

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

INTRODUCTION

On September 5, 1989, in a nationally televised speech, President George Bush announced several policies designed to combat the sale and use of illegal drugs in the United States.¹ In his address, President Bush demanded that employers eliminate drugs from the workplace.² Many employers have already begun to screen current or potential employees for drug use.³

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

I. PUBLIC EMPLOYERS — LEGAL ISSUES

A. *Search and Seizure*

The fourth amendment to the United States Constitution protects citizens from unreasonable governmental searches and seizures.⁴

1. N.Y. Times, Sept. 6, 1989, at A1, col. 6.

2. *Id.* at B7, col. 6.

3. As of 1986, approximately 25 percent of Fortune 500 companies drug tested employees. Note, *Employee Drug Testing - Issues Facing Private Sector Employers*, 65 N.C.L. REV. 832, 839 (1987). By the following year, almost half of all Fortune 500 companies had instituted or considered instituting testing procedures for drug and alcohol abuse. Note, *Drug Testing of Public and Private Employees in Alaska*, 5 ALASKA L. REV. 133, 133 (1988).

4. The fourth amendment provides, in pertinent part: "The right of the people to be

Courts have held that urinalysis, breathalyzer tests and blood tests constitute searches under the fourth amendment.⁵ In determining the reasonableness of a search, courts balance the nature and quality of the intrusion upon the employee's fourth amendment interest against the importance of the governmental interest asserted as justification for the search.⁶ In drug testing situations, courts weigh employee privacy interests⁷ against governmental interests in effective operation of the workplace.⁸

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

5. *See, e.g., Skinner v. Railway Labor Exec. Ass'n*, 109 S. Ct. 1402 (1989) (urinalysis of railroad employees pursuant to federal regulation constituted governmental search); *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987) (compulsory urinalysis of public employees constitutes a seizure whether or not act of urination is observed); *Arizona v. Hicks*, 480 U.S. 321 (1987) (chemical analysis of urine samples as invasion of privacy interest); *California v. Trombetta*, 467 U.S. 479 (1984) (breathalyzer test as search); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (blood test as search).

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

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

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

8. Public employers' interests are arguably magnified in light of Exec. Order No. 12,564, 3 C.F.R. 224 (1987) (*reprinted in* 5 U.S.C. § 7307). The order provides in pertinent part:

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

Section 1. Drug-Free Workplace

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

Section 3. Drug Testing Programs

- (a) The head of each Executive agency shall establish a program test for the use of illegal drugs by employees in sensitive positions

In rejecting the fourth amendment claims of government employees, some courts have held that certain employees, because of the nature of their jobs, have a diminished expectation of privacy.⁹ Further, it is uncertain whether a person has an expectation of privacy with respect to illegal activity such as the use of illegal drugs.¹⁰ Yet urinalysis can reveal information in which an individual has a reasonable expectation of privacy. For example, a urine specimen may reveal that an employee is pregnant or undergoing treatment for diabetes, epilepsy, schizophrenia or heart problems.¹¹

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

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

- (1) When there is a reasonable suspicion that any employee uses illegal drugs;
- (2) In an examination authorized by the agency regarding an accident or unsafe practice. . . .

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

President Reagan's order prompted local government entities to institute drug testing programs. See *Policemen's Benevolent Association of New Jersey v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988). For further analysis of the case, see Comment, *Applying the Fourth Amendment to Random Drug Testing of Police Officers*, 36 WASH. U.J. URB. & CONTEMP. L. 263 (1989).

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

9. See, e.g., *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1393 (1989) (customs service employees); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986) (fire fighters). Courts have also held that private employees in heavily regulated industries have a diminished expectation of privacy. See, e.g., *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986 (1986) (horse racing jockeys); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees).

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

11. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L.REV. 201, 206 (1986). But see *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1528 (D. Neb. 1987), aff'd, 844 F.2d 562 (8th Cir. 1988) (no ninth amendment privacy violation in collecting medical information absent the likelihood of unauthorized disclosure).

an issue that divided the federal courts.¹² However, in *National Treasury Employees Union v. Von Raab*¹³ and *Skinner v. Railway Labor Exec. Ass'n*¹⁴ the Supreme Court allowed drug testing of individuals in certain critical jobs without requiring the employer to suspect that the worker had been using drugs.¹⁵

B. Equal Protection

Public sector employees challenging drug testing schemes have brought equal protection claims against their employers. In *Poole v. Stephens*,¹⁶ for example, corrections officers, corrections officer recruits and a labor union brought a civil rights action against a state corrections department.¹⁷ They maintained that random testing of recruits, while officers were tested only upon individualized suspicion, as well as

12. For opinions requiring individualized suspicion prior to testing, see *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, *vacated*, 861 F.2d 1388 (6th Cir. 1988) (fire fighters); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Taylor v. O'Grady*, 669 F. Supp. 1422 (N.D. Ill. 1987) (correctional officers); *Amalgamated Transit Union v. Sunline Transit Agency*, 663 F. Supp. 1560 (C.D. Cal. 1987) (mass transit employees); *Bostic v. McClendon*, 650 F. Supp. 245 (N.D. Ga. 1986). For cases upholding testing absent individualized suspicion, see *Policemen's Benevolent Ass'n of New Jersey v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988) (policemen); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (transportation employees of school district); *McDonnell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (correctional officers); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (horse jockeys).

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

13. 109 S. Ct. 1384 (1989).

14. 109 S. Ct. 1402 (1989).

15. In *Von Raab*, the Court allowed the government employer to test customs employees involved in drug interdiction. The court reasoned that the employer's interest in random drug testing is enhanced because employees in customs are vital to the war on drugs in the United States, so the public interest demands that they be drug-free. 109 S. Ct. at 1397-98. The *Von Raab* and *Skinner* opinions allowed random testing of employees in positions that implicate safety concerns such as carrying guns, *Von Raab*, 109 S. Ct. at 1397, or working on railways, *Skinner*, 109 S. Ct. at 1420. In *Von Raab*, the Court vacated the determination of the Seventh Circuit that employees handling "classified" materials could be subjected to random drug testing. 109 S. Ct. at 1396-97.

16. 688 F. Supp. 149 (D.N.J. 1988).

17. *Id.* at 150.

the department's failure to test other categories of employees,¹⁸ deprived them of equal protection under the law.¹⁹ Rejecting these claims, the District Court for the District of New Jersey found a rational basis for the differing schemes.²⁰ The court therefore held that the testing scheme did not violate the plaintiffs' right to equal protection.²¹

In *Shoemaker v. Handel*,²² differential testing of various categories of employees led a horse racing jockey to bring an equal protection action against the New Jersey Racing Commission.²³ The Third Circuit determined that because jockeys are the most visible participants in horse racing, a jockey's drug abuse could more seriously undermine the integrity of the sport than could abuse by trainers, grooms and officials who were not subject to random testing.²⁴ Hence, the court found that random testing of jockeys alone was a rational step towards eradicating drug abuse in the horse racing industry.²⁵

C. Right of Privacy

Employees challenging drug testing schemes have asserted that testing programs intrude upon a constitutional right of privacy distinct from the privacy factor balanced in search and seizure claims.²⁶ The District Court for the Eastern District of Louisiana, in *National Treasury Employees Union v. Von Raab*,²⁷ found that drug testing of cus-

18. The department declined to test certain "civilian" employees although they had regular contact with the inmates. *Id.* at 156.

19. *Id.*

20. The court found that recruits were involved in different activities than officers, such as learning to fire weapons. This factor coupled with the intensity of the recruits' training program lent a rational basis to the Department's decision. As to the civilian employees, the court held that the Department could permissibly battle drugs one step at a time. *Id.* at 156-57.

21. *Id.*

22. 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

23. *Id.* at 1137. Because the racing industry conducted the test pursuant to administrative regulations promulgated by the Commission, the court applied constitutional analysis to the claims. *Id.* at 1141.

24. *Id.* at 1144.

25. *Id.* The court cited *Williamson v. Lee Optical*, 348 U.S. 483 (1955), as support for step-by-step reform. 795 F.2d at 1144.

26. For discussion of employees' privacy rights in light of fourth amendment claims, see *supra* notes 7-12 and accompanying text.

27. 649 F. Supp. 380 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part*, 109 S. Ct. 1384 (1989).

toms workers who sought promotion into certain positions unconstitutionally interfered with employees' "penumbral right of privacy."²⁸ The court found that the urinalysis offended the dignity of the workers.²⁹ The court noted that "excreting bodily wastes"³⁰ is a function accompanied by "a legitimate expectation of privacy in both the process and the product."³¹

Other courts have refused to sustain constitutional privacy claims, citing a countervailing state interests that outweigh employees' rights. In *Smith v. White*,³² employees of the Tennessee Valley Authority brought an action seeking damages for alleged violation of their constitutional rights as a consequence of drug urinalysis.³³ The Eastern District of Tennessee found that because investigations ensured that other persons were unaware that plaintiffs were targets of investigation, the Tennessee Valley Authority protected the employees' privacy rights.³⁴ Further, the court noted its uncertainty as to whether a non-consensual urinalysis is an infringement of constitutional privacy guarantees.³⁵ Fi-

28. 649 F. Supp. at 389. The Court cited *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973), both reproductive rights cases, in support of the existence of rights or zones of privacy emanating from more explicit constitutional guarantees. 649 F. Supp. at 389.

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

30. *Id.* at 389.

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

32. 666 F. Supp. 1085 (E.D. Tenn. 1987), *aff'd*, 857 F.2d 1475 (6th Cir. 1988).

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

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

34. *Id.* at 1090.

35. *Id.* The court assumed that plaintiff asserted a "penumbral personal privacy

nally, the court concluded that the government's need to secure a drug-free workplace outweighed any privacy rights the workers had.³⁶

D. *Self-Incrimination*

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

right" recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy interest in contraception).

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

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

37. See *Amalgamated*, 663 F. Supp. at 1570-71; *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1528 (D. Neb. 1987), *aff'd*, 944 F.2d 572 (8th Cir. 1988).

38. *Rushton*, 653 F. Supp. at 1528.

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

40. 653 F. Supp. 1510 (D. Neb. 1987), *aff'd*, 844 F.2d 562 (8th Cir. 1988).

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

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

E. *Due Process*

Another argument that the district court noted in *Rushton* was deprivation of substantive due process.⁴² This claim alleged arbitrary and capricious deprivation of liberty.⁴³ Based on evidence presented, the district court found that the testing program was not so susceptible to error as to violate the due process clause.⁴⁴

In *Everett v. Napper*,⁴⁵ the Eleventh Circuit rejected plaintiff's substantive due process claims. In *Everett*, a drug dealer implicated a fire fighter as a drug user.⁴⁶ As a result of the dealer's statement, Everett's employer ordered him to submit to urinalysis.⁴⁷ Everett's refusal to cooperate with the investigation resulted in his suspension.⁴⁸ In rejecting Everett's claim, the court determined that the employer's requirement was rationally related to the city's strong and legitimate interest in public safety.⁴⁹ The court further held that a rational basis

ment. The Fifth Circuit rejected this conclusion in holding that measurement of physical characteristics, like contents of urine samples, did not implicate the fifth amendment. 816 F.2d at 181.

42. 653 F. Supp. at 1525.

43. *Id.*

44. *Id.* The power plant used an EMIT procedure in conjunction with other confirmatory tests. *Id.* The Enzyme Multiplied Immunoassay Technique (EMIT) is the most widely used test for evidence of past substance usage. ZEESE, DRUG TESTING LEGAL MANUAL § 2.02[1][a] at 2-7 (1988). The drug, as it metabolizes in the urine, combines with antibodies to form complexes. Ordinary lab methods can detect these complexes. On the accuracy of particular tests, see Note, *Employee Drug Testing — Issues Facing Private Sector Employers*, 65 N.C.L. Rev. 832, 838 (1987); Comment, *Your Urine or Your Job: Is Private Employer Drug Urinalysis Constitutional in California?*, 19 LOY. L.A.L. REV. 1451, 1456-61 (1986); Note, *Private Sector Drug Testing: Availability of State Statutory Remedies for Aggrieved Employees*, 21 SUFF. U.L. REV. 1054, 1073-79 (1987); Stern & Weeks, *Substance Testing and Workers' Rights: Litigation & Collective Bargaining Strategies to Protect the Private-Sector Employees*, 90 W. VA. L. REV. 863, 870-76 (1988).

See also *McDonnell v. Hunter*, 809 F.2d 1302, 1309 (8th Cir. 1987), mandating that equipment and proceedings must conform to the standard of *Spence v. Farrier*, 807 F.2d 753 (8th Cir. 1986), which held that EMIT tests are reliable enough to satisfy the requirements of due process. *Id.* at 756.

45. 833 F.2d 1507 (11th Cir. 1987).

46. *Id.* at 1509.

47. *Id.*

48. *Id.* at 1513.

49. *Id.* The Court applied the test of *Kelley v. Johnson*, 425 U.S. 238 (1976), requiring a court to "look to whether the requirement imposed is rationally related to the legitimate interests of the employer." 833 F.2d at 1513. *Kelley* upheld a hair-grooming regulation for police officers over due process claims. Additionally, the court noted that

for testing those suspected of drug use existed such that the urinalysis requirement was neither arbitrary nor capricious in violation of due process.⁵⁰

II. PRIVATE EMPLOYERS — LEGAL ISSUES

A. *Constitutional provisions*

Privacy interests that plaintiffs have asserted in private sector drug-testing cases differ from claims by public employees. Most significantly, fourth amendment claims are unavailable in the private sector as courts have historically applied these claims solely to governmental institutions.⁵¹ Similarly, state constitutional right of privacy provisions are applied to state actors.⁵² Recently, however, a California appellate court considered whether private employers, without violating the state's constitutional privacy provision,⁵³ can require job applicants to

a substantive due process violation requires an egregious violation of decency and fairness. *Id.* The court cited *Rochin v. California*, 342 U.S. 165 (1952), in which the Supreme Court found that compelling an individual to vomit two capsules by forcing an emetic into his stomach violated the individual's due process rights. *Id.*

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

51. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109 (1984) (fruits of search, which would violate fourth amendment if conducted by government, are admissible if seized by private citizen); *Texas Employment Comm'n v. Hughes Drilling Fluids*, 746 S.W.2d 796 (Tex. Ct. App. 1988) (rejected private sector workers' fourth amendment claim).

52. *See, e.g.*, *Greco v. Halliburton Co.*, 674 F. Supp. 1447 (D. Wyo. 1987) (physical examination from Department of Transportation does not make private employer state actor); *Luedtke v. Nabors Alaska Drilling*, 768 P.2d 1123 (Alaska 1989) (constitutional right to privacy does not extend to private party actions).

53. *Wilkinson v. Times-Mirror Books*, 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989). California's state constitution provides that: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy." CAL. CONST. art. I, § 1.

In *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976), a suit against a private school for unauthorized disclosure of a transcript, a California court stated that the right of privacy "is protected not merely against state

submit to urine tests as a condition of employment. In *Wilkinson v. Times Mirror Books*,⁵⁴ a publishing office declined to hire three applicants who refused urinalysis. The California Court of Appeals upheld the urinalysis testing.⁵⁵ The court reasoned that the state constitutional privacy provision applied to the private sector, but the testing scheme did not unduly burden the applicants' privacy rights.⁵⁶

B. Other actions

1. Other Privacy Claims

Private sector workers in most jurisdictions bring actions for tortious invasion of privacy or breach of common law right of privacy. In *Luedtke v. Nabors Alaska Drilling*,⁵⁷ two former employees of a drilling rig brought suit against their former employer challenging their discharge following refusal to submit to urinalysis.⁵⁸ After rejecting

action; it is considered an inalienable right which may not be violated by anyone." 64 Cal. App. 3d at 829, 134 Cal. Rptr. at 842. The court cited an election brochure argument referring to the provision as a restriction upon business as well as upon government. *Id.* at 829 n.2, 134 Cal. Rptr. at 842 n.2.

54. 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989).

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

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

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

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

57. 768 P.2d 1123 (Alaska 1989).

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

Clarence's complaint arose after the company's policy announcement. When Clarence saw his name on a list of individuals to be tested, he declined "as a matter of principle." At that point, the company fired Clarence. *Id.* at 1126.

the employees' state constitutional privacy claims,⁵⁹ the Alaska Supreme Court determined that in order for the former employees to claim invasion of privacy, they had to show that the intrusion was unwarranted or conducted in an unreasonable manner.⁶⁰ The court found that no cause of action for invasion of privacy arose because the employees' refusal to submit to urinalysis prevented any intrusion from occurring. In considering whether the company's taking and testing of urine during a comprehensive physical was tortious, the court held that the manner of testing was not unreasonable because the employee volunteered the sample.⁶¹ Further, because the employer could test employees for drug use pursuant to an employment agreement,⁶² the intrusion was not unwarranted.⁶³

A private employee may also base a claim on state statutes providing a right to privacy. In *Jackson v. Liquid Carbonic*,⁶⁴ a truck driver dis-

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

60. 768 P.2d at 1137.

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

62. 768 P.2d at 1137-38. *See also* *Texas Employment Commission v. Hughes Drilling Fluids*, 746 S.W.2d 796 (Tex. Ct. App. 1988). In *Hughes Drilling*, a private employer discharged a worker for his refusal to submit a urine sample for drug screening purposes. For analysis of the employment contract issues in *Luedtke*, see *infra* notes 101-05 and accompanying text.

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

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

64. 863 F.2d 111 (1st Cir. 1988).

missed after failing a mandatory drug test⁶⁵ brought an action under the Massachusetts right of privacy statute.⁶⁶ Proscribing only unreasonable invasions of privacy, the statute created a balancing test where the court could weigh the employer's legitimate business interest in obtaining information against the substantiality of the privacy infringement resulting from the disclosure of test results.⁶⁷ The court held that the state created no additional privacy right independent of the parties' collective bargaining agreement.⁶⁸

2. *Intentional Infliction of Emotional Distress*

Workers challenging drug testing schemes have also sued employers for intentional infliction of emotional distress. Aggrieved employees allege emotional harm resulting from both the manner of testing and post-test disciplinary measures.⁶⁹

In *Kelley v. Schlumberger Technology Corporation*,⁷⁰ a successful plaintiff's claim for negligent infliction of emotional distress arose from the establishment, implementation and administration of an employer's drug testing plan.⁷¹ Plaintiff complained of the company's practice of

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

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

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

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

69. For further analysis of this tort claim in drug testing scenarios, see Hébert, *Private Sector Drug Testing: Employer Rights, Risks, and Responsibilities*, 36 U. KAN. L. REV. 823, 843-45 (1988).

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

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

The jury also found that Schlumberger violated plaintiff's right to privacy under the Louisiana Constitution. *Id.* The appellate opinion contained no analysis of state action

observing employees provide urine samples.⁷² The trial court instructed the jury to find for plaintiff if the defendant's conduct foreseeably caused the plaintiff serious emotional distress and if a reasonable person in the plaintiff's position would have been seriously distressed.⁷³ The First Circuit affirmed a jury verdict for Kelley finding that the instructions on foreseeability applied Louisiana law correctly.⁷⁴

Kelley demonstrates the extent to which private employees' claims are grounded in state law. Additionally, evidence that Kelly's drug use and injury declined two years after dismissal and after institution of the urinalysis program was irrelevant to the reasonableness of the test policy at the time of Kelley's discharge.⁷⁵ This holding will drastically affect future presentation of an employer's case supporting drug testing.⁷⁶

3. *Defamation*

Dissemination of an employee's positive drug test results beyond those who are privileged to know the results may lead an employee to sue for defamation.⁷⁷ In *Houston Belt & Terminal Railing Co. v. Wherry*,⁷⁸ the railroad tested Wherry after he sustained an injury and

issues. For discussion of state constitutional privacy provisions as applied to private actors, see *supra* notes 53-57 and accompanying text.

72. 849 F.2d at 43.

73. *Id.*

74. *Id.* at 44. The First Circuit also found that the employer had failed to preserve the issue of the instruction's adequacy by neglecting to object. *Id.* For a decision contrary to *Kelley*, see *Satterfield v. Lockheed Missile & Space Co.*, 617 F. Supp. 1359 (D.S.C. 1985). In *Satterfield*, plaintiff brought an action alleging infliction of emotional harm after losing his job following a positive result on an involuntary urine test. *Id.* at 1365. In ruling against plaintiff, the court held that the employer's conduct was neither "extreme" nor "outrageous." *Id.* at 1366. The court appeared to rely on the fact that the company approached the employee privately, expressed reluctance at having to terminate the employee and informed the employee that he could fight the termination decision. Hébert, *supra* note 69, at 843. Additionally, the company allowed the employee's work record to reflect a voluntary dismissal and offered the employee favorable references. *Id.*

75. 849 F.2d at 45.

76. For further discussion of the business sense of drug testing, see *infra* note 200 and accompanying text.

77. See Hébert, *supra* note 69, at 841.

78. 548 S.W.2d 743 (Tex. Civ. App. 1976), *cert. denied and appeal dismissed*, 434 U.S. 962 (1977).

subsequently fainted.⁷⁹ The test results revealed a trace of methadone.⁸⁰ After receipt of the results, the superintendent forwarded a report of the results and doctor's recommendations to several company officers.⁸¹ Pending an investigation, Wherry arranged for another urine test, which revealed no methadone or other illicit drugs.⁸² Even though Wherry testified that he had never used narcotics, the company dismissed him for being an "unsafe employee" and for failing to report his accident in a timely fashion.⁸³ After Wherry's discharge, the United States Department of Labor inquired into his dismissal.⁸⁴ The employer sent the Department a letter indicating that traces of methadone appeared in Wherry's urine.⁸⁵

In his action, Wherry claimed that the original doctor's report, the superintendent's report and the letter to the Department of Labor were defamatory.⁸⁶ Although the Texas Appeals Court found that the superintendent's report and the letter to the Department of Labor were defamatory,⁸⁷ the doctor's statement was not defamatory because the doctor intended to convey only a possibility that Wherry used drugs.⁸⁸ The statements concerning methadone were false based upon Wherry's testimony and a negative result on the later test.⁸⁹ Necessary publication of the defamatory statements occurred when company officials received superintendent's report and when the company sent the letter to

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

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

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

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

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

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

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

86. Hébert, *supra* note 69, at 842.

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

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

89. *Id.* at 750.

the Department of Labor.⁹⁰

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

4. *Employment Contract Issues*

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

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

90. *Id.* at 754.

91. 768 F.2d 703 (5th Cir. 1985).

92. *Id.* at 704. See Hébert, *supra* note 69, at 842.

93. 768 F.2d at 706. The court emphasized that the company in no way tried to cast the workers in an unfavorable light. Further, the opinion noted that Strachan was not charged with drug use; he was merely told that the company had "a possible suspicion of drug use." Finally, the court described the unusual behavior of plaintiff Gaspard as support for a finding of no malice on the part of the company. *Id.* at 706.

94. Hébert, *supra* note 69, at 843.

95. For analysis of this type of action, see *supra* note 51 discussing procedural due process claims.

96. See Hébert, *supra* note 69, at 845. The commentator notes that in states which have abrogated the doctrine, wrongful discharge issues resemble issues in labor arbitration cases. *Id.* For discussion of labor arbitration cases on drug testing, see *infra* notes 158-86 and accompanying text.

97. 674 F. Supp. 1447 (D. Wyo. 1987).

98. *Id.* at 1448. The employer fired Greco for refusing to submit to a drug test. *Id.* at 1449.

Court for the District of Wyoming determined that a "contraband policy" requiring employees to submit to random urinalysis formed part of plaintiff's at-will employment contract upon signing a copy of its terms.⁹⁹ Furthermore, the court noted that even if a good faith or fair dealing covenant was implied in the parties' contract, plaintiff failed to show that Halliburton dismissed plaintiff in bad faith.¹⁰⁰

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

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

99. *Id.* at 1449. The court noted that the contraband policy did not give plaintiff tenure in his position or change his at-will status because it did not create procedures for discipline or discharge or destroy Halliburton's plenary discretion to discharge employees. *Id.* at 1450.

100. *Id.* at 1450.

101. 768 P.2d 1123 (Alaska 1989).

102. *Id.* at 1131-32. The court based this holding on a number of Alaska law sources. Among these sources were statutes protecting workers from polygraph tests as a condition of employment and from management inquiry into certain subjects. Additionally, the court noted the state constitutional privacy clause and an Alaska citizen's common law right to privacy. *Id.* at 1132-33.

For further discussion of the state's constitutional privacy provision, see *supra* note 59 and accompanying text. For consideration of common law rights to privacy as analyzed in tort cases, see *supra* notes 56-68 and accompanying text.

103. *Id.* at 1136. Employing a balancing test, the court applied the reasoning of federal courts on fourth amendment issues. For discussion of search and seizure cases balancing employee privacy with company safety interests, see *supra* notes 4-15 and accompanying text. For analysis of the significance of the balancing test in comparing public and private sector testing schemes, see *infra* notes 205-07 and accompanying text.

104. 768 P.2d at 1136. Compare this concept to President George Bush's request for companies to halt employee drug use as a means of affecting a generalized "war on drugs." See *supra* notes 1-2 and accompanying text.

test the additional term of employment.¹⁰⁵

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

5. *Handicap Discrimination*

a. *Federal Law*

An employer who receives federal financial assistance is subject to the Rehabilitation Act of 1973. The Act prohibits discrimination against handicapped persons based solely on their handicap when such

105. 768 P.2d at 1137.

106. 765 S.W.2d 497 (Tex. Ct. App. 1989).

107. *Id.* at 449.

108. *Id.*

109. *Id.* at 502. Plaintiff asserted that her consent was invalid because she consented under threat of losing a job that she needed to support her family. In rejecting this contention, the court found that agreeing with plaintiff's theory would create two laws of contract, one for the wealthy and one for the poor. *Id.* *But see* City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) ("coerced consent" given under threat of discipline held invalid).

110. 765 S.W.2d at 500-01. Plaintiff relied upon *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985), which held that an employee could obtain money damages from an employer who fired him solely because the employee refused to commit an illegal act. *Id.* at 735. The *Jennings* court, in refusing to recognize a distinctive public policy for privacy in drug testing cases, noted that the *Sabine* distinction was a narrow one. 765 S.W.2d at 500-01. Further, the court believed that the at-will doctrine, without modification, served a public policy by itself. *Id.* at 501. Besides the employee-at-will doctrine, the issue of drug testing in the employee contract arena has also arisen regarding unemployment benefits. In *Texas Employment Comm'n v. Hughes Drilling Fluids*, 746 S.W.2d 796 (Tex. Ct. App. 1988), the court determined that, given the reasonableness of Hughes' drug testing policy due to safety interests, plaintiff's refusal to provide a urine sample pursuant to the policy constituted "misconduct," disqualifying the employee from obtaining unemployment benefits. *Id.* at 802-03. In reaching its decision, the court rejected the Commission's theory that the policy was not part of plaintiff's employment contract. *Id.* at 799. Additionally, the Commission failed with a novel argument that plaintiff's refusal to submit a sample did not violate the policy because the testing scheme required an employee's consent to collect urine. *Id.* at 800.

persons are otherwise qualified for their duties.¹¹¹ In defining handicapped person, the Act excludes an alcoholic or one who abuses drugs and whose current alcohol or drug use prevents them from performing their duties or causes their employment to constitute a direct threat to the safety or property of others.¹¹²

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

111. 29 U.S.C. § 794 (1982 & Supp. IV 1986).

112. 29 U.S.C. § 706(8) (B) (1982 & Supp. IV 1986). *See also* American Federation of Government Emp. v. Dole, 760 F. Supp. 445, 447 n.6 (D.D.C. 1987) (even if drug user is considered handicapped, freedom from drug effects is proper standard governing testing in critical jobs).

113. 680 F. Supp. 590 (S.D.N.Y. 1988).

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

115. *Id.* at 597.

116. *Id.* at 598. Employers were concerned with the effects interpretations of various administrative regulations finding that alcoholics and drug users were "handicapped individuals" could have on affirmative action programs. *Id.*

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

The *Burka* court also dismissed plaintiff's claim under 49 C.F.R. § 27.37(a) (1986), which prohibits employers in the transportation industry from conducting pre-employ-

b. *State Law*

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

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

III. STATE STATUTORY REGULATIONS

Seven states have enacted statutes specifically dealing with employee

ment investigations into the extent of a handicap. Based on its holding that narcotic use is not *per se* a handicap, the court found the claim meritless. 680 F. Supp. at 601 n.20.

For additional analysis of handicap discrimination and federal law, see Hébert, *supra* note 69, at 848-49.

118. For a comprehensive list of these enactments, see Hébert, *supra* note 69, at 849 n.171.

119. 192 Ill. App. 3d 343, 548 N.E.2d 702 (1989).

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

121. *Id.* at ___, 548 N.E.2d at 721.

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

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

drug testing.¹²⁴ Many of the statutory guidelines resemble the principles guiding public employee testing.

Minnesota, for example, permits random drug testing only for workers in "safety-sensitive" positions.¹²⁵ Such a scheme resembles the Supreme Court's standard in *National Treasury Employees' Union v. Von Raab*,¹²⁶ which allowed random testing only for customs officials in certain critical positions.¹²⁷ Vermont allows such testing only when required by federal law.¹²⁸ Of all the state enactments, Utah's is the least restrictive,¹²⁹ placing few limits on testing rationales or circumstances.¹³⁰ In contrast, Iowa, Montana and Rhode Island forbid random testing.¹³¹

Rhode Island considers privacy interests of employees by requiring that workers provide testing samples in private.¹³² Moreover, all state enactments provide procedures for ensuring the accuracy of results.¹³³

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

125. MINN. STAT. ANN. § 181.951(4) (West 1988).

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

127. 109 S. Ct. at 1397.

128. VT. STAT. ANN. tit. 21, § 513(b) (1987). See also CONN. GEN. STAT. ANN. § 31-51x(b) (West 1987 & Supp. 1989) (prohibits random drug testing except in safety-sensitive positions, if required under federal law or as a part of an employee-assistance program). For further discussion, see Comment, *Drug Testing Legislation: What are the States Doing?*, 36 U. KAN. L. REV. 919, 934-35 (1988). For analysis of the Vermont enactment, see generally Field, *Jar Wars in the Green Mountain State: Vermont's Drug Use Testing Act Has the Potential to be the Best in the Nation*, 13 VT. L. REV. 593 (1989).

129. UTAH CODE ANN. § 34-38-1 to § -15 (1988). See Hébert, *supra* note 69, at 828.

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

131. IOWA CODE ANN. § 730.5(2) (West 1979 & Supp. 1989); MONT. CODE ANN. § 39-2-304(1)(c) (1989); R.I. GEN. LAWS § 28-6.5-1(A) (Michie Supp. 1988). Iowa allows individualized testing only when the company has probable cause to declare an employee impaired. Further, testing applies only to positions where the impairment poses a safety threat or violates a company rule of which the worker is aware. IOWA CODE ANN. § 730.5(3). See Hébert, *supra* note 69, at 829-31.

132. R.I. GEN. LAWS § 28-6.5-1(b). See also UTAH CODE ANN. § 34-38-6(2); CONN. GEN. STAT. ANN. § 31-51w(a). See Hébert, *supra* note 69, at 838.

133. Utah provides that employers must conduct testing in order to prevent sample substitution. UTAH CODE ANN. § 34-38-6(a). Safeguards against contamination must

Several of the statutes also indicate proper uses for the results with respect to disciplinary measures.¹³⁴

IV. UNION AND ARBITRATION ISSUES

A. *Railway Labor Act*

Recently, the Supreme Court decided¹³⁵ that disputes about the ad-

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

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

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

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

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

For further analysis of statutory requirements, see Hébert, *supra* note 69, at 828-38.

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

135. Consolidated Rail v. Railway Labor Exec. Ass'n, 109 S. Ct. 2477, 2479 (1989). The Court's holding agreed with Seventh and Eighth Circuit decisions. See *Railway Labor Executives Assn' v. Norfolk & Western R. Co.*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.C.*, 802 F.2d 1016 (8th Cir. 1986).

For purposes of the Act, a major dispute deals with the formation of contractual

dition of a drug testing component to routine physicals are "minor disputes" under the Railway Labor Act.¹³⁶ Courts have found that the controversy is a minor dispute if the disputed action is arguably justified by an existing labor agreement or if contentions that the contract sanction the disputed action are not insubstantial or frivolous.¹³⁷

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

rights involving lengthy bargaining and mediation. 109 S. Ct. at 2480. In contrast, minor disputes develop from the interpretation of existing rules. *Id.* Additionally, minor disputes do not require employers to maintain the status quo pending resolution of other disagreements. *Id.* at 2481.

One district court, prior to the *Consolidated Rail* decision, found that had it been called upon to reach the issue, it would have found the dispute to be major. *Railway Labor Execs. Assoc. v. Long Island Railroad Co.*, 651 F. Supp. 1284, 1285 (E.D.N.Y. 1987). For extensive analysis of the *Burlington Northern* and *Long Island* cases, see Hébert, *supra* note 69, at 853-55.

136. 45 U.S.C. §§ 151-88 (1982). The Act applies to carriers engaged in interstate commerce. *Id.* at § 151.

137. 109 S. Ct. at 2482. The union in *Consolidated Rail* asserted that the dispute was a "hybrid dispute" because it involved a change in working conditions made in accordance with a contractual right to make such a change. *Id.* at 2488. The Court refused to recognize a third category of dispute. *Id.* at 2484.

138. 109 S. Ct. 2477 (1989).

139. *Id.* at 2485.

140. *Id.* at 2485-86.

141. *Id.* at 2487.

142. *Id.* at 2488. The union also disputed certain provisions which could result in employee discharge instead of suspension for drug problems. In effect, the union asserted that the employer's motive was disciplinary, not safety-related. *Id.* at 2489.

143. *Id.* at 2488-89.

144. *Id.* at 2488.

sequences of positive testing were "arguably justified."¹⁴⁵

B. *The National Labor Relations Act*

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

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

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

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

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

147. 295 N.L.R.B. No. 26.

148. *Id.*

149. *Id.*

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

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

152. *Johnson-Bateman*, 295 N.L.R.B. No. 26.

153. *Id.* The Board relied upon its decision in *Medicenter Midsouth Hospital*, 221

also found that, like polygraph testing, drug testing was not a decision involving investments. Rather it was a change in the character of the workplace so that it could not be considered an entrepreneurial decision.¹⁵⁴ Therefore, bargaining over the testing was mandatory.¹⁵⁵

C. Labor Arbitration Issues

When an employer requires drug testing or disciplines an employee for a positive test result or a refusal to submit to testing, a labor union may file a grievance on the employee's behalf.¹⁵⁶ Most collective bargaining agreements call for arbitration; arbitrators must interpret these agreements to decide if the testing scheme or the disciplinary action is proper.¹⁵⁷

1. Implementation of procedures for drug screening

In *Dow Chemical Co.*,¹⁵⁸ an arbitrator decided that a random drug testing program was permissible at a petrochemical plant.¹⁵⁹ In *Dow*, an employer expanded an existing substance abuse policy to permit random drug testing of employees at all levels.¹⁶⁰ The grievance contended that the testing policy violated a provision of the parties' collec-

N.L.R.B. 670 (1975). In *Medicenter*, an employer violated the National Labor Relations Act when it unilaterally submitted all employees to polygraph tests in an attempt to discover which employees were responsible for vandalism in the workplace. The Board found that this was a change in "terms and conditions of employment," as it varied both the "mode of investigation and character of proof" involved in the employer's search for a culprit, factors affecting the job security of all employees. *Id.* at 675.

Because of the disciplinary consequences of Johnson-Bateman's program, the Board found that the testing requirement was analogous to the *Medicenter* polygraph testing. The Board noted that the technology used in drug testing was a change in investigation and proof strategies similar to the aberrations in the *Medicenter* investigating techniques. Thus, the Board concluded that the testing requirement was germane to the workplace environment. *Johnson-Bateman*, 295 N.L.R.B. No. 26.

154. *Johnson-Bateman*, 295 N.L.R.B. No. 26.

155. *Id.* Additionally, the Board failed to find a waiver of the Union's right to bargain and declared that the parties' contract could not be interpreted to permit the employer's unilateral implementation of a testing program. *Id.*

156. Hébert, *supra* note 69, at 855.

157. *Id.* at 855-56.

158. 91 Lab. Arb. (BNA) 1385 (1989) (Baroni, Arb.).

159. *Id.* at 1391.

160. *Id.* at 1385-86. The employer first issued the policy in 1984. On August 19, 1986, the company revised the policy to permit testing when the employer had probable cause to suspect that an employee used drugs. Subsequently, Dow expanded the policy

tive bargaining agreement which forbade employer's use of medical examination to be used to "affect adverse discrimination" against a worker.¹⁶¹ The arbitrator concluded that the agreement prohibited differential treatment of employees on the basis of the same medical restrictions but did not prohibit discipline based on positive test results.¹⁶² Furthermore, random testing did not by itself discriminate against workers.¹⁶³

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

to permit random testing first, of top-level management; and, within a few months, of union-hourly workers. *Id.*

161. *Id.* at 1389.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* The arbitrator noted the presence of toxic chemicals and the seriousness of a recent explosion.

166. *Id.* at 1389-90. An undercover investigation unveiled some drug users and others came forward for an employee assistance program. Nearly 30 percent of employees in one part of the plant tested positive for or admitted to drug use. *Id.* Further, an expert witness testified that effects of drug use are not always readily discernible. Therefore, supervisors are unable to refer impaired employees to "for-cause" testing programs. *Id.*

167. *Id.* at 1390. The decision also upheld the company's testing process. The arbitrator found that the testing process itself was accurate and sufficiently uniform as to all workers. Moreover, the workers proffered no evidence of excessive discretion in choosing test subjects. Finally, the need for effective testing outweighed any intrusions on employee privacy. *Id.* at 1391.

For additional decisions on testing programs, see *Hopeman Brothers, Inc.*, 88 Lab. Arb. (BNA) 373 (1986) (Rothschild, Arb.) (upheld testing program noting protections for employees and employees' opportunity to combat abuses through grievance procedure). *But see Day & Zimmerman, Inc.*, 88 Lab. Arb. (BNA) 1001 (1987) (Heinsz, Arb.) (program unreasonable because testing invades privacy and does not measure on-the-job impairment). For discussion of *Hopeman* and *Day*, see Hébert, *supra* note 69, at 856-59.

2. *Discipline for Positive Test Results*

In *Boone Energy*,¹⁶⁸ an arbitrator found that a company was justified in instituting a substance abuse program after a clerical employee reported to work while under the influence of a controlled substance.¹⁶⁹ The arbitrator concluded that the company had a right to conduct a nondiscriminatory search of employees and that employees' written consent permitted the company to obtain and analyze blood and urine samples.¹⁷⁰ Despite this finding, the arbitrator refused to discharge grievants for positive test results¹⁷¹ because the company offered no evidence that the discharged individuals ever exhibited signs of on-the-job impairment.¹⁷² The decision reflected a belief that body fluid testing only demonstrates past exposure to drugs and not necessarily on-the-job use or impairment.¹⁷³

The arbitrator in *Roadway Express*¹⁷⁴ found that, under the parties' collective bargaining agreement, the presence of marijuana in urine was sufficient to establish that a worker was under the influence of drugs.¹⁷⁵ When the grievant, a truck driver, showed signs of impairment, the

168. 85 Lab. Arb. (BNA) 233 (1985) (O'Connell, Arb.).

169. *Id.* at 236.

170. *Id.* The company informed employees that they did not have to undergo a search or produce body fluid samples. However, the company advised employees that a failure to cooperate would require the company to conclude that they were using controlled substances. Hence, the company placed a burden on employees to prove otherwise. *Id.* at 234. The decision also found that the company employed reasonable chain-of-custody and labeling procedures. *Id.* at 237.

171. *Id.*

172. *Id.* See Zeese, *supra* note 44, at § 4.02[1][c], 4-22 to 4-23 (discussing the *Boone* case and other arbitration decisions involving urine testing).

173. 85 Lab. Arb. at 237. See Zeese, *supra* note 44, at § 4.02[1][c]. Other decisions reached similar results. See, e.g., Chase Bag Co., 88 Lab. Arb. (BNA) 441 (1986) (Strasshofer, Arb.) (employer improperly fired workers for reporting to job under the influence when test results were based solely on urine tests that did not reliably establish blood alcohol content at time each grievant came to work; arbitrator noted that the workers showed no sign of intoxication or impairment of work-related functions); Trailways, Inc., 88 Lab. Arb. (BNA) 1073 (1987) (Goodman, Arb.) (noting no connection between THC, a marijuana by-product, in the system and ability to work safely and efficiently); Union Oil Co., 88 Lab. Arb. (BNA) 91 (1986) (Weiss, Arb.) ("under the influence" implied impairment); Georgia Pacific Corp., 86 Lab. Arb. (BNA) 411 (1985) (Clarke, Arb.) (tests do not conclusively establish that an employee is under the influence of drugs).

174. 87 Lab. Arb. (BNA) 224 (Cooper, Arb.).

175. *Id.* at 230-31.

company tested him for drugs and alcohol.¹⁷⁶ The company fired the driver after he tested positive for marijuana.¹⁷⁷ The arbitrator upheld the discharge on the basis of the result, despite the Union's contention that the company failed to present additional proof of impairment.¹⁷⁸

3. *Discipline for refusal to submit to test*

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

176. *Id.* at 227-28.

177. *Id.* at 228.

178. *Id.* at 230-31. See also *Amoco Oil Co.*, 88 Lab. Arb. (BNA) 1010 (1987) (Weisenberger, Arb.) (did not decide whether employer must present evidence of impairment). For additional decisions upholding discharge for positive drug test results, see *B.F. Shaw Co.*, 90 Lab. Arb. (BNA) 497 (1988) (Talarico, Arb.) (revoked conditional employment on basis of positive test); *NPL Corp.*, 88 Lab. Arb. (BNA) 1031 (1987) (Tripp, Arb.) (test results showed that employee had taken PCP shortly before administration of the test); *Washington Metropolitan Area Transit Authority*, 82 Lab. Arb. (BNA) 150 (1983) (Bernhardt, Arb.) (test after bus accident). For further analysis of these and other decisions upholding discharge, see ZEESE, *supra* note 44, at § 4.02[1][c]; Hébert, *supra* note 69, at 864-66.

179. ZEESE, *supra* note 44, at § 4.02[1][c], 4-23, citing *Albert Einstein Medical Center*, 303 Summary Lab. Arb. Awards (AAA) No. 7 (1983) and *Shell Oil Co.*, 81 Lab. Arb. (BNA) 1205 (1983) (Brisco, Arb.). Sometimes such a ruling depends on whether an employee has received notice that refusal amounts to insubordination. *Signal Delivery Services, Inc.*, 86 Lab. Arb. (BNA) 75 (1985) (Wies, Arb.); see ZEESE, *supra* note 44 at § 4.02[1][c], 4-23 through 4-24.

180. 88 Lab. Arb. (BNA) 1254 (1987) (Nicholas, Arb.).

181. *Id.* at 1255. The arbitrator found that the company had a right to direct that the workers deliver the specimens. *Id.*

182. *Id.* The arbitrator described the employees' position as a "temporary emotional disorder." *Id.*

183. *Id.* at 1256. The samples were negative. *Id.* at 1255. Other decisions have upheld discharge decisions in drug testing refusal disputes. See, e.g., *Concrete Pipe Products Co.*, 87 Lab. Arb. (BNA) 601 (1986) (Caraway, Arb.) (discharge for refusal to sign form acknowledging awareness of company's testing policy following written warnings for refusal to submit to test after on-the-job injury); *American Standard*, 77 Lab. Arb. (BNA) 1085 (1981) (Katz, Arb.) (discharge for refusal to submit to test after being advised of consequences of refusal). For further discussion of these cases, see Hébert, *supra* note 69, at 860-61.

V. ANALYSIS

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

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

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

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

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

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

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

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

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

191. See *supra* note 50 for discussion of this aspect of due process.

cation of private facts¹⁹² in complaints reminiscent of invasion of privacy¹⁹³ and defamation¹⁹⁴ actions. State statutes may regulate private sector testing;¹⁹⁵ public agencies promulgate testing procedures.¹⁹⁶ Handicap discrimination statutes may apply to public and private employers.¹⁹⁷ Arbitration and collective bargaining play roles in both areas of employment.¹⁹⁸ For example, an arbitrator's analysis of the reasonableness of a private company's testing program involves a balancing test similar to the one applied in search and seizure cases.¹⁹⁹

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

192. See *supra* note 50 for discussion of due process actions based on a press release.

193. See *supra* notes 77-94 for discussion of the "disclosure" type of privacy action.

194. See *supra* notes 88-94 and accompanying text for an example of acts constituting publication.

195. See *supra* notes 124-34 and accompanying text for an analysis of these statutes.

196. See *supra* note 23.

197. See *supra* notes 111-23 for discussion of handing discriminatory statutes.

198. For discussion of the labor law aspects of drug testing, see *supra* notes 135-84 and accompanying text.

199. Both balance employer interests and worker privacy interests. See *supra* note 37 and accompanying text for description of the test in fourth amendment actions. See *supra* notes 165-68 and accompanying text for an arbitrator's finding that an employer interest in eradicating a burgeoning drug problem outweighed intrusions on employee rights because of safeguards within the testing program designed to protect employees.

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

200. See *supra* note 74 and accompanying text. This part of the article discussed

nies eliminate drug users from safety-sensitive positions will encourage employers to institute testing programs. Workers, too, clearly have an interest in job safety. Workers' safety interests may override those of management because lower-level employees are more often present at accident sites.

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

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

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

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

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

202. See, e.g., *Skinner v. Railway Labor Exec. Ass'n*, 109 S. Ct. 1402, 1418 (1989) (testing procedure did not require monitoring the production of samples).

203. See *supra* note 202.

204. Title VII prohibits discrimination on the basis of pregnancy. 42 U.S.C. § 2000e(K) (1981). Handicap discrimination statutes cover many kinds of physical disabilities. See *supra* notes 118-23 and accompanying text.

205. The Supreme Court in *Skinner v. Railway Labor Exec. Ass'n*, 109 S. Ct. 1402 (1989), allowed random testing of workers in sensitive positions. "Critical position" requirements appear in state statutes. See e.g., IOWA CODE ANN. § 730.5(3) (b).

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

discipline or rehabilitation of casual users of illicit drugs.²⁰⁷

VI. CONCLUSION

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

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

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