. opportunities for rehabilitation
  i. rights of employees to due process and to be free from discrimination
  j. EAP and/or treatment monitoring procedures
  k. company responsibility to be fair and provide dignified testing
  l. procedures for confirmation of positive test results.

Implementation of the Policy

- The cost of the program must be considered, including insurance and treatment costs.
- Develop procedures to include test administration, specimen collection and storage, chain of custody, and confidentiality. Establishment of chain of custody procedures is very important. Chain of custody is the term applied to the safeguarding of a test specimen to ensure that the specimen collected is the same one that is tested. The chain of custody is important for your program's integrity and in case the test result becomes part of a legal dispute.
- Testing procedures must be implemented that do not humiliate or harass employees.
- Consent to test must not be obtained by fraud, misrepresentation, or threats.
- Scientific and test manufacturer's procedures must be followed.
- All testing equipment should function properly and be subjected to documented maintenance and examination.
- Tests must be administered and specimens stored in accordance with state law.
- Change any labor-management agreements to comply with the policy if necessary.
- Inform all employees of the policy in writing and train employees and supervisors on the policy.

- If you choose to use on-site testing equipment, get proper training for your staff on the equipment and procedures.
- If you choose an outside laboratory, choose a well qualified laboratory that adheres to good quality control and state and federal law.
- Create a committee of relevant company representatives to oversee the program on a continuing basis.
- Have your program evaluated every few years by an outside consultant.

The New Jersey "Pre-Employment and Employment Drug Testing Standards Act"

New Jersey currently has a bill before its legislature that incorporates adequate protections for employees. It provides uniform standards for public and private employee drug testing and limits random testing to safety and security needs or other compelling interests. It requires employers to have written policy statements 30 days prior to implementing a program, and provides employees with the right to get tests confirmed and to contest the test results. Rehabilitation is called for and there are strict confidentiality protection. The bill also authorizes an aggrieved employee to file a civil suit in appropriate circumstances for lost wages, benefits, employment rights,as well as costs and attorney's fees.

Finally, the bill creates an Advisory Committee on Employee Drug Testing, which would solicit information and make recommendations regarding guidelines and regulations. The Advisory Committee will have 12 members including government health and labor officials, organized labor, a physician, and a representative from the American Civil Liberties Union.

In closing, please know that it is gratifying to see that you have taken on this important issue. We are well on our way to resolving it successfully. Drug testing has its place, as long as individual rights are protected and the public health and safety benefit.

Drug Testing, Work Performance, And EAPs: Recent Legal Guidelines

by David G. Evans, Esq.

Drug testing in industry is here to stay. Although there are currently a number of legal battles under way, the basic question of the legality of drug testing has been decided in favor of testing. No court has decided that testing is per se illegal. What the courts have decided is that some testing programs or policies are proper or not. In doing so, the courts have provided guidelines on how a proper program should be implemented. This article will explore these guidelines and how they relate to work performance and EAPs.

Some EAP professionals have mixed feelings about testing. Some feel it conflicts with the goals of an EAP. Others feel that it undermines the need to enforce employee job performance standards. In addition, there are concerns about test accuracy and potential discrimination against employees. In looking at recent court cases and legislative proposals, it appears that EAPs have little to fear from testing and everything to gain. The recent cases and legislation reinforce the idea of testing "for cause," i.e. to enforce proper work performance standards. They also call for testing programs to be accurate, confidential, and aimed at rehabilitation. Let's explore these issues and see what guidelines have been developed.

In private and public industry, a "for cause" testing policy is usually best.[1] Under such a policy, a test may be requested if "reasonable suspicion" exists such as specific objective facts and reasonable inferences on the job that suggest an employee is using drugs or alcohol. These observable facts could include accidents, carelessness, erratic behaviors, or other job performance problems. These may be the same criteria for an EAP referral.

In addition there may be other work related reasons to test, such as public safety or security.[2] In some private companies, such as financial institutions where there are security concerns, it might be reasonable to require employees to never use any illegal addictive drug because of the potential threat of corruption. In some cases, where public confidence in employees is important, testing of employees for drug use on or off the job may be justified.[3]

WORK PERFORMANCE STANDARDS

Testing has been criticized because it may not be able to show the level of drug impairment in the same way a breath-

ABOUT THE AUTHOR —David G. Evans, Esq., specializes in the legal aspects of drug testing and other areas of substance abuse. He has authored two books on legal issues published by Hazelden, and has made a number of presentations at national and regional ALMACA conferences. Mr. Evans practices in Lawrenceville, New Jersey.

alyzer can determine the level of alcohol impairment. This determination may not be necessary. If you base your testing program on work performance standards, it means there is other evidence of impairment. The test merely provides scientific proof to back up the other evidence. In addition, testing *can* determine a pattern of drug use. If a person tests positive and is referred to counseling, additional tests will allow a better understanding of past and current use patterns. For example, in the case of marijuana, an infrequent user should be completely negative in a few days. If you test the person again and there is another positive test, this can indicate continuing use or previous heavy chronic use.

Testing for legitimate business purposes does not appear to violate discrimination laws protecting alcoholics and drug addicts. If an alcoholic's or addict's current use of drugs makes him unable to perform a job, or would pose a threat to the safety of persons or property, the discrimination laws may not apply.[4]

When employee assistance programs (EAPs) are established by companies to help employees with personal and work performance problems, a test can be used to generate a referral to an EAP. It is best not to have the EAP do the testing because this undermines the rehabilitative nature of the EAP. Once a drug user is sent to an EAP, the company could require random urine drug tests during and after treatment to ensure that the employee refrains from drug use. Some counselors like to use drug abuse testing as part of the treatment process to overcome any denial of a drug abuse problem or to reinforce abstinence.

If the employee does not respond to treatment, the company can use urine testing to justify disciplining or discharging the employee. In the long run, this is more fair to the employee because the decision is based on scientific evidence instead of subjective allegations.

Recent court cases and legislation provide general guidelines on how to set a testing policy which reinforces job performance standards and EAPs.

Most of the court cases involving testing result from testing programs for government employees, or in industries regulated by the government.[5] When the government is involved, there is a greater concern about constitutional rights because many of our constitutional protections were designed to restrict the government. These cases set a stricter constitutional standard than may be required in private employment. However, if a company develops its program according to these stricter standards, it will stand a better chance of holding up under any legal scrutiny.

RIGHTS AND PUBLIC EMPLOYMENT

What are the rights that have been developed in the public employment cases? First of all, employees must have notice that testing is a possibility and how it will be conducted. Testing in most cases should be on the basis of reasonable suspicion. Employees have due process rights to a fair hearing before sanctions are applied as a result of a positive test. Testing must be conducted fairly and according to proper scientific procedures. All positive tests should be confirmed by another scientific method of equal sensitivity, or at least a repeat of the test. This will guarantee test accuracy, although in fact, the tests are extremely accurate. They meet strict legal proof requirements as long as they are properly performed.[6] If you follow the manufacturer's instructions and are properly trained, the test will be accurate. Confirming the test, however, is the best policy. It guarantees fairness to the employee. In addition to confirmation, the recent cases call for rehabilitation and confidentiality.

One leading case, Shoemaker v. Handel,[7] upholds the above standards, and is beginning to bridge the gap between public and private employment. The plaintiffs are jockeys who brought an action challenging the New Jersey Racing Commission regulations providing for administration of breathalyzer tests and random urinalysis tests to jockeys at the race track. The regulations were established to protect the jockeys from accidents and to deter corruption. The lower and appellate federal courts upheld the testing program. The case was appealed to the U.S. Supreme Court by the jockeys and the court refused to hear the appeal.

In the testing program, oral and written notice is provided to all persons affected by the testing. The test results are kept confidential. If a jockey tests positive for alcohol or drugs, the tests are used to monitor the jockey, and if there is a repeated offense, to send the jockey to rehabilitation. For a third violation, punishment may result, such as fines and expulsion from racing in New Jersey. The jockeys have a right to a hearing before being disciplined.

What are the principles the case upholds?

1. Testing must be related to a legitimate business or public purpose.
2. Due process and notice must be provided.
3. Rehabilitation is desirable before punishment or discharge.
4. Confidentiality is a requirement.

In another leading case, Railway Labor Executive's Association v. Dole,[8] the U.S. Department of Transportation began to implement a nationwide drug and alcohol testing program for railroad employees. The program requires preemployment drug testing, and post accident alcohol and drug testing of employees involved in major accidents, authorizes toxocological testing when there is reason to suspect impairment, as well as tests based on reasonable suspicion. In addition, each carrier must adopt a policy to aid in the identification of troubled employees prone to alcohol or drug use.

The federal trial court found that the program was proper, thus upholding job related work performance standards and employee rehabilitation.

In addition to these cases, various legislative proposals have established the legality of testing and have established guidelines. The proposed bill in New Jersey is a prime example.[9] This bill provides that employees who test positive can be offered rehabilitation. EAPs are mentioned in the bill for this purpose. The bill also provides notice requirements and strict confidentiality rules, and that the tests must be properly performed and positive tests must be confirmed.

With these cases and laws in mind, how can a testing program be established that incorporates these principles and works well with an EAP?

Guidelines for Establishing a Drug Testing Program

- *Document the need for a testing program.* Is it necessary for enforcement of work performance standards, the detection of illegal drug possession, pre-employment appraisal, or EAP monitoring?

- *Develop a testing policy.* Include unions, management, personnel, occupational health and safety, affirmative action, risk management, security, legal department, and the EAP. The policy should deal with the following issues:
  - Need for the policy.
  - Use of drugs or alcohol on company premises and on or off duty.
  - Need for company-wide awareness of work performance standards.
  - Possible consequences of positive test results as they relate to discharge, discipline or other sanctions.
  - Policy on rehabititation opportunities if an employee tests positive.
  - Need for compliance with state and federal discrimination laws.
  - Procedures for referral to the EAP.
  - Responsibility of employees to seek treatment.
  - Confidentiality of test results and treatment.
  - Circumstances in which testing will be required; i.e., pre-employment, random, for-cause, post-accident, etc.
  - Consequences of refusal to take required drug tests.
  - Company responsibilities for fair and dignified testing procedures.
  - Due process procedures for employees who test positive.
  - Procedures for confirmation of positive tests.

- *Implementation of the Policy*
  - Modify collective bargaining agreements to comply with the policy.
  - Inform, in writing, all job applicants, employees, and supervisors of the policy. All employees and supervisors should receive training on the policy and work performance standards, and on how the EAP operates.
  - A procedures manual should be developed for test procedures. It should include specimen collection, chain of custody, storage, confidentiality and procedures for on-site testing.
  - If specimens are sent to a laboratory, choose a laboratory that is responsible, and in compliance with state and federal laboratory laws.
  - Have the program evaluated periodically by an outside consultant.
  - Establish an ongoing program improvement committee composed of company representatives directly affected by the program and legal counsel.

Establishment of chain of custody procedures is very important. Chain of custody is the term applied to the safeguarding of a test specimen to ensure that the specimen collected is the same one that is tested. The chain of custody is important for your program's integrity and in case the test result becomes part of a legal dispute.

Your chain of custody procedures should be established with your attorney's advice. In general they should include issues such as proper identification of the specimen, protecting specimen containers, transportation, and quality control.

By using proper procedures, a testing program can be used to reinforce work performance standards and your EAP. Confidentiality, rehabilitation, fairness, and enforcement of work performance standards are the keys to the proper connections between a testing program, an EAP, and to meeting the requirements of the law. □

FOOTNOTES

[1] *Division 241 A.T.U. vs. Suscy* 538 F2d 1264 (1976); *Allen vs. City of Marietta* 601 F Supp. 482 (1985)

[2] *Najera vs. Southern Pacific Co.* 13 Cal. Rptr. 146 (1961); 29 USCA 651

[3] *Masino vs. U.S.* 589 F2d 1048 (1978); *McDowell vs. Goldschmidt* 498 F Supp. 598 (1980)

[4] 29 USCA 706(7)(b); *McLeod vs. City of Detroit* 39 FEP Cases 225 (1985)

[5] *McDonnell vs. Hunter* 612 F Supp. 1122 (1985); *Capua vs. Plainfield* No. 86-2992 (D.N.J. opinion 9/18/86)

[6] *Jensen vs. Lick* 589 F Supp. 35 (1984); *Peranzo vs. Coughlin* 608 F Supp. 1504 (1985); *Wykoff vs. Resig* 613 F Supp. 1504 (1985)

[7] *Shoemaker vs. Handel* 608 F Supp. 1151 (1985), affirmed step opinion filed July 10, 1986, 3rd Circuit No. 85-5655

[8] *R.L.E.A. vs. Dole* ND Cal C-85-7958, see also 120 LRRM 3082 and 54 LW 3498

[9] N.J. Assembly Bill 2850, still in committee as of 10/28/86

Frequently Asked Questions About Syva and Drug Abuse Testing

Syva/a Syntex company worldwide

Table of Contents

I. TESTING AND RESULTS

A. What is an immunoassay?

An immunoassay is a test that uses antibodies to detect the presence of drugs and other substances in urine or blood. Each immunoassay uses antibodies that react only with that particular drug* for which the sample is being tested. In the test mixture, these antibodies attach themselves to the drug if it is present in the sample. Each drug is detected by various means, depending on the type of immunoassay.

B. Who uses immunoassays manufactured by Syva and why?

Emit® urine assays are used to detect the drugs most commonly abused in our society today. These assays range from simple tests done on a small, portable unit to multi-step tests run on a large clinical laboratory analyzer. Major users of Emit® urine assays for drugs of abuse include hospital laboratories and emergency departments, drug and alcohol treatment programs, parole and probation agencies, prisons, work release programs, the U.S. military, and medical or security departments of public institutions and private industry.

Emit® assays are also used in hospitals, medical laboratories, and doctors' offices. More than 30 Emit® assays are available to measure serum or plasma levels of prescribed drugs, such as those used to treat heart conditions, asthma, and epilepsy, to aid physicians in adjusting drug dosages for safe and effective treatment.

*Or drug metabolites, which are compounds resulting from the breakdown of drug by the body.

C. How does an Emit® urine drug test work?

Step-by-step, an Emit® test works as follows:

1. An Emit® test contains antibodies that attach themselves to drug in a person's urine sample.
2. All the antibodies that have not become attached to drug in the sample attach themselves to chemically tagged drug from the Emit® test reagent.
3. Chemically tagged drug without any attached antibody produces a chemical reaction that changes the light-absorbing properties of the test mixture. Tagged drug that has attached antibody is inhibited from producing the chemical reaction.
4. Emit® test instruments measure changes in the amount of light the sample absorbs, which is related to the amount of drug the sample contains. The more drug present in the person's urine, the greater the response produced. On the other hand, if there is no drug present in the sample, the response is minimal.
5. To determine the presence or absence of detectable drug, the sample's response is compared to the response of a calibrator which contains a known amount of drug. If the sample's response is less than that of the calibrator, the sample is considered to be negative. Conversely, if the sample's response is higher than or equal to the calibrator's, the sample is considered to be positive for the drug.

D. Does an Emit® urine drug test measure the amount of drug present in the urine?

Concentrations of compounds in urine may vary widely because of individualized excretion patterns, fluid intake, diet, and the effect of physiological and psychological stresses on kidney function. Therefore, Emit® st™ urine assays are not designed to measure the amount of drug present in urine samples. They provide either positive or negative results, indicating the presence or absence of detectable drug. The Emit® st™ urine assays also can be run on the Syva Ost™ System to yield positive or negative results.

Emit® d.a.u.™ urine assays can give, in addition to positive-negative results, data that can be used to estimate the approximate concentrations of drug and drug metabolites present.

E. What do the test results mean?

A positive result means that drug is present in the urine sample at a detectable level. It does not necessarily mean that the individual is intoxicated, since there is no established relationship between amount of drug in urine and intoxication.

A negative result means that either there is no drug present in the urine sample or the level is so low that it is undetectable by the test.

F. How long after taking a drug can it be detected in the urine by Emit® tests?

Drugs vary considerably in how quickly they pass through the body. This variation depends on the drug, the individual's metabolism, the frequency of drug use, and the amount of drug ingested.

Depending on the above, most drugs can be detected in the urine for up to three days after being taken. Some drugs, such as methaqualone and phenobarbital, however, may be detected for as long as two to three weeks. Other drugs, such as some amphetamines and secobarbital, pass through the body so quickly that a negative result may be obtained from someone who has recently used the drug. Recent studies have shown that due to highly individualized excretory patterns of cannabinoids, consistently negative results may not be seen for several days to more than a month after marijuana use, particularly in the case of heavy use (1).

G. Can Emit® urine drug tests determine the mode of administration?

No, the Emit® urine assays detect only the presence of drug in the sample.

II. TEST RELIABILITY

A. How accurate are Emit® urine drug tests?

Emit® urine drug tests have been shown to be among the most consistently accurate drug testing methods in current use.

Syva has abstracted recent studies comparing Emit® assays with other commonly used methods including radioimmunoassay (RIA), thin-layer chromatography (TLC), gas chromatography/mass spectrometry (GC/MS), gas-liquid chromatography (GLC), high-performance liquid chromatography (HPLC), bonded phase adsorption (BPA), and gas chromatography with flame ionization detector (GC/FID) (2). Researchers cited the ease of use, speed of performance and excellent sensitivity of Emit® assays. One of these studies (Frederick et al.) yielded a 97-98% confirmation of the Emit® assays (3). Another (Jones et al.) resulted in a 96% confirmation by a less sensitive method, then a 100% confirmation by GC/MS (4). Kogan et al.,reported a 100% confirmation of 100 samples analyzed by Emit® d.a.u.™ (5); a follow-up by Verebey et al., in 1986, resulted in a 100% confirmation of Emit® assays by using BPA/TLC, RIA, and GC/MS (6).

B. Are there any medications that can cause false positive test results?

In general, no. However, medications with very similar chemical structures may sometimes produce positive results in certain tests. The levels at which tested medications may interfere are listed in the product literature accompanying each test or in notifications mailed directly to Syva customers.

For more detailed information, customers are invited to call Technical Consultation toll free at (800) 227-9994; those in California may call (800) 982-6006.

C. **Is it necessary to confirm a positive result? How should this be done?**

No test method can consistently provide 100% accuracy. Therefore, for maximum confidence in results, Syva recommends confirmation of positive results by an alternative scientific method.

The most scientifically valid means of confirming a positive result is to test the sample by a method based on a scientific principle different from the Emit® urine drug test. The confirmation method must be at least as sensitive as the Emit® tests. The specific confirmation method used will vary depending on the drug in question. Well-recognized confirmation methods include gas chromatography (GC), either alone or followed by mass spectrometry (GC/MS); thin-layer chromatography (TLC); and high-performance liquid chromatography (HPLC).

In certain environments, repeating the test or obtaining verbal corroboration of drug use from the individual may satisfy the need for verification. If objective verification of greater accuracy is required, Syva recommends confirmation by an alternative scientific method of at least equal sensitivity.

III. CANNABINOID (MARIJUANA) TEST

A. **Can a nonsmoker in close contact with others who are smoking marijuana give a positive result in a Syva test?**
Research conducted to study the effects of passive inhalation of marijuana varies widely in experimental conditions. Variants include ventilation, enclosure size, length and frequency of exposure, and concentrations of THC (delta-9-tetrahydrocannabinol).

While a few positive results were obtained using the more sensitive Emit® d.a.u.™ Cannabinoid 20 Assay, not a single urine specimen from a passive "smoker" produced a positive result at the Emit® d.a.u.™ 100 ng/mL cut-off level (7). Peak urine concentrations were generally found in either the first or the second urination after exposure, and these lower-level positives tended to revert quickly to negative, usually within twelve hours.

It is important to keep in mind that all of these studies investigated the effects of passive inhalation under rather extreme conditions. So far, no study has simulated the exposure conditions found in real-life situations, such as passive exposure at a public concert or private party. However, it would obviously be difficult to encounter such extreme passive inhalation exposure levels in a real-life situation without at least the tacit consent of the person exposed (8).

B. **How long after smoking marijuana can drug be detected in the urine?**
In general, due to highly individualized excretory patterns, consistenly negative test results may not be seen for several days to several weeks after ingesting or inhaling marijuana. Heavy, chronic use will extend that period (1).

As seen in recent studies, the Emit® 100 ng/mL assay will detect drugs in light users for 2 to 3 days and in heavy users for 6 to 19 days (1,7).

C. If a person gives a negative result one day and a positive result the next day, does it mean he has smoked marijuana again?
Not necessarily. Marijuana is stored in the body and is broken down into compounds which are released in an erratic pattern over a period of days or weeks. Thus, a person could give a negative result several days after discontinuing smoking, followed the next day by a positive result. Depending on the person's prior frequency of marijuana use, it may take days to weeks before test results become consistently negative.

D. How can a test for marijuana work when there are so many different types of marijuana?
Although there are many different types of marijuana, all contain the same active ingredient, delta-9-tetrahydrocannabinol (THC), which is thought to be responsible for the "high." This substance is broken down in the body to form a number of compounds, or metabolites. These breakdown compounds are excreted in the urine and are detectable by the tests. Because all types of marijuana are broken down to the same metabolites, they are all detected by our tests.

E. Can the Syva cannabinoid urine test be used to determine intoxication?
No, nor can any urine test for marijuana use. No clinical or legal definition of marijuana intoxication has been established.

IV. USE OF EMIT® URINE DRUG TEST RESULTS IN COURT

A. **Can Emit® urine drug tests be used as evidence in court?**
Emit® urine drug test results can and have been admitted as evidence in a variety of legal proceedings (9). The Emit® method is well recognized by experts as a valid method of testing for drugs of abuse.

B. **In what types of court proceedings have Emit® urine drug tests been used as evidence?**
Emit® urine drug test results have been used as evidence in the revocation of parole and probation privileges, in prison disciplinary action, and in sanctions against employees. In many such cases, Emit® test results have been used in conjunction with other evidentiary information.

Note: For the most current information concerning legal issues and questions, consult Syva Company.

For those involved in drug testing who may have to testify in court, an informative monograph entitled "Instructions for Witnesses" is available from Syva (10).

V. REFERENCES

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9. Collins WC: Urine Testing and the Workplace: Some Legal Considerations. Syva Company, Palo Alto, CA.*

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*Available on request from Syva.

WP: 2138K

Update: 8/87

Provided by ABA

DRUG TESTING IN THE WORKPLACE

Summary of State Actions

HOUSE LABOR RELATIONS COMMITTEE
Eric S. Fillman, Research Analyst
(717) 787-3085

OVERVIEW

The search and seizure provisions of the Fourth Amendment to the U.S. Constitution apply to drug testing of government employees. This means that testing may occur only when there is at least reasonable suspicion to believe that a drug problem exists. Therefore, random drug testing is unconstitutional except in exceptional situations.

Courts agree that requiring an individual to undergo a urinalysis constitutes a Fourth Amendment search or seizure. They require, at a minimum, reasonable suspicion before any drug testing may be imposed on any specific employee. Mass round-up of employees violates their constitutional rights, it has been held.

The administrative search exception to the requirement of individualized suspicion has been approved only in limited situations.

Employees who are compelled to submit to urinalysis as a precondition to obtaining a promotion may not be held to have waived their constitutional rights voluntarily.

The reliability of drug tests is a major issue. A number of courts have pointed out that drug testing is not an infallible process and that errors can occur at numerous points. False positive readings can occur when the employee who is being tested has ingested prescription and over-the-counter drugs, when the sample is stored or handled improperly, or when the results are misinterpreted.

The extent to which cases involving drug testing by governments apply to private sector employees is not yet known. Traditionally, constitutional considerations have not been applied directly to such employers. It is possible, however, that through arbitration, wrongful discharge actions, and other common law and statutory proceedings, concepts applied to government could also govern private employers.

STATE & LOCAL LAWS

CALIFORNIA - (San Francisco)

Ordinance states that all citizens of the City and County of San Francisco enjoy the full benefit of the right of privacy in the workplace guaranteed to them by the California Constitution. The purpose of which is "to protect employees against unreasonable inquiry and investigation into off-the-job conduct, associations, and activities not directly related to the actual performance of job responsibilities."

Employees other than police, sheriff, fire department, and emergency service vehicles operator employees are covered under this ordinance. Employers of those other than specified are prohibited from demanding, requiring or requesting employees to submit to any blood, urine, or encephalographic tests as a condition of continued employment. Tests are allowed if:

(a) The employer has reasonable grounds to believe than an employee's faculties are impaired on the job; and

(b) the employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public; and

(c) the employer provides the employee, at the employer's expense, the opportunity to have the sample tested or evaluated by State licensed independent laboratory/ testing facility and provides the employee with a reasonable opportunity to rebut or explain the results.

CONNECTICUT

No employer may determine an employee's eligibility for promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action solely on the basis of a positive urinalysis drug test result unless (1) the employer has given the employee a urinalysis drug test, utilizing a reliable methodology, which produced a positive result, (2) such result was confirmed by a second test which was separable and independent from the initial test, utilizing a reliable methodology, and (3) such positive result was confirmed by a third test which was separate and independent from the initial test, utilizing GC/MS methodology or a methodology which has been determined by the commissioner of health services to be as or more reliable.

No employer may require a prospective employee to submit to a test as part of the application procedure before employment unless (1) he is informed in writing at the time of application of the employer's intent to conduct such a test, (2) such test is

CONNECTICUT (cont.)

conducted in accordance with this act, and (3) the prospective employee is given a copy of any positive test result. The results of any such test shall be confidential and shall not be disclosed by the employer or its employees to any person other than any such employee to whom disclosure is necessary.

No employer or employer representative, agent or designee engaged in a urinalysis drug testing program shall directly observe an employee or prospective employee in the process of producing the urine specimen.

Test results shall be maintained along with other employee medical records and shall be subject to the privacy protections of the general statutes. Such results shall be inadmissible in any criminal proceeding.

No employer may require an employee to submit to a test unless the employer has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance.

Nothing in this act shall prevent an employer from conducting medical screenings, with the express written consent of the employees, to monitor toxic or other unhealthy substances in the workplace. Any such screenings shall be limited to the specific substances expressly identified in the employee consent form.

Nothing in this act shall restrict or prevent a urinalysis drug test program conducted under the supervision of the division of special revenue within the department of revenue services relative to jai alai players, jai alai court judges, jockeys, harness drivers or stewards participating in activities upon which pari-mutuel wagering is authorized under Chapter 226 of the general statutes.

FLORIDA - (Related law)

No person may be compelled to identify or provide identifying characteristics which, if disclosed, would identify any individual who receives or has received a serologic test. Any person who discloses the serologic test result to another person, unless the disclosure is to the person receiving the test, is guilty of a misdemeanor of the first degree.

The result of a serologic test conducted under declaration of the Secretary of the Department of Health and Human Services shall not be used to determine if a person may be insured for disability, health, or life insurance or to screen or determine suitability for, or to discharge a person from employment. Any person who violates the provisions of this subsection is guilty of a misdemeanor of the first degree.

IOWA

A used in this section, "drug test" means any blood, urine, saliva, chemical, or skin tissue test conducted for the purpose of detecting the presence of a chemical substance in an individual.

Except as provided in subsection 7 (testing allowed as part of a routine physical exam), an employer shall not require or request employees or applicants for employment to submit to a drug test as a condition of employment, preemployment, promotion, or change in status of employment. An employer shall not request, require, or conduct random or blanket drug testing of employees. (This section does not apply to preemployment drug tests authorized for peace officers or correction officers of the state, or to drug tests required under federal statutes....

This section does not prohibit an employer from requiring a specific employee to submit to a drug test if all of the following conditions are met:

a. The employer has probable cause to believe an employee's faculties are impaired on the job;
b. The employee is in a position where such impairment presents a danger to the safety of the employee, another employee, a member of the public, or the property of the employer, or where impairment is a violation of a known rule of the employer;
c. The test sample withdrawn from the employee is analyzed by an approved laboratory by the department of health;
d. If a test is conducted and the results indicate the employee is under the influence, a second test using an alternative method of analysis shall be conducted (on the same sample, if possible);
e. An employee shall be accorded a reasonable opportunity to rebut or explain the results of a drug test;
f. The employer shall provide substance abuse evaluation, and treatment if recommended by the evaluation, with costs apportioned as provided under the employee benefit plan or at employer expense, the first time a test indicates the presence of alcohol or a controlled substance. An employer shall take no disciplinary action against an employee due to the employee's drug involvement if the employee successfully completes treatment. However, if an employee fails to undergo substance abuse evaluation when required, or fails to successfully complete treatment when recommended, the employee may be disciplined up to and including discharge.

Medical screening to monitor exposure to toxic or other unhealthy substances is not prohibited.

A drug test conducted as part of a physical exam is only permissible under the following circumstances:

IOWA (cont.)

a. For a preemployment physical, the employer shall include notice that a drug test will be a part of the exam in any notice or advertisement soliciting applicants, or in the application, and an applicant shall be personally informed of the requirement at the first interview.

b. For a regularly scheduled physical, the employer shall give notice at least thirty days prior to the date the physical is scheduled.

An employer shall protect the confidentiality of the results of any drug test conducted on an employee. If an employee successfully completes treatment, the employee's personnel records shall be expunged of any reference to the test or its results when the employee leaves employment.

MINNESOTA

An employer may not request or require an employee or job applicant to undergo drug and alcohol testing unless the testing is done pursuant to a written drug and alcohol testing policy, and is conducted by a testing laboratory licensed by this act, or by an unlicensed laboratory transitionally allowed under this act.

An employer may not request or require an employee or job applicant to undergo drug or alcohol testing on an arbitrary and capricious basis.

An employer may request or require a job applicant to undergo testing provided a job offer has been made to the applicant and the same test is requested or required of all job applicants conditionally offered employment for that position.

An employer may request or require an employee to undergo testing as part of a routine physical examination, provided the drug or alcohol testing is given no more than once annually, and the employee has been given two weeks' written notice.

An employer may request or require only employees in safety-sensitive positions to undergo testing on a random selection basis. An employer may test an employee if the employer has a reasonable suspicion that the employee:

1. is under the influence of drugs or alcohol;
2. has violated the employer's written work rules prohibiting use, possession, sale, or transfer of drugs or alcohol while the employee is working, on the premises, operating the employer's vehicle, machinery, or equipment, provided that the work rules are in writing and contained in the employer's written testing policy;

MINNESOTA (cont.)

3. has sustained a personal injury, or caused another employee to sustain a personal injury; or
4. has caused a work-related accident.

An employer may test an employee participating in a chemical dependency treatment plan, and may test that employee without prior notice during the evaluation or treatment period and for a period of up to two years following completion of prescribed treatment.

The Commissioner of Health shall adopt rules by Jan 1, 1988, which govern the following:

a. Standards for licensing, suspension and revocation of laboratories;
b. Body component samples that are appropriate for testing;
c. Procedures for taking samples that ensure privacy to employees and job applicants;
d. Methods of analysis to ensure reliability, including standards for initial screening tests and confirmation tests;
e. Threshold detection levels for drugs, alcohol, or their metabolites for determining positive results;
f. Chain of custody procedures; and
g. Retention and storage procedures.

Provides for granting licenses and requiring annual fees. Sets standards for laboratory directors, and makes provisions for methods of analysis (IA technology), chain of custody procedures, certification of testing procedures, and operations reporting.

Requires mandatory confirmation tests on all positives. Provides for submission of information which may be relevant to test results (allowed within three days after test results). Provides for results to be given to employees/applicants.

An employee or job applicant may request a confirmation retest of the original sample at his own expense after notice of a confirmed positive test result. (sets up procedures)

An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of an initial, unconfirmed positive result. In addition, an employer may not discharge on the basis of a first-time confirmed positive, unless the following conditions are met:

1. The employee has been given the opportunity to participate in rehabilitation (either by his own expense, or through a health plan; and
2. The employee has either refused to participate in counseling or rehab, or failed to successfully complete the program.

MINNESOTA (cont.)

If a job applicant has been given an offer contingent upon taking a drug test, the offer may not be withdrawn on the basis of an initial screening test result.

Labs may only disclose to the employer test result data regarding the presence or absence of drugs, alcohol, or their metabolites in a sample tested. All test results are private and confidential. They may be used in arbitration or collective bargaining proceedings.

Positive test results may not be used as evidence in a criminal action against the employee or job applicant tested.

Remedial actions include: filing suit only after exhausting internal grievance procedures applicable; civil damages allowable by law; injunctive relief; and reinstatement with back pay.

UTAH

Employers may test employees or prospective employees for the presence of drugs or alcohol as a condition of hiring or continued employment. However, employers and management in general must submit to the testing themselves on a periodic basis.

Employers may require samples from employees and prospective employees, and may require presentation of reliable identification to the person collecting the samples. The employer may designate the type of sample to be used for testing.

An employer shall pay all costs of testing for drugs or alcohol required by the employer, including the cost of transportation if the testing of a current employee is conducted at a place other than the workplace.

The collection of samples shall be performed under reasonable and sanitary conditions Samples shall be collected and tested with due regard to the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions. Documentation of sample collection shall include labeling and an opportunity for employees to disclose any pertinent information which may affect the test. Sample testing shall conform to scientifically accepted analytical methods and procedures.

Employers shall develop and distribute a written policy, in which the employer may require tests for the following purposes:

a. investigation of possible individual employee impairment;

UTAH (cont.)

b. investigation of accidents in the workplace or incidents of workplace theft;
c. maintenance of safety for employees of the general public; or
d. maintenance of productivity, quality of products or services, or security of property of information.

An employer may use a verified or confirmed positive test result, or refusal to take a test, as a basis for disciplinary or rehabilitative actions, which may include:

a. Requirement of counseling or treatment;
b. suspension without pay;
c. termination;
d. refusal to hire; or
e. other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement.

All information, interviews, reports, statements, memoranda, or test results received by the employer through his drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding, except in a proceeding relating to an action taken by an employer (i.e. action based on a confirmed positive result) or in an action of defamation, slander, or damage of reputation, as provided by this act.

A physician-patient relationship is not created between an employee or prospective employee, and the employer or any person performing the test, solely by the establishment of a drug or alcohol testing program in the workplace.

VERMONT

Except as provided below, an employer or an employment agency shall not, as a condition of employment, do any of the following:

1. Request or require that an applicant for employment take or submit to a drug test.
2. Administer or attempt to administer a drug test to an applicant for employment.
3. Request or require that an applicant consent, directly or indirectly, to a practice prohibited under this subchapter.

Exception to the above: An employer may require an applicant to submit to a drug test only if all of the following conditions are met:

1. The applicant has been given an offer conditioned on a

VERMONT (cont.)

negative test result. A conditional offer shall not be necessary if the applicant resides more than 200 air miles from the place the applicant is to be tested.

2. The test is given not less than ten days from the date the applicant received written notice. The notice shall list the drugs to be tested. The notice shall also state that therapeutic levels of prescription drugs tested will not be reported.

3. The drug test is given as part of or in conjunction with a comprehensive physical exam, but the test and exam need not be taken or administered at the same time.

4. The drug test is administered according to this act.

Employees are subject to virtually the same conditions as above, with the following changes. The employer cannot, as a condition of employment, promotion or change of status of employment, or as an expressed or implied condition of a benefit or privilege of employment, test, attempt to test, or request or require that an employee consent, directly or indirectly.

An employer may require a drug test of an employee if the following conditions are met:

1. The employer has probable cause to believe the employee is using or under the influence of a drug on the job.

2. The employer has available a bona fide rehabilitation program.

3. The employee may not be terminated if the test result id positive and the employee agrees to participate in, and then successfully completes the employee assistance program. (The employee may be suspended only for the period of time necessary to complete the program, but no longer than three months.) The employee may be terminated if, after completing the EAP, the employer subsequently administers a drug test upon another instance of probable cause, and the test result is positive.

Testing requires a written policy on the part of the employer. Blood tests are prohibited. The employer shall use a laboratory designated by the department of health. Chain of custody must be ensured. If urinalysis is performed, GC/MS must be used to confirm.

An employer shall provide an employee or applicant to be retested at an independent laboratory at the expense of the employee/applicant, and shall consider the results of the retest.

RECENT DEVELOPMENTS

CALIFORNIA

Legislation to allow employers to conduct drug testing of employees based on "reasonable suspicion" of drug or alcohol impairment was stalled May 21 by the California Senate's Industrial Relations Committee but will be reconsidered in 1988, according to a spokeswoman for the sponsor, Sen. John Seymour (R). The bill defines "reasonable suspicion" as "a belief based on facts sufficient to lead a reasonable person to suspect that the employee is under the influence of drugs or alcohol." SB 1611 provides for confidentiality of test results, independent confirmation of the tests, and guidelines for assuring the quality of the testing procedure. Seymour's bill, if passed, would supersede all local drug testing laws, such as San Francisco's controversial ordinance. A second Seymour bill (SB 1610), which deals with random testing in safety-sensitive jobs, also will be reconsidered in 1988.

A companion bill by Assemblyman John Klehs (AB 330) cleared the Assembly Labor and Employment Committee May 20, 1987. The bill would establish a state licensing procedure for laboratories that analyze drug test samples for employers. The Ways and Means Committee is next to consider the bill. Similar to a measure vetoed in 1986 by Gov. George Deukmejian, AB 330 also would require confidentiality of test results, give employees the right to copies of results, allow for voluntary participation in drug rehabilitation programs, raise licensing fees, and provide for the retention of samples for at least 90 days.

KANSAS

Attorney General's Opinion, issued March 19, 1987, rules that mandatory drug tests without regard to job performance violates the Fourth Amendment prohibition against "unreasonable searches and seizures." However, there is no constitutional bar to testing county employees when the employer has a reasonable, objective basis to suspect illicit drug use. Further, while mandatory tests of job applicants without regard to job requirements violates the Fourth Amendment, testing is permissible if done to learn whether an applicant is physically capable of performing the duties of a particular job, including testing of all applicants for public safety positions.

MARYLAND

Indiscriminate urine testing of state employees for drug use would be an unconstitutional search and seizure, according to an opinion issued October 22, 1986 by then-Attorney General Stephen H. Sachs.

VIRGINIA (cont.)

drug screening for public safety occupations is legal. In an opinion requested by a state legislator, Terry said that the legality of testing public employees depends largely upon the circumstances and that her responses were therefore general in nature. But on the question of random mandatory testing for state and local employees whose jobs are related to public safety, Terry said, "It is clear that the balance of interests in most work situations requires that drug testing be conducted only on the basis of at least 'reasonable suspicion.' Therefore, it is my opinion that random drug testing is not permissible in most work settings, including public safety occupations."

WASHINGTON

A bill that would allow an employer to conduct drug testing of employees only when there are "reasonable grounds" to believe an employee's job performance has been affected by drugs is under consideration by the Legislature. HB 1063, which passed the House Commerce and Labor Committee March 6, 1987, requires a prior written statement setting forth the grounds for conducting the test.

FEDERAL DEVELOPMENTS

Language requiring uniformity in federal agency drug testing plans for their employees and the publication of guidelines with a two-month public comment period are included in a massive supplemental appropriations bill signed into law by the President on July 11, 1987 (PL 100-71).

The provision was offered by Rep. Steny Hoyer (D-Md) as an amendment to the conference report adopted 343-77 on June 30, 1987. The $9.4 billion fiscal 1987 supplemental spending bill (HR 1827) itself passed the House that day by a vote of 309-114 and the Senate on July 1, 1987 by a voice vote. Hoyer, who had originally sponsored an amendment that would have put off testing until at least the end of the fiscal year, said he believes ultimately "this issue must be decided in the courts, not on procedural grounds, but on constitutional grounds, and I think that will be done."

The legislation would prohibit agencies from spending any funds, under the supplemental appropriation or any future money bill, to implement the President's September 1986 drug testing order until certain conditions are met. Among these are that the Department of Health and Human Services must publish procedures for testing on a government-wide basis to ensure that the best available technology is used and that there are strict procedures for chain of custody of specimens. These are in addition to the scientific and technical guidelines HHS issued last February. The Secretary of HHS also must submit to Congress agency-by-agency analyses detailing criteria that will be used to select employees for testing, position titles designated for random testing, and the nature and frequency of the testing.

The bill also assures employee access to test results and limits disclosure of results.

Altogether, about 200,000 employees the Administration believes are critical to law enforcement and safety are exempt from the bill's provisions.

NEW STATE LAWS REGULATING WORKPLACE DRUG TESTING

CONNECTICUT: "An Act Concerning Drug Testing in the Workplace" enacted 6/87

What it does:

1. restricts random testing;

2. requires reasonable suspicion before most employees can be tested; and

3. prohibits direct observation of urine specimen collection.

Applicants:

1. Prohibits testing of job applicants unless the following conditions are met:

a) applicant has been given written notice of employer's intention to test;

b) gas chromatography/mass spectometry* is utilized; and

c) all positive results are confirmed by two different urinalysis methodologies;

d) applicant is given a copy of any positive test result.

Employees:

1. No employer can require an employee to submit to a test unless employer "has reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects...such employee's job performance."

2. Prohibits random testing except if:

a) authorized under federal law;
b) employee serves in "high-risk or safety-sensitive occupation";
c) it is part of employee assistance program.

3. Requires GC/MS plus two confirmatory tests as above.

---

* GC/MS is generally recognized as the most accurate, and the most expensive, urine test currently available.

Penalties:

Aggrieved employee may sue for general and special civil damages, plus costs and attorneys' fees, or for an injunction against any violation of the law's provisions.

IOWA: "An Act to Regulate the Circumstance and Procedure Under Which an Employer May Request a Drug Test of An Employee or an Applicant for Employment and Providing a Penalty", enacted 6/5/87.

What it does:

1. prohibits random or blanket testing of employees;
2. requires probable cause before employee may be tested;
3. regulates applicant testing; and
4. requires employer to provide substance abuse evaluation and treatment.

Applicants:

1. prohibits applicant testing unless test is given as part of pre-employment physical examination;
2. employer must use services of state approved lab;
3. confirmatory test for all positive results required;
4. applicant must have "reasonable opportunity to rebut or explain the results."

Employees:

1. prohibits random or blanket testing;
2. permits testing if:
   a) employer has probable cause to believe that an employee's faculties are impaired on the job;
   b) impairment presents danger to safety of employee, other employees, public or property;
   c) employer uses state approved lab, confirmatory testing, employee has right to rebut, as above;
   d) if result is confirmed positive, employer must provide evaluation and treatment, with costs apportioned under employee benefit plan, or at employer's expense. No disciplinary action may be taken against first offender if treatment is successfully completed.

3. permits testing as part of regularly scheduled physical exam if employer gives 30 days notice.

Penalties:

1. Aggrieved employee may sue for damages, affirmative relief such as reinstatement and back pay, or an injunction.

2. Violation of law may be punished as simple misdemeanor.

MINNESOTA: "An Act Relating to Employment; Regulating Drug and Alcohol Testing of Employees and Job Applicants", enacted 6/3/87.

What it does:

1. restricts random testing;

2. requires reasonable suspicion before most employees can be tested; and

3. regulates applicant testing.

Applicants:

1. Only those applicants to whom job offer has been made can be tested;

2. use of lab licensed by state required;

3. confirmation of positive screen by GC/MS required;

4. applicant has right to explain or rebut positive result and may request further confirmation of original sample at own expense.

Employees:

1. Permits testing as part of regular physical exam as long as two weeks notice has been given;

2. permits random testing of employees in "safety-sensitive" positions;

3. permits testing on basis of reasonable suspicion, including post-accident;

4. requires use of licensed lab, confirmation by GC/MS and right of rebuttal and retest as above;

5. may not be discharged on basis of first confirmed positive unless given opportunity at own expense or under employee benefit plan to attend counseling

or rehabilitation program and employee has refused or failed successfully to complete program.

Penalties:

1. Aggrieved employee or applicant may sue for civil damages including attorneys fees.

2. Aggrieved party may seek injunctive relief against employer or laboratory.

MONTANA: "An Act Regulating the Testing of Blood and Urine of Employees and Prospective Employees," enacted 4/87.

What it does:

1. Prohibits random testing;

2. Requires reasonable belief of impairment before employee may be tested;

3. Restricts applicant testing.

Applicants:

1. job applicants may not be tested except for occupations in "hazardous work environments or jobs the primary responsibility of which is security, public safety or fiduciary responsibility;

2. requires "verification" of test results by two or more different testing proceudres;

3. applicant my submit sample for further confirmation at an "independent laboratory" and has right to rebut or explain results of tests.

Employees:

1. cannot be tested unless employer "has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use";

2. have right to verification, confirmation at lab or choice and rebuttal, as above.

Penalty: Violation is misdemeanor.

RHODE ISLAND: "An Act Relating to Unfair Employment Practices Prohibiting of Mandatory Drug Testing", enacted 6/87.

What it does:

1. prohibits random testing;
2. prohibits direct observation of urine specimen collection;
3. requires reasonable grounds before employee may be tested.

Applicants:

The Act does not apply to applicants.

Employees:

1. may not be tested unless employer has "reasonable grounds to believe based on specific objective facts, that the employee's use of controlled substances is impairing his ability to perform his job";
2. may not be observed while providing sample;
3. testing must be conducted in conjunction with "bona fide rehabilitation program";
4. requires confirmation by GC/MS;
5. employee has right to retest at employer's expense and right to rebut or explain results.

Penalties:

1. violation of Act is misdemeanor;
2. aggrieved party may bring civil action and judge may award punitive damages, attorneys' fees and costs and afford injunctive relief

UTAH: "Drug and Alcohol Tests; Employer Liability", enacted 4/87.

What it does:

1. legalizes drug testing in private sector on any basis for any reason so long as policy is estab-

lished and distributed in writing;

2. defines "drugs" as: "any substance recognized as a drug in the United States Pharmacopeia, the National Formulary, the Homeopathic Pharmacopeia, or other drug compendia, or supplement to any of those compendia."

3. exempts employers from legal liability for most causes of action if requirement that a policy be established is followed.

Applicants and employees:

1. may be tested as a condition of employment for the following purposes:

   a. investigation of individual impairment;

   b. investigation of accidents or theft;

   c. maintenance of safety; or

   d. maintenance of productivity, quality of services, or security of property or information.

2. requires confirmation by GC/MS before action may be taken;

3. "employers and management in general must submit to the testing themselves on a periodic basis."

Penalties:

Employers are not liable for causes of action including negligence (action based on false test result is not actionable if employer's reliance on result was reasonable and in good faith), defamation, or under the Utah Anti-Discrimination Act.

VERMONT: "An Act Relating to Employee Drug Tests", enacted May 22, 1987.

What it does:

1. prohibits random testing;

2. requires probable cause before employees can be tested;

3. restricts applicant testing.

Applicants:

1. only those who have received job offer may be tested;

2. must be given ten days written notice of test;

3. positive results must be confirmed by GC/MS by state approved labs;

4. have right to retest at own expense.

Employees:

1. can't be tested unless employer has probable cause to believe employee is using drugs or is under influence of a drug on the job;

2. no testing unless employer has established an employee assistance program;

3. may not be discharged on basis of confirmed positive result if agrees to complete EAP;

4. have right to confirmation by GC/MS in state approved lab, retest, as above.

Penalties:

1. Aggrieved applicant or employee may bring civil action for damages, injunctive relief, costs and attorneys' fees;

2. Violator of law subject to civil penalty of $500 - $2,000.

3. Violation of law is a misdemeanor.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD. 10-24-87 9:00 a.m. KETCHIKAN CITY COUNCIL CHAMBERS

JOHN SUND, REPRESENTATIVE
2504 2nd Avenue
Ketchikan, Alaska 99901
(907) 225-5552

While in Juneau
P. O. Box V
Juneau, Alaska 99811
(907) 465-4919

October 24, 1987

MEMORANDUM

TO: Members, House Judiciary Committee

FROM: Rep. John Sund

SUBJECT: House Bill 283 - Prohibiting certain employers from testing employees for drugs or other substances consumed by employees.

I introduced HB 283 to get this issue on the table for discussion. Drug testing has become a nationwide controversy as exhibited by the many lawsuits surrounding its use -- including several in Alaska. Seven states have adopted workplace drug testing legislation to date.

While certain drug testing is justified, clear guidelines and procedural safeguards are needed to protect workers from false accusations and employers from expensive lawsuits.

House Bill 283 attempts to protect Alaskans' privacy rights by prohibiting <u>random</u> drug testing as a condition of employment. Drug testing is still a new science and is far from accurate. Different labs use different tests and while one may test positive, another may turn up negative. False positive rates as high as 30% are not unheard of. Meanwhile, an employee may suffer losing an income and being "blacklisted" in the community. Our small communities would be particularly sensitive to this.

Drug testing also may not give the employer sufficient information to justify the intrusion into employees' privacy and the accompanying loss of morale. It will not measure on-the-job impairment which is the prime focus of drug testing. The bill includes exemptions for those responsible for the safety of the public, such as aircraft pilots, peace officers and firefighters.

Introduced: 4/17/87
Referred: Labor & Commerce
and Judiciary

IN THE HOUSE

BY SUND, ADAMS, KOPONEN, WALLIS AND BROWN

HOUSE BILL NO. 283

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act prohibiting certain employers from testing employees for drugs or other substances consumed by employees."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. POLICY. (a) The legislature declares that it is the public policy of the state that all citizens enjoy the full benefits of the rights to privacy and due process of law, and the protection against unreasonable searches and seizures guaranteed by art. I, secs. 7, 14, and 22, Constitution of the State of Alaska.

(b) It is the purpose of this Act to protect employees against unreasonable inquiry and investigation into conduct and activities that happen outside of work and that are not directly related to the actual performance of job responsibilities.

* Sec. 2. AS 23.10 is amended by adding a new section to article 1 to read:

Sec. 23.10.038. TESTS FOR CONSUMED SUBSTANCES. (a) An employer may not request, require, or conduct random or company-wide blood, urine, or encephalographic testing. An employer may not suggest or require that an employee or an applicant for employment submit to a blood, urine, or encephalographic test that tests for the presence of drugs or other consumed substances as a condition of employment. However, an employer may require a specific employee to submit to blood or urine testing if

(1) the employer has reasonable grounds to believe that the

employee's faculties are impaired by a drug or other consumed substance on the job;

(2) the employee is in a position in which an impairment would present a clear danger to the physical safety of the employee or another person;

(3) the employer preserves an adequate sample or portion of a sample so that the employee may conduct an independent test to verify or refute the employer's results; and

(4) the employer provides the employee an opportunity to rebut or explain the test results.

(b) In conducting tests permitted under this section, the employer shall limit the tests to the extent feasible so that only information regarding chemical substances in the body that are likely to affect the employee's ability to work safely is taken or recorded.

(c) In an action alleging that an employer violated this section, the employer has the burden of proving that the requirements of (a) of this section have been satisfied.

(d) This section does not prevent an employer from conducting medical screening to monitor exposure to toxic or other unhealthy substances found in the workplace or encountered in the performance of the employees' job duties if the employer has the express written consent of the employees. The screenings or tests must be limited to the specific substances expressly identified in the employee consent form.

(e) This section does not prohibit an employer from prohibiting the use of intoxicating substances or tobacco during work hours or from disciplining employees for using tobacco or being under the influence of intoxicating substances during work hours.

(f) This section does not apply to

(1) the state or a political subdivision of the state when dealing with peace officers or firefighters in its employ or persons applying to be employed as peace officers or firefighters; or

(2) an employer as to an employee operating emergency service vehicles for the state or a political subdivision of the state.

(g) A person who violates or assists in a violation of this section is liable to the person aggrieved for special and general damages, together with attorney's fees and the costs of the action as provided in the Alaska Rules of Court.

(h) A person who violates or proposes to violate this section may be enjoined by a court of competent jurisdiction. An aggrieved person, the attorney general, or a person or entity that will fairly and adequately represent the interest of the protected class may bring an action for injunctive relief.

(i) In this section

(1) "employer" means a person who retains by personal services contract or employs at least one other person and includes the state and a political subdivision of the state;

(2) "peace officer" means a public servant vested by law with a duty to maintain public order or to make arrests, whether the duty extends to all offenses or is limited to a specific class of offenses or offenders.

Proposed Amendment

to House Bill 283

by the Department of Labor

Amend lines 21-24 on page 2 to read:

the employees' job duties. The screenings or tests must be limited to the specific substances to which the employee may be exposed.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB 283
Publish Date :

Revision Date:
Title :"An Act prohibiting certain employers from testing employees for drugs..."
Sponsor : Representative Sund
Requestor : House Labor & Commerce

Agency Affected : Department of Law
BRU : Legal Services

Components : Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard I. Pegues

Prepared by : Richard I. Pegues, Director
Phone : 465-3672
Division : Administrative Services Division,
Date : May 11, 1987

Richard I. Pegues /FOR/
Approved by Commissioner : Grace Berg Schaible, Atty. Gen.
Date : May 11, 1987
Agency : Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)
Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 283

This bill amends AS 23.10 by adding a new section that prohibits certain employers from testing employees for drugs or other substances consumed by employees. This testing prohibition would also extend to applicants for employment. The bill would permit an employer to require a specific employee to submit to testing, if the employer had reasonable grounds to believe the employee's faculties are impaired by a drug or other consumed substance on the job. The new section does not apply to the state or a political subdivision of the state when dealing with peace officers or firefighters in its employ, or persons applying to be employed as peace officers or firefighters.

The bill provides that a person who violates the new section may be enjoined be a court of competent jurisdiction. And it further provides that a person who violates or assists in the violation of the section is liable to the aggreived person for special and general damages, together with attorney's fees and costs. An aggrieved person, the attorney general, or a person or entity that will fairly and adequately represent the interest of the protected class may bring an action for injunctive relief. It is not anticipated that the attorney general will often become involved in seeking injunctive relief, because of the private right of action that the bill provides to individuals, including an individual's right to seek damages against violators.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 283 (L&C)
PUBLISH DATE:

FISCAL NOTE

REQUEST

Revision Date:
Title: "An Act prohibiting certain employers from testing employees . . "
Sponsor: Judiciary Committee
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments and C.I.B.

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY88	FY89	FY90	FY91	FY92	FY93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

JNR 2/11/88

Prepared by: Francis C. Allan G.C.G.
Division: Alaska State Troopers
Phone: 269-5691
Date: 2/7/88

Approved by Commissioner: Arthur English
Agency: Public Safety
Date: 2/7/88

Distribution: (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 240
PUBLISH DATE:

FISCAL NOTE

REQUEST

Revision Date:
Title: "An Act relating to illegally controlled enterprises . . "
Sponsor: Donley and Gruenberg
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments and C.I.B.

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY88	FY89	FY90	FY91	FY92	FY93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

JNR 2.11.88

Prepared by: Francis C. Allan F.C.A.
Division: Alaska State Troopers
Phone: 269-5691
Date: 2/6/88

Approved by Commissioner: Arthur English D.A.H.
Agency: Public Safety
Date: 2/6/88

Distribution: (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SB 153
PUBLISH DATE:

FISCAL NOTE

REQUEST

Revision Date:
Title: "An Act relating to the penalty imposed for certain traffic offenses."
Sponsor: Sen. Fahrenkamp
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Alaska State Troopers
Components: Detachments

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY88	FY89	FY90	FY91	FY92	FY93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

JNR 2/11/88

Prepared by: Francis C. Allan F.C.A.
Division: Alaska State Troopers
Phone: 269-5691
Date: 2/6/88

Approved by Commissioner: Arthur English
Agency: Public Safety
Date: 2/6/88

Distribution: (by preparer):
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Legislative Sponsor
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Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION : CSHB 283 (L&C)
PUBLISH DATE : _____

FISCAL NOTE

REQUEST:

Revision Date: January 19, 1988
Title : "An Act prohibiting certain employers from testing employees for drugs..."
Sponsor : House Labor & Commerce
Requestor : House Judiciary

Agency Affected : Department of Law
BRU : Legal Services

Components : Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard L. Pegues

Prepared by : Richard I. Pegues, Director
Division : Administrative Services Division
Phone : 465-3672
Date : January 19, 1988

Grace Berg Schaible

Approved by Commissioner : Attorney General
Agency : Department of Law
Date : January 19, 1988

Distribution (by preparer) :
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 283 (L&C)

This bill amends AS 23.10 by adding a new section that prohibits certain employers from testing employees for drugs or other substances consumed by employees. This testing prohibition would also extend to applicants for employment. The bill would permit an employer to require a specific employee to submit to testing, if the employer had reasonable grounds to believe the employee's faculties are impaired by a drug or other consumed substance on the job. The new section does not apply to the state or a political subdivision of the state when dealing with aircraft pilots, peace officers or firefighters in its employ, or persons applying to be employed as aircraft pilots, peace officers or firefighters.

The bill provides that a person who violates the new section may be enjoined be a court of competent jurisdiction. And it further provides that a person who violates or assists in the violations of the section is liable to the aggreived person for special and general damages, together with attorney's fees and costs. An aggrieved person, the attorney general, or a person or entity that will fairly and adequately represent the interest of the protected class may bring an action for injunctive relief. It is not anticipated that the attorney general will often become involved in seeking injunctive relief, because of the private right of action that the bill provides to individuals, including an individual's right to seek damages against violators.

Drug testing

Temporary restraining order granted; athletes join suit

Stanford has been granted a temporary restrain order against the National Collegiate Athletic Association's drug testing program.

While the order is in effect, student athletes wil be required to sign forms consenting to drug testi a condition for participating in intercollegiate spor

Santa Clara County Superior Court Judge Conr Rushing issued the temporary restraining order A 26.

A hearing on the request by the University and student athletes for a preliminary injunction again drug testing program was set to begin Oct. 13 bef Judge Rushing.

In arguing for the temporary restraining order, University attorney Debra Zumwalt said that Stan as an institution, would "irreparably damage" its relationship with its students if it forced them to si consent forms, since a previous court ruling found the NCAA drug testing program is probably unconstitutional.

On March 13, Santa Clara Superior Court Judge Peter Stone called the program "overbroad" and s that NCAA cannot require an athlete to give up th "very valuable constitutional right of privacy."

At that time, Stone granted a preliminary restrai order allowing diver Simone LeVant to compete without submitting to drug testing.

LeVant graduated in June. The case is being continued by two other Stanford athletes, Jennifer Hill, co-captain of the women's soccer team, and J. Barry McKeever, a linebacker on the football team They are being represented by the San Francisco la firm of Keker and Brockett, acting for the America Civil Liberties Union.

The two athletes believe strongly that their priva being invaded and that the NCAA's program is unconstitutional.

Hill, a senior from Watsonville, Calif., is studyin engineering and has designed her own major, huma engineering. McKeever, a junior from Escondido, Calif., is a political science major.

The NCAA demands that all college athletes sign forms at the beginning of their season, consenting t be tested for drugs if their teams reach a post-seaso game.

"I feel this to be an incredible invasion of my privacy," says Hill. "The NCAA has no right to coe me into doing something that is against the Constitution, at least in California."

McKeever says, "It is irresponsible on NCAA's p not to put together a program to help students; inste NCAA punishes those who test positive. I feel there must be better ways to go about solving the problem if in fact there is such a problem."

"The NCAA," says Hill, "has no reason to believ that I, as an individual or athlete, have been using drugs, particularly as a soccer player. They are assuming I'm guilty until I prove myself innocent. I don't like being looked at as a criminal or a person who has done something wrong, when in fact I'm no And then there's the pure embarrassment of the way testing is done." (Athletes must urinate into a bottle front of an NCAA official.)

Letter

Drug testing

EDITOR, Daily News:

Paul Apfelbeck's article on the recent hearings of the House Judiciary Committee missed a few points and had a few errors that need to be corrected.

John Sund has not, as of this date (Nov. 20), co-sponsored HB 55 to modernize our state's marijuana law, nor has he said he will support the bill.

Robin Taylor is a co-sponsor of the bill and has indicated his support of the legislation. Sen. Lloyd Jones is also in support of the bill. Rep. Navarre has said that his constituents support the bill but he did not state how he would vote.

The article indicated that in the Ravin decision the Court noted that marijuana used in 1975 was 1 percent THC when, in fact, the Court noted that the THC was less than 1 percent.

The actual test on a 1987 sample of Ketchikan-grown marijuana done at the School of Pharmacy at the University of Mississippi was 4.38 percent THC, while the average test done in their lab is about 2.5 percent THC. This sample certainly was not from one of Ketchikan's finest gardens, either.

John Holst, Kayhi principal, testified in support of HB 55 as did about a dozen other citizens.

Dan Anslinger, Chief of Police, when testifying regarding the drug testing bill spoke about Ketchikan's drug problem among youth and adults.

We would like to see the names used of those who spoke and what they said.

The most blatant error that we saw in the article was when Dr. Forrest Tennant was quoted as saying, "I understand why the Legislature would want to make rules on urine testing. I like the bill you proposed."

Dr. Tennant's remarks were taken out of context. He actually said, "I looked at the legislative bill that Alaska had proposed, where they were going to, for example, ban pre-employment urine testing. I mean, to me, that would be the height of lunacy. If employers can't do pre-employment drug testing, we might as well turn the country over to the drug dealers, the drug growers, and the drug takers because we have no other way to keep those people out of the workplace."

He then stated, "Other than the one thing you had on pre-employment drug testing, I liked the bill you had proposed, and my other thought was if someone has a real concern about pre-employment urine testing, write into the bill that the person has the right to retake the test. In other words, the idea is to have clean workers."

Sincerely yours,
Alaskans for Drug Free Youth
BETTY J. WILSON
LYNDA ADAMS
MARSHA HILLEY
FRANCES YOUNG
Ketchikan

KETCHIKAN Daily News 11/28

Capital Comments

11/30/87

Tough action on drugs is needed

By STATE REP. ROBIN TAYLOR
District One

There is an enemy within Alaska that is insidiously eating at our moral, economic, and social structures as quietly and effectively as termites will undermine the foundations of a building. This enemy is the extensive use and abuse of drugs within our communities. This issue is one that I feel strongly about, and my concern has prompted me to take legislative action.

As a result of my investigation and the concerns expressed by numerous citizens, I am currently drafting legislation which will change the law and require the judiciary to more carefully examine the case of anyone accused of dealing drugs prior to setting bail and certainly prior to the release of that individual. The courts would have to make special findings in these cases which would assure that the accused was of no risk to the community prior to their release, and release without bail on a persons own recognizance would be dramatically reduced to only the minor offender.

In fact, my concerns on this issue go much further. I am personally disturbed by the current law, release without bail for drug dealers. Another problem is that the district attorney's office often fails to insist on cash bail and states no objection to the defendant's request for release on ther own recognizance. In fact, this happened last spring in Wrangell. As I promised concerned members of this community, I have investigated these practices and I am drafting appropriate legislation which will rectify this problem. I also intend to ask Senator Lloyd Jones to introduce this same legislation in the Senate.

This is not the only action that I have to report on the issue of drug use, however. Many may not realize that I am the co-sponsor on the recent bill that would recriminalize the use of marijuana. I have also requested legislation that would enable police officers to perform a drug test for those persons thought to be driving while under the influence of drugs. Such a test is currently in use in other states.

Finally, I have been drafting legislation which would encourage employers to screen employees for drugs prior to their hire as well as during the term of their employment. Ketchikan Pulp Co., Long Island Development and other large employers across the State had taken the leadership in removing drugs from the workplace by using such tests. We should, by legislation, be encouraging other employers to follow this example. Unfortunately, the only bill presently pending on this subject, HB 283, would have the opposite effect. The workplace is no place for the drug user. He injures not only himself, but often the non-drug-user who, by necessity, must work with him.

We are all well aware of the cost to our community that extensive drug use has created. It is no longer a problem we can dismiss lightly as a problem that only affects big cities. We are all aware that drugs have disabled some of the people around us, and that they threaten the future of our children, our most precious natural resource. My legislative efforts are being made with the hope of making drug use less desirable and the penalties for their use more severe. If you wish to express your concerns and/or support, please call me at my office at 874-2316, or write to me at Box 1441, Wrangell, AK 99929.