1-1-1990

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A Comprehensive Assessment of Employment Drug Testing: Legal Battles Over Delicate Interests

STEPHEN PLASS*

INTRODUCTION

During the past ten years, evidence has mounted that drug and alcohol abuse have critical workplace ramifications. The concern about drugs in the workplace heightened as consumption rose in the 1980s. Employers began paying more attention to data suggesting that their employees might be abusing drugs or alcohol, and that such abuse had, among other things, serious safety and financial implications for their businesses.

The 1988 survey results released by the National Institute on Drug Abuse reflect the latest statistics on drug and alcohol abuse.¹ The survey reported that marijuana, the most widely used illegal drug, was consumed at least once a month by 11.6 million people, and that more than thirty-three percent of Americans over twelve years of age had tried marijuana at least once. It also reported that cocaine was the second most consumed drug, with 2.9 million people using it at least once a month, and 21 million people having tried it at least once. In addition, the survey estimated that 1.9 million people have tried heroin at least once, with regular users estimated at 500,000 to 750,000. The survey also concluded that 106 million people consume alcohol at least once a month, with the number of alcoholics estimated at about 17 million. Alcohol abuse is therefore

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America's number one substance abuse problem.

While these figures represent a sharp decline from 1985 estimates,\(^4\) they still reflect illegal drug and alcohol usage by a substantial part of the population and workforce. Although the numbers from the 1988 survey indicate declines in occasional illegal drug use, chronic cocaine abuse has risen sharply.\(^8\)

The increased availability of data on substance abuse in the 1980s led more employers to institute drug testing policies. Unions responded, contending that these policies violated, among other things, employees' collective bargaining and constitutional rights. On these bases, unions challenged newly implemented and revised drug policies in various administrative and judicial forums. This article looks at the development of the law in this area vis-a-vis workplace realities. It will also explore the law's impact on the relationship between employer and employee.

I. Public Sector Challenges

In March 1989, the Supreme Court handed down two decisions on drug testing in the workplace. Both cases involved testing in the public sector. Several months later, the Court decided a third drug testing case. This case dealt with testing in the private sector. The first, *Skinner v. Railway Labor Executives' Association*,\(^4\) involved railroad workers; the second, *National Treasury Employees Union v. Von Raab*,\(^5\) involved Customs Service employees; and the third, *Consolidated Rail Corp. v. Railway Labor Executives' Association*,\(^6\) also involved railroad workers. None of these cases arose in "pure" private sector settings. Nonetheless, their analyses and conclusions will serve as guideposts for both private and public sector employers.

Long before *Skinner* and *Von Raab* reached the Supreme Court, state and lower federal courts had ruled on the issue of drug testing.

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\(^2\) A similar study done by the Department of Health and Human Services in 1985 reported that 18 million people used marijuana and 5.8 million used cocaine once a month. *Nat'l Inst. on Drug Abuse, U.S. Dep't of Health & Human Servs., The National Household Survey on Drug Abuse* (1985).

\(^3\) The 1988 survey concluded that while there was a 37% overall decline in illegal drug use, the number of people using cocaine once a week or more jumped from 647,000 in 1985 to 862,000 in 1988. First time estimates were also done for crack, which showed approximately 484,000 people using the highly addictive form of cocaine at least once a month, and 2,400,000 people have tried it at least once. See sources cited supra notes 1 - 2.


\(^7\) In each case, the employer was either covered by a collective bargaining contract, regulated in some way, or fell under the guidelines of the Constitution or a federal statute. Hence, these cases do not address an employer's right to test employees who have been traditionally considered "at will."
Public employers had implemented a variety of testing programs, most of which were challenged in court. The resulting decisions established a judicial sense of when employers had an acceptable basis for testing. The following examples are illustrative of this principle.

A. Public Sector Testing Before Skinner

1. Random Testing

Many state governments implemented new policies which were met with mixed success. Courts generally did not support state and local government policies that called for random testing. For example, in Capau v. City of Plainfield, a federal district court judge stated that Plainfield, New Jersey violated the constitutional rights of its firefighters and police employees when it conducted surprise, random drug tests. The judge held that the city did not have reasonable suspicion of drug use by any particular employee, and that the workers were not given notice of the testing. In addition, the judge ruled that the city's actions violated the fourth amendment prohibitions against unreasonable searches and seizures. The judge felt that the applicable standard was one of reasonable, "individualized" suspicion of drug use.

Similarly, in McDonell v. Hunter, a federal district court enjoined Iowa's testing and search program which (1) allowed strip searches of prison guards, (2) required them to provide blood and urine samples, and (3) subjected their automobiles to searches at the discretion of their supervisors. The court held that testing was appropriate under certain limited circumstances: for example, upon an employee's application for a job, as part of a yearly physical, or when reasonable suspicion exists.

2. Prescheduled Testing

Unlike challenges to random testing, courts generally did not uphold employees' constitutional challenges to prescheduled drug testing. In Fraternal Order of Police, Newark Lodge No. 12 v. City of

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9. Id. at 1522.
11. Id. at 1132. In modifying the decision, the appeals court found that random urine tests "performed uniformly or by systematic random selection" were less intrusive and, therefore, reasonable. McDonell, 809 F.2d at 1308.
Newark, the court reviewed a policy which called for urine testing twice a year of narcotics police officers. In approving the policy, the court balanced the state's interest in the search against the officer's expectation of privacy. The urine tests were viewed as minimal invasions when balanced against the strong public interest in ensuring that police officers are not drug users. The view was the same in City of Palm Bay v. Bauman. Even though the Florida appellate court enjoined random testing of police officers and firefighters in this case, it recognized the legitimacy of testing during regularly scheduled physical exams.

3. Transportation Entities

Courts are especially sensitive to policies implemented by public transportation entities. In Sanders v. Washington Metropolitan Area Transit Authority, a federal appellate court upheld the right of the transit authority to test its bus drivers and subway operators for drugs and alcohol after an accident or mishap and after returning from sick leave. In dismissing the claims of seventeen discharged employees, the court held that drug and alcohol use threatens public safety, and that the discharges served the public interest.

At issue in Division 241 Amalgamated Transit Union v. Suscy were the transit authority rules providing for blood and urine testing whenever an employee is involved in a serious accident or is suspected of intoxication. In upholding the rules, the Seventh Circuit stated that in view of the paramount state interest in protecting public safety by making sure its drivers are fit for duty, the drivers have no reasonable expectation of privacy regarding submission to blood and urine testing.

4. Regulated Industries

A special interest is also taken in industries subject to government regulation. For example, in Shoemaker v. Handel, the Third Circuit upheld a New Jersey law which allowed stewards to direct race-track officials, jockeys, or horse trainers to submit to breathalyzers, and which subjected jockeys to post-race urine testing. In disagreeing with the jockeys' contention that the rules violated their fourth,

13. Id. at 473-74, 524 A.2d at 437.
15. Id. at 1324-26.
17. Id. at 1156.
18. 538 F. 2d 1264 (7th Cir), cert. denied, 429 U.S. 1029 (1976).
19. Id. at 1267.
fifth, and ninth amendment rights, as well as the due process and equal protection clauses, the court stated that the unique nature of the horse racing profession provided the basis for such testing. The court reasoned that the industry is highly regulated to prevent fraud, and that drug testing serves to bolster the state's significant interest in maintaining the integrity of all participants in the field.\textsuperscript{21}

\textbf{B. Skinner v. Railway Labor Executives' Association}

\textit{Skinner} came to the federal courts much the same way as other drug testing cases. In this instance, the Secretary of Transportation implemented regulations providing for drug and alcohol testing of certain railroad employees. The regulations required testing of covered employees after major train accidents or incidents, and upon violation of certain safety rules.\textsuperscript{22}

The railway union sued to enjoin implementation of the testing regulations, arguing that they violated the employees' fourth amendment rights. The district court disagreed and granted summary judgement upholding the regulations.\textsuperscript{23} The court of appeals reversed, holding that to qualify as reasonable under the fourth amendment, testing must be based on a particularized suspicion that

\begin{itemize}
  \item \textsuperscript{21} Id. at 1143-44.
  \item \textsuperscript{22} \textit{Skinner}, 109 S. Ct. at 1408-09. The regulations at issue have their genesis in Rule G, an industry-wide rule promulgated by the American Association of Railroads. Rule G applies to all railroads, and was adopted in varying forms since its promulgation. For the Secretary of Transportation's authority to promulgate safety rules, see 45 U.S.C. § 431(a) (1982). The pertinent regulation prohibiting the possession and use of alcohol and controlled substances are codified at 49 C.F.R. § 219.101(a)(1)-(2), (c) (1989). In the railroad cases considered, we see essentially the same rule being subjected to public and private sector analysis, with different results.
  \item \textsuperscript{23} This amendment to the United States Constitution provides:
  \begin{quote}
  The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrents shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.
  \end{quote}
  U.S. Const. amend. IV. The judicial creativity that has gone into interpreting this amendment is noteworthy. Its application has moved from protecting against unreasonable intrusions in homes by government officials, to numerous other situations created by societal developments. Because the essence of the amendment is to protect what people regard as private domain, it lends itself to great interpretive flexibility. See \textit{Warden v. Hayden}, 387 U.S. 294 (1967) (principal object of fourth amendment is privacy, not property). As a result, it is not surprising that drug testing policies which require the giving of bodily fluids are construed as an infringement on privacy rights.
  \item \textsuperscript{24} \textit{Skinner}, 109 S. Ct. at 1410. In a bench decision, the district court found that the government and public's interest in railroad safety outweighed employees' interest in the integrity of their bodies as protected under the fourth amendment.
\end{itemize}
drugs or alcohol were used. The Supreme Court granted a writ of certiorari and reversed the court of appeals, finding the testing regulations reasonable under the fourth amendment.

In reaching its decision, the Court had to jump several hurdles. In the first instance, it had to determine the applicability of the fourth amendment to the testing procedures (outlined by the regulations) since the testing was conducted by private railroads. The Court seemingly had little difficulty concluding there was "governmental action"—a necessary predicate to fourth amendment application and analysis. It found that railroads complying with one aspect of the regulations did so by compulsion of the sovereign, and that the government was not passive with respect to the remaining testing provisions. The Court concluded that the government had made plain its strong preference for testing, and also its desire to share in the fruits of such tests. The Court ruled that the regulations "preempt[ed] state laws, rules, or regulations covering the same subject matter, and are intended to supersede 'any provision of a collective bargaining agreement, or arbitration award construing such an agreement.'" It further noted that the regulations conferred specific rights on the Federal Railway Administration, thereby accentuating the government’s role.

Once past the government action hurdle, the Court tackled the issue of whether the taking of blood and urine samples from employees constitutes a search and seizure within the ambit of the fourth amendment. The Court relied on its own precedent to support its position that blood tests constitute a search and seizure under the fourth amendment. In this regard, it turned to Schmerber v. California, its first decision on the issue.

Schmerber, a 1966 ruling, dealt with a police officer’s decision to

25. Id. at 1410. In reversing, the court of appeals acknowledged the significant government interest in safety, but felt that the employees' privacy interests should be better accommodated. It reached that accommodation by applying an individualized suspicion standard as opposed to the literal probable cause requirement of the fourth amendment. See Railway Labor Executives’ Ass’n v. Burnley, 839 F.2d 575, 583-88, rev'd sub nom. Skinner v. Railway Labor Executives’ Ass’n, 109 S. Ct. 1402 (1989).
27. Id. at 1411. The fourth amendment is inapplicable to private individuals. See United States v. Jacobsen, 466 U.S. 109, 113-14 (1984). In cases where an official of the government is acting on the government's behalf, the amendment is triggered and there is no difficulty with its applicability. The amendment can also be triggered by a private party if the government plays a role in that private party's conduct. The degree of government involvement will determine whether the private party will be regarded as an instrument of the government, and therefore covered by the amendment. See Coolidge v. New Hampshire, 403 U.S. 443, 487-89 (1971).
29. Id. at 1412.
30. Id. at 1411 (citations omitted) (quoting 50 Fed. Reg. 31,552 (1985)).
31. Id. at 1411-12.
have a blood sample taken from Schmerber, the driver of a motor vehicle involved in an accident. The officer testified that when he arrived at the scene of the accident, Schmerber's breath smelled of alcohol and his eyes were bloodshot, watery, and glassy in appearance. In addition, the officer stated that he noticed similar symptoms of drunkenness at the hospital, where Schmerber was being treated for injuries sustained in the accident. The officer then placed Schmerber under arrest and directed a physician to take a blood sample for alcohol testing, despite Schmerber's objection.\(^3\)

At trial, Schmerber objected to the introduction into evidence of the test results, on the basis that the circumstances of its “taking,” and the admission of the chemical analysis into evidence, violated due process of law under the fourteenth amendment. He also contended that such evidence violated his privilege against self incrimination, right to counsel, and his right not to be subjected to unreasonable searches and seizures.\(^3\) The Court overruled the objection and admitted the test results.\(^5\)

The Court ruled that taking of blood under these circumstances constituted a search and seizure as contemplated by the fourth amendment. However, the Court concluded that the search and seizure was “reasonable” in this case. The Court held, “[s]uch testing procedures plainly constitute searches of ‘persons,’ and depend antecedently upon seizures of ‘persons,’ within the meaning of that Amendment.”\(^3\)

The Court went on to elaborate on the policy and functional considerations behind the fourth amendment. The Court noted that the amendment's proper function is not to constrain all intrusions as such, but rather to guard against intrusions which are not justified in the circumstances, or which are made in an improper manner. Among other things, the Court stated:

The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact

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33. Id. at 768-69.
34. Id. at 759.
35. Id.
36. Id. at 767. The penetration of skin by needle for the purpose of obtaining blood, arguably was not contemplated by the amendment. Even more attenuated are the private medical facts that are revealed by the blood. However, the amendment’s “right of people to be secure in their persons” provision, lends itself to that interpretation. Although Schmerber is not an employment testing case, it proved to be seminal in resolving fourth amendment issues stemming from the taking of bodily fluids in the employment context.
such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

... It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.\(^3\)

Having established that blood tests are searches within the fourth amendment, the Court turned to urine testing. Prior to *Skinner*, the Court had not ruled on whether taking and testing of urine constitutes a search and seizure within the meaning of the fourth amendment. However, lower federal courts dealing with this issue so held. For example, in *Allen v. City of Marietta*,\(^3^8\) the federal district court squarely confronted this issue and held that a urinalysis is a search and seizure within the meaning of the fourth amendment.

In this case, the city had concluded, based on several reports and an undercover operation, that numerous employees in its electrical distribution division were using drugs. Employees identified as drug users were given the "alternatives" of resigning, taking a urinalysis, or being fired. Six employees who elected to take the urinalysis tested positive for marijuana. They were discharged. The employees then sued, contending, among other things, that they were deprived of their rights secured by the fourth amendment.

Ruling that the urinalysis was a search and seizure, the court noted:

·While the court has some doubts whether requiring a person to provide a sample of his urine for analysis is the kind of "search" contemplated by the framers of the fourth amendment, the court feels constrained by current law to hold that a urinalysis is a search within the meaning of that amendment.\(^3^9\)

Citing *Schmerber*, the court continued:

[T]he Supreme Court held that the extraction of a blood sample from a defendant for purposes of determining his state of intoxication was a search within the meaning of the fourth amendment. While the extraction of blood from an unwilling defendant is qualitatively different from a requirement that an individual provide the government samples of his biological waste products, other courts have applied *Schmerber* to breathalyzer tests, ... detention of persons suspected of smuggling contraband in their stomachs until the contraband is expelled in a bowel movement, ... [and] at least two cases have treated urinalysis tests as searches within the meaning of the fourth amendment.\(^4^0\)

In upholding the interpretation of *Schmerber* previously given by

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37. *Id.* at 769-72.
39. *Id.* at 488.
40. *Id.* at 488-89.
lower federal courts, the Court in *Skinner* stated:

It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. . . . Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, . . . these intrusions must be deemed searches under the Fourth Amendment. 41

The Court went one step further and ruled that breathalyzer tests, for which provision was made in the regulations, are also searches, since they implicate “similar concerns about bodily integrity.” 42 As a result, such testing also fell within the ambit of fourth amendment analysis.

Hence, for the taking of blood, urine, and breath samples, the *Skinner* Court concluded that an intrusion on privacy occurs at two levels. In the case of blood, the first intrusion occurs when a needle is used to penetrate beneath the skin to obtain the blood specimen; the second intrusion occurs when that specimen is chemically analyzed for physiological data. A similar analysis was applied for breathalyzer tests. In the case of urine, the initial intrusion occurs through the visual or aural monitoring of the act of urination. Like blood, the second intrusion revolves around the private medical facts that chemical analysis of the urine can reveal.

Based on the foregoing analysis, the *Skinner* Court determined that the fourth amendment applied because the promulgation and use of the railroad regulations were “governmental actions.” It then noted that employees have a “reasonable expectation of privacy” in their blood, urine, and breath specimens, and therefore, the taking of such specimens constituted searches. As such, the existence of probable cause and its related fourth amendment considerations controlled the determination of whether such searches conducted by employers were reasonable.

In determining that testing employees was reasonable in *Skinner*, the Court made the following findings: (1) Historically, American railroads have suffered from the effects of alcohol abuse, and more recently, from drug use by its employees; (2) substantial evidence of harm exists in the form of accident investigation reports, which show personal injuries, loss of lives, and extensive property damage argua-

42. *Id.* at 1412.
bly attributable to drug and alcohol use; (3) the employees affected by the regulations at issue engaged in safety-sensitive work; (4) railroad employees have always been subjected to regulation because the industry itself is regulated; and (5) government has always had a strong interest in ensuring the safety of the traveling public and of the employees themselves.43

Based on these findings, the Court determined that the government had a compelling interest in testing the covered employees. It found that interest so compelling as to justify dispensing with the traditional probable cause or individualized suspicion requirements of the fourth amendment. However, the Court pointed out that its decision was made in the context of "limited" intrusions on privacy allowed by the Federal Railway Administration regulations. In this regard, it noted that the circumstances that trigger testing and the limits of such testing are narrowly defined, and that affected employees are on notice that testing can take place. The Court also noted that the tests were standardized and there was limited discretion given to those administering the testing program.44

In addition, the Court noted that because drugs and alcohol dissipate from the bloodstream over time,45 the probable cause and warrant requirements would frustrate the objectives of the testing program. Moreover, the Court felt that because it is burdensome to force supervisors to comply with such intricate requirements, eliminating the requirements assures the certainty and regularity afforded by the regulations.46

Similarly, the Court found the requirement of particularized suspicion impractical because generally employees seldom display signs of impairment, and objective indicia of impairment are absent and difficult to gather under the circumstances that trigger testing. It also noted that individuals consent to significant restrictions on their freedom when they accept employment, and that their privacy interests are reduced because they expect intrusions and restrictions inappropriate in other contexts. The Court felt that any additional intrusion caused by the testing procedures was minimal, and therefore, did not infringe significant privacy interests.47

Based on its findings that neither probable cause nor particular-

43. Id. at 1407-08. These findings are critical to fourth amendment analysis since the amendment only protects against "unreasonable" searches and seizures. A determination that the particular circumstances militate strongly in favor of testing will generally serve as the foundation for a finding of reasonableness.
44. Id. at 1415-16.
45. Id. at 1416. The speed with which drugs and alcohol pass from a person's system remains a hotly litigated issue. The Court seems to have accepted the proposition that medical technology can measure the speed of dissipation within reasonable limits.
46. Id. at 1416.
47. Id. at 1417.
ized suspicion analysis was controlling, the Court went on to balance the government’s interest in testing against the employees’ fourth amendment interest in privacy. It found the government’s interest in safety, deterring drug use, and collecting information on the cause of train accidents outweighed employees’ privacy interests. The Court further justified its conclusion by finding that employees already have significantly reduced privacy expectations when they work in a regulated industry. This factor, coupled with the employer’s attempts to minimize intrusion by performing the tests in a medical environment with nonemployer personnel, and by allowing unobserved urine collection, served as additional rationale for the Court’s holding.\(^4\)

C. National Treasury Employees Union v. Von Raab

Using the balancing analysis, the Court reached the same result in *Von Raab*.\(^4\) In this case, the United States Customs Service implemented a drug testing program for employees seeking transfers or promotions to positions which have direct involvement with drug interdiction, or which require the employee to carry firearms or handle classified information. The program required that affected employees provide urine samples for analysis.\(^5\) The employees' union sued, alleging, inter alia, violation of fourth amendment rights. The district court agreed with the union and enjoined the testing program.\(^6\) The court of appeals vacated the injunction, holding that even though the program effects a search as contemplated by the fourth amendment, such searches were reasonable.\(^7\) The court reasoned that the Customs Service took steps to minimize the intrusiveness of the search by (1) giving notice to affected employees of the impending test; (2) not requiring visual observation of the act of urination; and (3) limiting the discretion as to which employees must take the test. The court also noted that testing was performed in the employment context and emphasized the government’s interest in assuring the integrity of the service and safety of its employees.\(^8\)

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48. *Id.* at 1418.
50. *Id.* at 1387.
51. *Id.* at 1389. Unlike the district court in *Skinner*, this court found the employees’ privacy rights weighed more heavily in the balance, and the testing plan was overly intrusive, particularly because it was not based on probable cause or reasonable suspicion. *Id.* at 1389.
The Supreme Court granted a writ of certiorari and upheld the ruling of the court of appeals, except that portion dealing with employees who handle classified information. The Court remanded this issue for clarification on what materials are classified and which employees can be tested. The Court addressed the fourth amendment concerns by invoking the same balancing analysis it employed in *Skinner*. Reiterating its conclusion from *Skinner* that urine tests are searches within the fourth amendment, the Court went on to assess the reasonableness of these searches. Citing *Skinner* and other precedents, the Court noted that "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."56

In this case, the Court dispensed with traditional warrant and probable cause requirements when it noted that testing was not performed in a criminal context, but was a routine administrative function to prevent the development of hazardous conditions. The Court noted that test results were not turned over to criminal authorities unless the employee first gave written consent. The Court went on to find that warrants and neutral magistrates would severely impede the daily operations of government offices, and are more suitable in criminal cases.58

The Court then turned its attention to analyzing the Government's interests in testing. The Court noted that affected Customs Service employees had routine contact with contraband and drug traffickers, and therefore, the government's interests in ensuring the integrity of the Customs Service and the safety of its employees were compelling. Although the testing program was not based on a history of

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55. *See id.* at 1396-97. In an apparent attempt to keep the ruling limited to circumstances where there is a nexus between the government's interest in testing and the content of an employee's job, the Court required a finding on the likelihood that the categories of employees identified would gain access to sensitive information.
56. *Id.* at 1398.
57. *Id.* at 1389-90. Some drug testing policies require management personnel to report incidents of violation to criminal authorities. In addition, discovered or confiscated drugs are turned over to law enforcement officials who will pursue an independent line of investigation in deciding whether to prosecute. Clearly, this occurrence heightens the jeopardy to the employee. Recognizing that the probable cause requirement is most comfortably applied to criminal cases, the Court likened the Customs Service's testing program to administrative searches in which no notice or a standard less than probable cause will suffice. *See Camara v. Municipal Court*, 387 U.S. 523 (1967) (searches of a building to detect violations of building code reasonable since public's interest militates in favor of such searches, and since it involves only limited invasion of citizen's privacy interests).
drug abuse or a belief that drug abuse was prevalent in the Service, the Court found that "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgement." The Court added that since there is now a national drug crisis, Customs Service employees are often exposed to violence, have access to drugs, and are easy targets for bribery. These factors, combined with the public's interest in interdiction, provided a sufficient rationale for finding a compelling governmental interest.

Next, the Court assessed the employees' privacy or liberty interests. It premised its assessment on the proposition that one's freedom in the workplace is more limited than in other contexts. Concomitantly, it reasoned that employees have a diminished expectation of privacy inasmuch as workplace realities make certain intrusions reasonable, although such intrusions might be viewed as unreasonable in other contexts. Analogizing Customs Service employees involved in interdiction work or carrying firearms to United States Mint, military, or intelligence employees, the Court justified further diminution of these employees' privacy interests. The Court concluded that extraordinary assurances of trustworthiness through testing was not unreasonable under the circumstances.

In balancing the Court's assessment of the Government's interests against its assessment of employees' expectation of privacy, the Government's interests easily outweighed privacy rights. In view of the substantial harm the Government sought to prevent, it was easy for the Court to conclude that the Customs Service's urinalysis testing program was a reasonable mechanism for deterring drug use and a reasonable infringement on privacy interests. Privacy rights, therefore, were overwhelmed by public safety and national security considerations.

D. What Do Drug Tests Prove?

What drug and alcohol tests seek to prove, in conjunction with their reliability and accuracy, are hotly debated issues involving a cross section of our society. Naturally, doctors and others with medical expertise are at the forefront of this debate. Those who oppose

59. Id. at 1393-94.
60. Id. at 1392-93.
61. Id. at 1393.
62. Id.
63. Id. at 1395.
drug testing contend, among other things, that tests are indeterminative as to when a drug was taken; that tests are unable to gauge whether intoxication or impairment occurred as a result of the exposure to a drug; and that tests cannot predict the extent of the effects of a drug on health or behavior.

The *Skinner* court of appeals dealt with these issues, concluding that blood and urine tests cannot measure drug intoxication or degree of impairment, but rather, they only disclose drug metabolites which may remain in the body for days or weeks after ingestion.⁶⁴ Therefore, the court’s reasoning supports the argument that there is an uncertain nexus between drug use and workplace misconduct or mistake. Notwithstanding the negative criticisms, drug testing appears to have credibility. In *Von Raab*, the Court noted the reliance by the Commissioner of Customs on data which concluded that testing urine for drugs is technologically reliable, valid, and accurate.⁶⁵ The Customs Service program utilized the enzyme-multiplied immunoassay technique (EMIT) as an initial screening device. If the initial test was positive, a confirmation test was done using the gas chromatography and mass spectrometry (GC-MS) method. Confirmed positive results were then reviewed by a licensed physician who possessed the ability to evaluate these results.⁶⁶

In *Skinner*, the employees tested had to provide both blood and urine samples. The regulations provided that samples “be analyzed by a method that is reliable within known tolerances.”⁶⁷ The Court noted that these samples were analyzed using state-of-the-art equipment and techniques. Primary reliance was placed on results from blood specimens, which the Court accepted as providing clear indication of drug use and impairment effects.⁶⁸

The Court apparently had no difficulty accepting the EMIT test followed by a GC-MS confirmation as an accurate mechanism for identifying drug use. Its pronouncement in *Skinner* on this issue evidences its belief that technology is currently available to perform accurate and reliable testing. The Court further elaborated that one should not focus on conclusive proof of impairment, but rather on the basic wrong or evil of drug ingestion. The Court noted that the fruits of testing do not become irrelevant because they fail to conclusively prove causation, but rather “the gravamen of the evil is performing certain functions while concealing the substance in the

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⁶⁶. *Id.* at 1389.
⁶⁸. *Id.* at 1409.
Employers with testing policies use a variety of methods to analyze blood and urine specimens. Positive test results usually lead to employee discipline or discharge. The testing method an employer chooses depends largely on how much the employer wants to spend, and whether the employer is interested in testing for a wide range of drugs or simply targeting a few illicit substances. The more commonly used testing methods, along with some of the accuracy and reliability issues they raise, are outlined below.

1. **Thin Layer Chromatography (TLC)**

   This procedure involves applying blood or urine samples to the bottom edge of specially prepared paper (chromatography paper) which is then placed upright in a tank of solvent. The solvent is absorbed and ascends, carrying the contents of blood or urine. At the appropriate time, the paper is removed from the solvent, dried, and placed in a staining solution. Because different drugs travel up the paper at different speeds, a drug is identified by its exact location on the paper. The drugs interact further with the staining solution, serving as an additional identifying characteristic.

2. **Radioimmunoassay (RIA)**

   This selective testing method uses antibodies and radioactivity to determine the presence of drugs. The process involves combining a urine specimen with a radioactive antibody. The solution is then measured to determine whether its radioactivity has decreased. A significant decrease in radioactivity indicates that a particular drug is present. The radioactive antibody attaches itself to the drug. The presence of a sought-after drug is detected by determining how

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69. Id. at 1421.
71. Montagne, Pugh & Fink, supra note 70, at 1299; Finkle, supra note 70, at 12.
72. The narrative below represents the author’s simplification of processes that are replete with technical terminology. For a more in-depth discussion, see Montagne, Pugh & Fink, supra note 70; Finkle, supra note 70.
much radioactivity remains in the free, unattached portion of the antibody solution.

3. **Enzyme Multiplied Immunoassay Technique (EMIT)**

EMIT, like RIA, is an antibody method. This process involves combining a urine specimen with an antibody test solution. The antibody generally inhibits chemical reaction. However, if the drug tested for is present in the urine, it combines with the antibodies and allows the chemical reaction to take place. By measuring the extent of the chemical reaction, one can determine whether the particular drug is present.

4. **Gas Chromatography and Mass Spectrometry (GC-MS)**

The GC-MS method is normally used to confirm initial TLC, RIA, and EMIT screens. However, it can also be used as the primary method of analysis. This process involves separating drugs from either blood or urine specimens by using a stream of hot gas. The drugs are vaporized and individual compounds are separated and recorded on a graph. Each drug is then shot into a mass spectrometer where its physical characteristics are analyzed; that is, its mass (atomic weight) and spectrum are determined.

5. **Accuracy and Reliability Issues**

A fundamental concern of the labor community is the accuracy of any testing method. Accuracy generally revolves around a test's sensitivity and specificity. The skill of the technician performing the test is also always important. For example, the TLC method can test for many substances simultaneously and has reasonable specificity. However, because it involves a great deal of subjective interpretation, the skill of the technician performing the test is critical. On the other hand, the antibody methods have great sensitivity. They can detect drugs at very low levels but they are relatively unspecific, thereby increasing the potential of confusing one drug with another.\(^{73}\)

Because of the specificity and sensitivity of the GC-MS method, there is some consensus that when done properly, this test is definitive and eliminates the potential for false positives. It was apparently for this reason that the Court found the procedures in *Skinner* and *Von Raab* acceptable. It appears that the natural extension is that

\(^{73}\) See Montagne, Pugh & Fink, *supra* note 70, at 1299-1304; Finkle, *supra* note 70, at 13-20.
confirmatory testing using the TLC or EMIT methods will remain more susceptible to challenge than the GC-MS method.

Court rulings have already shown that failure to perform confirmatory testing can lead to devastating results, as illustrated in Jones v. McKenzie. In that case, the District of Columbia School System terminated an employee for violating a directive which prohibited the use of drugs. The directive included a statement that a confirmed finding of an illicit narcotic substance in the urine of an employee is grounds for termination.

Pursuant to the directive, the employee submitted to an initial urinalysis done by computer; that test showed positive for THC metabolites (marijuana). The test was then repeated manually and the result was again positive for THC. The employee was then discharged for marijuana use. Subsequently, she filed suit alleging, among other things, that she was discharged solely on the basis of an unconfirmed EMIT urinalysis. She argued this discharge violated her constitutional rights to substantive and procedural due process, and violated the directives of the District of Columbia Board of Education and Superintendent of Schools.

The court agreed with the employee, focusing on the preponderance of evidence in the record which recommended confirmation testing by an alternative method. The court noted that the manufacturer of the EMIT test had a label which stated that a positive result should be confirmed by an alternate method. In addition, the employee proffered reports issued by the Food and Drug Administration, the Journal of the American Medical Association, the United States Center for Disease Control, and the United States Air Force School for Aerospace Medicine, which recommended or mandated confirmatory testing. Based on substantial evidence that a confirmation test was essential, the Court concluded that the school system's reliance on an unconfirmed EMIT test was arbitrary and capricious.

This issue was also raised in San Diego Gas and Electric Co. v.

74. 628 F. Supp. 1500 (D.D.C. 1986), rev'd on other grounds, 833 F.2d 335 (D.C. Cir. 1987). On the specific issue of confirmatory testing, the appellate court ruled that a single EMIT test cannot pass constitutional muster.

75. Id. at 1502-03. In this case, the employer's procedure called for confirmation of an initial positive result. In addition, the manufacturer's label warned that confirmatory testing should be done by an alternate method. The court's decision suggests that even if these factors were absent, the EMIT test standing by itself is not accurate and reliable enough to pass legal muster.

76. Id. at 1504.

77. Id. at 1506-07.
In asking for a half-million dollars in punitive damages, the San Diego utility alleged that the lab was guilty of negligence, fraud, and breach of contract because it failed to confirm an initial positive result, yet represented that a confirmatory test was done. In reliance on the lab's representations, the utility refused to hire an applicant who then filed suit. As the utility prepared to defend itself, it discovered that a confirmatory test was not done and felt forced to settle out of court.

Therefore, there are strong indications that at a minimum, employers must perform some type of confirmatory testing to pass legal muster. The GC-MS method appears to have the Court's imprimatur, while other methods remain more open to challenge. In the collective bargaining context, long hours will still be spent fighting over the accuracy and reliability of test results. As long as a case or issue is significant to the union and medical experts disagree, the parties in many instances will litigate or arbitrate the accuracy and reliability issues.

6. Integrity of the Specimens

Aside from problems engendered in the tests themselves, many other factors affect the integrity of the test result. From the outset, an employer must ensure that the sample collected is not tainted. An employee must be observed literally while giving the specimen to ensure this result. The problem of sample integrity is compounded by the fact that drug-free urine is available for purchase in the open market. Neither the Federal Railroad Administration in *Skinner*, nor the Customs Service in *Von Raab* required visual observation of the employee during urine collection. However, the Customs Service took precautionary measures by having a monitor listen for the normal sounds of urination. The sample was also checked to ensure it had the proper color and temperature. In this way, the regulations attempted to collect unadulterated samples, while at the same time seeking to reduce intrusions on employees' privacy.

Once a specimen is collected, proper chain of custody procedures must be followed to ensure that someone other than the provider does not tamper with it. The specimen is also labeled properly to avoid commingling, and appropriate preservation and storage procedures are followed. In *Skinner*, the employees tested were transported to an independent medical facility for the collection of blood and urine samples. The samples were then shipped to a Federal Rail-

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79. See *Skinner*, 109 S. Ct. at 1418; *Von Raab*, 109 S. Ct. at 1389.
road Administration laboratory for analysis. The Customs Service employees in Von Raab also provided samples at an independent medical facility. Samples were sealed and identified, placed in a plastic bag which was sealed, then sent to a laboratory for testing. Employees also executed chain of custody forms.

The Court approved of the collection and handling procedures in both cases. Customs Service procedures, in particular, were detailed and comprehensive. These procedures provided great assurance that the integrity of the sample was protected. The Customs Service’s exclusive use of independent contractors for the entire procedure also increased that assurance.

Quality assurance is another critical aspect of a lab’s ability to provide accurate and reliable results. There is a plethora of information in the media documenting both the false positive and false negative dilemmas of labs. Because testing has become big business, labs have sprung up overnight across the country. The likelihood of accurate results is greatly diminished if labs do not have proper equipment and highly trained personnel. Constant policing is necessary to ensure that correct procedures are followed. In recognizing the importance of accurate results, several states have begun licensing labs and outlining personnel and equipment requirements.

E. Implications of Court Decisions

The Court’s rulings in Skinner and Von Raab do not leave public employees at the whim of their employers’ unfettered discretion in the area of drug testing. Employees are still afforded protection under several statutes and the common law.

1. Statutory Restrictions

In the field of drug and alcohol testing, confidentiality is of paramount importance. An employee tested for drugs or alcohol can generate a variety of medical data from various institutions. For example, a company’s medical department, its employee advisory service, an independent lab, and a drug treatment facility might all collect and maintain drug testing data for a single employee. However, numerous statutory restrictions and guidelines intended to protect the

82. Von Raab, 109 S. Ct. at 1388.
confidentiality of medical records exist at both the federal and state levels.

Several federal laws impose restrictions on a federal employer's ability to release or disseminate medical information kept in connection with drug and alcohol testing. Section 408(a) of the Drug Abuse Office and Treatment Act of 1972 states:

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall . . . be confidential and be disclosed only for the purposes and under the circumstances expressly authorized . . .

Section 333(a) contains an identical provision for alcohol abuse.

The federal Privacy Act of 1974 also sets parameters for disclosing medical and other records of individuals kept by an agency. This Act provides: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." The Act goes on to list the entities and circumstances exempted from this proscription. In addition to numerous federal regulations protecting an employee's right to privacy, some state codes have provisions specifically providing for confidentiality of medical records.

2. Common Law Protection

Employees' confidentiality and privacy are also afforded common law protection. For example, in Houston Belt & Terminal Railway v. Wherry, the Texas Supreme Court dealt with an employee's contention that he was defamed by several of his employer's communications. The employee, Joe Wherry, was employed by the railroad as a switchman. He sustained a knee injury while working and subsequently fainted, cutting his face. His cuts were treated by the company's chief surgeon who ran two tests to determine why the employee had fainted. One of the tests was a drug screen which came back positive for a trace of methadone.

Several reports were generated because of the positive methadone result. The company doctor prepared one of these reports, which in-

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86. Id. § 290dd-3.
88. Id. § 552(b).
cluded a statement that "'[t]he Drug screening test was positive for methadone. Methadone is a drug which is often used to give heroin addicts since it has essentially the same effects as heroin, but is much less expensive. It can in some doses produce syncope . . . .'"\textsuperscript{91}

This report was delivered to the superintendent of safety, who prepared his own report. His report included a statement that "'[l]aboratory results of the urine specimen was [sic] positive for methadone, which is a synthetic drug commonly used in the withdrawal treatment of heroin addicts.'"\textsuperscript{92} Seven other company officials received the superintendent's report through the normal accident reporting procedure.

Wherry was suspended pending an investigation and hearing. He first learned of the methadone finding at the hearing. He denied ever using heroin, methadone, or any other narcotic. Subsequently, he gave another urinalysis and the report from this test stated that his urine revealed the presence of a compound similar to methadone. Further analysis showed the compound was not methadone or any other commonly abused illegal drug.\textsuperscript{93} Nonetheless, Wherry was dismissed for being an unsafe employee and for his failure to report the accident in a timely fashion. He appealed his discharge under the Railway Labor Act, but the discharge was affirmed by an arm of the National Railway Adjustment Board.

Since Wherry was a veteran, he sought assistance from the Veteran's Administration, contending that he was discharged without cause. The Department of Labor then wrote the company inquiring about Wherry's dismissal. The company's director of labor relations responded in a letter, stating that Wherry was dismissed for violation of safety and accident reporting rules. The director wrote: "'It was also determined by the Doctor who examined Mr. Wherry following his injury caused when Wherry passed out and fell, that traces of methadone were present in Mr. Wherry's system, which constitutes grounds for discharge under Uniform Code of Operating Rules, Rule G.'"\textsuperscript{94} Rule G provides that the use of intoxicants or narcotics is prohibited.

After analyzing all statements made about Wherry, the court ruled that the company doctor's report was not libelous. The doctor had accurately reported that only a "trace" of methadone was de-

\begin{itemize}
  \item \textsuperscript{91} Id. at 747.
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Id. at 748.
  \item \textsuperscript{94} Id. at 747.
\end{itemize}
ected and that, except upon further investigation, he could not say it meant anything at all. The doctor intended to convey only the possibility that Wherry was a heroin or methadone user, not that he was an actual user. However, the court found the representations of other company representatives libelous. Both the superintendent and director of labor relations admitted that a good faith allegation could not have been made that Wherry was a narcotics user.

The company contended that all writings were authored in good faith and there was no ill will or malice intended towards Wherry. It added that all communications were among persons who had a strong interest in truthful reporting of the accident. Notwithstanding these contentions, the court concluded that the representations by these officials had the import and effect of defaming Wherry. The court then affirmed the trial court's award of $150,000 compensatory and $50,000 exemplary damages, finding sufficient evidence of malice to permit an award for punitive damages.

Failure to properly limit disclosure of arguably confidential or private information is also extremely damaging. This was shown in Benassi v. Georgia Pacific when the employer announced to a large gathering of employees that a certain manager was fired for being drunk and misbehaving in a bar. The employee filed suit, arguing the employer lacked reasonable grounds to believe that the announcement was true. The court agreed with the employee and noted that notwithstanding an employer's privilege to disseminate this type of information, that privilege could be lost if the employer: (1) lacks the belief or does not have reasonable grounds to believe the statement is true; (2) abuses the privilege, that is, discloses information for some purpose other than that for which the privilege was given; (3) discloses information to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege; or (4) discloses information not reasonably believed to be necessary to accomplish the purpose of the privilege.

However, under some circumstances an employee is precluded from pursuing tort claims and is thereby forced to utilize grievance or arbitration procedures, as shown in Strachan v. Union Oil Co. Management suspended two employees based on its suspicion that one used drugs and the other had mental problems. Personnel meetings were then held to discuss the employees' conduct. A decision was made to conduct medical tests and examinations. Examinations

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95. Id. at 748.
96. Id. at 753.
98. Id. at 709, 662 P.2d at 767.
99. 768 F.2d 703 (5th Cir. 1985).
of both employees proved negative and they were promptly returned to work.100

Both employees filed suit in state court.101 The employee suspected of drug use contended he was forced to allow a search of his person, automobile, and locker. In addition, he asserted he was defamed because the company charged him with being a drug user or addict. The employee suspected of having mental problems contended that she was falsely imprisoned when she was asked to take a taxi to have her medical examination. She also alleged defamation on the grounds that the company charged her with having mental problems.102

The company removed the case to federal court where both the district court and the court of appeals rejected the employees’ claims.103 In affirming the district court, the court of appeals held that the essence of the employees’ claims did not constitute a tort under state law. It added that investigations, medical examinations, and issues related to blood and urine tests were questions arising under the collective bargaining agreement. Moreover, the court found that under the contract, the company had the right to insist upon medical examinations when the physical condition of an employee was in doubt.104

The court held that the various employee claims demonstrate an attempt to create major state court claims out of matters which are all part of a company claim of right under a collective bargaining agreement. Therefore, the employees’ right to challenge the employer’s conduct rests in the grievance procedure ending with binding arbitration.105 The court further noted that the employees’ contentions were unsupported in the record. The inquiries and searches made by the company were based on a reasonable suspicion, which does not result in liability for defamation merely because it becomes known in the plant. The court concluded that since there was no showing of malice, the defamation claims under state law were preempted by the grievance and arbitration procedures.106

Because employees are afforded a variety of legal protections in the areas of confidentiality and privacy, it behooves employers to

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100. *Id.* at 704.
101. *Id.*
102. *Id.* at 706.
103. *Id.*
104. *Id.*
105. *Id.* at 705.
106. *Id.* at 706.
limit disclosure and third party access to testing information. Employers should only disseminate employees' medical records to persons with a legitimate need to know. Employers can also set up personnel systems that separate medical records from records that do not have strict confidentiality requirements. Of course, employee consent prior to disclosure eliminates most defamation concerns.

F. Protection Under Handicap Discrimination Laws

1. Federal Laws

Handicap discrimination laws limit an employer's ability to discipline, discharge, or refuse to hire an employee who is a drug or alcohol user, capable of performing the job. The federal Rehabilitation Act of 1973 requires employers with government contracts exceeding $2,500 to take affirmative action to employ qualified individuals. In addition, the Act prescribes recipients of federal funds from discriminating against the handicapped.

The Act's application is limited to employees whose disabilities substantially impair a major life activity or who have, or are perceived to have, a past record of such disabilities. However, the Act expressly excludes from its coverage individuals who are alcoholics or drug abusers, whose current use of alcohol or drugs prevents them from performing the duties of the job in question, or whose employment, by reason of current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. If an individual qualifies under the statute's definition, an employer may be required to make reasonable accommodation. This accommodation may require the employer to provide rehabilitation opportunities. The following cases illustrate.

In Healy v. Bergman, a federal district court addressed an alco-
holic's contention that he was improperly discharged and had a private right of action under Section 503 of the Rehabilitation Act. The employee was hired by a government contractor, subject to the provisions of Section 503, who had knowledge that the employee was an alcoholic. Subsequently, the employee voluntarily admitted himself into a detoxification facility where he stayed for approximately three weeks. He then returned to work, and approximately one month later, informed the company that he had to enter a rehabilitation center for sixty days. He was told that the company did not approve of his first hospitalization and if he again admitted himself, termination would result. Despite this warning, he admitted himself into rehabilitation and was terminated.\(^2\)

During and after his hospitalization, he saw advertisements for his former position and applied, but was refused employment. He filed a complaint with the Office of the Federal Contract Compliance Program (OFCCP) alleging discrimination. The regional office ruled he was a "handicapped individual" within the meaning of the Act and that his employer had unlawfully discriminated against him.\(^3\) Several months later the regional office changed its position, stating that alcoholics currently receiving treatment are not qualified "handicapped individuals" under Section 503. The director of the national office upheld the denial of the employee's claim on the ground that alcoholics are not considered handicapped if their current abuse of alcohol prevents them from performing their job.\(^4\)

The employee then filed suit in federal district court alleging discrimination under Section 503.\(^5\) The court found Section 503 silent as to whether an individual is entitled to maintain a private cause of action against the employer. The court then reviewed a litany of court rulings on this issue and the provision's legislative history. That review resulted in the court holding that Section 503 does not confer federal rights on handicapped individuals, but merely imposes certain obligations on government agencies.\(^6\) "This is quite different from Section 504 of the Act which confers directly upon qualified handicapped individuals a right to be free from discrimination by any recipient of federal funds."\(^7\)

The court then reviewed the OFCCP's final decision and pointed

\(^{112}\) Id. at 1450.
\(^{113}\) Id.
\(^{114}\) Id.
\(^{115}\) Id. at 1451.
\(^{116}\) Id. at 1453.
\(^{117}\) Id.
out that the term “handicapped individual” is explicitly defined in the Act. The court noted that for purposes of Sections 503 and 504, the definition of “handicapped individual” does not include individuals whose current use of alcohol or drugs prevents them from performing the duties of the job in question, or whose employment would constitute a direct threat to property or the safety of others.\textsuperscript{118} The court remanded the case to the Director of OFCCP, finding the administrative record incomplete. The court requested the agency to conclude its investigations and make detailed findings as to whether the employee’s alcoholism prevented him from performing his job, and whether the company’s dismissal and subsequent failure to rehire him constituted a violation of Section 503 of the Act.\textsuperscript{119}

In interpreting the Act, some courts have held that former alcohol or drug use qualifies under the Section 504 definition of handicap. For example, in \textit{Davis v. Bucher},\textsuperscript{120} several applicants were denied employment with the city of Philadelphia because of their prior histories of drug abuse.\textsuperscript{121} The applicants sued the city, contending that they were denied employment solely on the basis of their former drug usage, a decision made without regard to their qualifications, present rehabilitative status, or the nature of the job for which they applied. Counsel for the city stipulated that the applicants were fully qualified for the jobs and would have been hired absent physical evidence and admission of prior drug use.\textsuperscript{122}

The federal district court stated that as a matter of public policy, it was Congress’ intent to include past drug users within the protections of the Act. Relying on the statutory definition of “handicap,” in conjunction with an analysis provided by the Department of Health, Education and Welfare, and a legal opinion by the Attorney General, the court concluded that drug addiction and alcoholism are physical or mental impairments within the meaning of Section 706(6)(C) of the Act.\textsuperscript{123} However, the court emphasized in a lengthy footnote that its decision was limited to those situations where a qualified person is discriminated against solely because of the handicap. The court pointed out that an employer may still consider past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules, and unsatisfactory work performance when making an employment decision about an alcoholic or drug addict.\textsuperscript{124}

\textsuperscript{118} \textit{Id.} at 1455-56.
\textsuperscript{119} \textit{Id.} at 1456.
\textsuperscript{121} \textit{Id.} at 793.
\textsuperscript{122} \textit{Id.} at 794.
\textsuperscript{123} \textit{Id.} at 796.
\textsuperscript{124} \textit{Id.} at 797 n.4.
The federal courts further interpreted Section 504 in regard to willful misconduct in *Tinch v. Walters*. In this case, a veteran, William Tinch, alleged that Section 504 rendered ineffective a Veteran's Administration (VA) regulation which equated primary alcoholism with willful misconduct. Tinch attempted to take advantage of a VA regulation extending the time during which educational benefits are available to veterans. However, the extension was not available to veterans whose handicap was a result of their willful misconduct.

Tinch filed for an extension, contending that he was unable to pursue his education from 1966 to 1974 because of his alcohol addiction and its associated social, psychological, emotional, and physical debilitating. Tinch's claim was denied on the ground that his alcoholism constituted "willful misconduct" as defined by the VA regulation. In other words, it was "an act involving conscious wrongdoing or known prohibited action." After denial of all administrative appeals, Tinch filed suit in federal district court contending, among other things, that the VA policy of treating primary alcoholism as "willful misconduct" violated Section 504 of the Rehabilitation Act. The district court granted summary judgment in favor of Tinch on his 504 claim, and the appellate court affirmed. In ruling that Tinch, a recovered alcoholic, was an "otherwise qualified handicapped individual within the meaning of the Rehabilitation Act," and therefore protected from discrimination solely on the basis of this status, the appellate court held that the "willful misconduct regulation discriminates against Mr. Tinch on the basis of his handicap, primary alcoholism." The court stated:

By presuming that primary alcoholics are disabled solely due to their own willful misconduct, the [Board of Veteran Appeals] interpretation of the regulation precludes it from considering relevant evidence which is causally

125. 765 F.2d 599 (6th Cir. 1985).
127. *See* 38 C.F.R. § 3.301(c)(2) (1989) ("If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct.").
130. *Id.* at 349.
133. *Tinch*, 765 F.2d at 603.
related to the handicap of primary alcoholism. Because primary alcoholism is presumed to result from lack of will, no finding of fact regarding the cause of the disease can legally rebut the presumption of willful misconduct. Due to this interpretation, a showing that an individual suffers from alcoholism as a primary disease, without an underlying psychiatric disorder or secondary illness, automatically presumes the alcoholic veteran has engaged in willful misconduct.134

The court also compared alcoholism to other diseases, since the VA regulation provided, "a primary alcoholic who acquires an organic disability as a result of his alcoholism is not barred by the willful misconduct provision, if the organic disability—rather than the primary alcoholism—prevents use of the educational benefits within the basic period prescribed . . . ."135 The VA had concluded that Tinch’s organic disabilities, that is, his impaired liver functions, were not severe enough to seriously interfere with his educational pursuits.136 On this issue the court stated:

Unlike those who suffer from primary alcoholism, veterans who suffer from other maladies including other forms of alcoholism, are not required to prove the existence of a secondary disease in order to escape a presumption of willful misconduct with respect to their primary condition. Thus, the conclusive presumption of willfulness is only directed at primary alcoholics, and constitutes discrimination on the basis of their handicap.137

If an employee’s condition is covered by a federal handicap statute, the employer may have to accommodate the employee. The court in Whitlock v. Donovan138 provides a good discussion on this issue. In Whitlock, an employee of the Department of Labor was discharged because of repeated absences caused by alcoholism. The employee filed suit, contending that the Department of Labor failed to meet its statutory obligation to reasonably accommodate his handicap. Specifically, he alleged that his employer (1) was not sufficiently forceful in outlining the choice between obtaining treatment or losing his job; (2) failed to follow up on post therapy treatment; and (3) failed to give the reasonable options of a lengthy leave without pay for intensive in-patient treatment or accepting disability retirement.139

It was not disputed that alcoholism is a handicap covered by the Rehabilitation Act. However, the court ruled that Section 501 and not Section 504, applied to the case. The court reasoned that the legislative history of Section 504 supports the proposition that the provision has no application to alcoholics or drug abusers whose current use of alcohol or drugs prevents them from doing their job. The

134. Id.
135. Id. at 600.
136. Id. at 601.
137. Id. at 603-04.
139. Id. at 129.
court concluded that alcoholics and drug abusers in need of rehabilitation fall outside the ambit of the statutory definition of "handicapped individuals." The court then proceeded to analyze the case on the basis of federal regulations, which require agency employers to make "reasonable accommodations" for the known physical or mental limitations of a qualified handicapped employee, provided the accommodations do not impose an undue burden on the operations of the employer. The court also looked to protection afforded federal employees under the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970.

Once the legislative history of the statutory and regulatory obligations of federal employers was reviewed, the court concluded that it was Congress' intent to require federal employers to exert "substantial affirmative efforts" to assist alcoholic employees in overcoming their handicap before firing them for alcohol related performance deficiencies. Particularly, the employer is first obligated to offer counseling. If the employee refuses and work deficiencies persist, the "firm choice" of treatment or discipline is presented to the employee. Finally, the agency must follow through on any "firm choice" decision made. The court ultimately found that even though the Department of Labor was compassionate, tolerant, and more patient than most other employers, it nonetheless fell short of its statutory mandate to accommodate handicapped employees. Among other things, the court found that the employer did not satisfy the "firm choice" requirement by mandating that the employee either re-enter the program from which he had withdrawn or face serious discipline.

The accommodation issue was also addressed in Walker v. Weinberger. Clarence Walker was hired by Defense Printing Service in 1978. He developed attendance problems and was disciplined with increasing severity, until discharge was imminent in 1980. He then informed the agency that he was an alcoholic, and his proposed removal was reduced to a ten-day suspension. This action allowed him...
to utilize the government alcohol counseling and assistance program. Upon completing the program, alcohol ceased to be the cause of any work related problems.\textsuperscript{148}

Three months after rehabilitation, he was progressively disciplined for new attendance problems, and he was eventually terminated. He appealed to the Merit Systems Protection Board, and the hearing officer reduced the discharge to a thirty-day suspension. The Board disagreed with the hearing officer and reinstated the termination, expressly relying on Walker's pretreatment record in conjunction with his post-treatment violations.\textsuperscript{149}

Walker filed suit contending that termination might be appropriate if his pretreatment and post-treatment disciplinary records could properly be considered together. However, he argued that, "an indiscriminate combination of both sets of violations to justify a penalty supposedly proportionate to the total culpability they purport to reflect is inconsistent with the anti-discrimination statutes and regulations, because it effectively punishes him for what has been legislatively decreed an illness."\textsuperscript{150} The employer contended Walker was "reasonably accommodated" when his initial discharge was reduced to a ten-day suspension and he was allowed to participate in a government affiliated alcohol program.\textsuperscript{151}

The court disagreed with the employer, holding:

\begin{quote}
\textsuperscript{A}n agency does not “reasonably accommodate” an alcoholic employee by keeping score of alcohol-induced, pre-treatment transgressions and reviving them post-treatment for purposes of cumulation with non-alcohol-related misconduct to produce an aggregate disciplinary record warranting more severe punishment. Pre-treatment records certainly remain relevant to gauge how successful treatment has been, or whether the disease process is so far advanced as to be unamenable to treatment or accommodation. In a disciplinary context, however, “reasonable accommodation” of an alcoholic employee requires forgiveness of his past alcohol-induced misconduct in proportion to his willingness to undergo and favorable response to treatment. Use of pre-treatment records conceded to be attributable to alcohol abuse for disciplinary purposes is inconsistent with the legislative perception of alcoholism as a disease, and behavioral problems a part of the symptomatology rather than the product of volitional acts of dissipation. Moreover, knowledge that his employer may resurrect his alcohol-related infractions for penalty-enhancement purposes if he errs in the future may well be a disincentive for the alcoholic employee to enter, continue or complete necessary treatment.\textsuperscript{152}
\end{quote}

\begin{flushright}
\textsuperscript{148. Id. at 759-60.}
\textsuperscript{149. Id. at 760.}
\textsuperscript{150. Id.}
\textsuperscript{151. Id. at 761-62.}
\textsuperscript{152. Id. at 762 (citation omitted).}
\end{flushright}
2. State and Local Laws

Besides the protection afforded by federal handicap statutes, state and local legislation may also provide grounds for discrimination challenges. Since there is no uniform state and local approach to this issue, a check of each jurisdiction's code and regulations is required to determine whether drug and alcohol abuse qualify as handicaps. Local laws will also state whether accommodation of any sort is required.

For example, the Supreme Court of Alaska held that alcoholism is not a handicap as defined under its state statute. In *Welsh v. Municipality of Anchorage*, employee Darnell Welsh was discharged after his driver's license was revoked for driving while intoxicated. His job required possession of a driver's license. Welsh sued in state court, arguing that the true reason for his discharge was his alcoholism. He contended that his discharge constituted discrimination inasmuch as alcoholism is a physical handicap, as defined by statute.

The statute in question provides: "'Physical handicap' means any physical disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including diabetes, epilepsy, and including any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, or other remedial appliance or device." In rejecting Welsh's contention, the court ruled that even if Welsh was medically correct in asserting that he suffered from the illness of alcoholism, his condition did not constitute a physical handicap as defined by the statute. Therefore, a discharge on account of his condition was not discrimination.

A similar result was reached in *Biltz v. Northwest Airlines, Inc.* Paul Biltz, a pilot, had a drinking problem which caused poor attendance and work performance. As a result, the airline scheduled him for a checkup and he was diagnosed as an alcoholic. Consequently, the Federal Aviation Administration (FAA) revoked his first-class medical certificate and grounded him. Biltz consulted other doctors in an attempt to refute the diagnosis. He was subse-

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154. Id.
155. Id. at 603.
156. ANCHORAGE, ALASKA, CODE § 5.20.010(A).
157. Id. § 5.20.010(N).
158. Welsh, 676 P.2d at 603.
159. 363 N.W.2d 94 (Minn. Ct. App. 1985).
quently reexamined by the company doctor and the diagnosis of alcoholism was confirmed. Biltz maintained that he was not an alcoholic, refused treatment, and stated that he had no plans to seek treatment. This resulted in his termination.\(^{160}\)

Biltz sued in state court, alleging violations of the Minnesota Human Rights Act and Section 503 of the Rehabilitation Act of 1973. The company removed the case to federal district court. The Section 503 claim was dismissed, and the remaining claims were remanded for state court resolution.\(^{161}\)

In addressing Biltz’s discrimination contention, the state court noted that it was unclear whether alcoholism was a disability under the 1976 version of the Human Rights Act, and the court pointed to the Minnesota Supreme Court’s specific refusal to address that question. However, the court ruled that it need not address this issue because the airline had a valid defense premised on a provision which allows employers to discriminate based on bona fide occupational criteria. The court found the defense applicable since Biltz lacked a bona fide occupational qualification: a valid medical certificate.\(^{162}\) In addition, the court found that Biltz refused to undergo treatment to regain his medical certificate.\(^{163}\)

However, in *Connecticut General Life Insurance Co. v. Department of Industry, Labor & Human Resources*,\(^{164}\) a Wisconsin employee diagnosed as an alcoholic by a medical expert was protected by statute. Wisconsin’s Fair Employment Act outlines the state’s policy proscribing employment discrimination on the basis of handicap. The Act states that an employer falls within its provisions if the employer terminates an employee on the basis of a handicap, unless such handicaps are “reasonably related to the individual’s ability to adequately undertake the job-related responsibilities of that individual’s employment . . . .”\(^{165}\)

It is not uncommon for employers to place alcohol on a separate footing from drugs when designing their drug and alcohol policies. This separation is required to the extent that the units of measurement for each substance is different. A policy will generally also set out a schedule of discipline, up to and including discharge, that correlates with levels of intoxication.

Not surprisingly, many policies provide for lesser discipline for alcohol infractions, notwithstanding the fact that alcohol remains the

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160. *Id.* at 96.
161. *Id.*
162. *Id.* at 97.
163. *Id.*
164. 86 Wis. 2d 393, 273 N.W.2d 206 (1979).
166. *Id.* § 111.32(a).
number one abused drug. Lesser discipline for alcohol violations is sometimes justified solely on the basis that its consumption is legal. Buttressed by legal recognition, society's attitude about alcohol abuse has grown to one of acceptance and accommodation, while drug abuse seems to trigger condemnation and punishment. Drug and alcohol policies tend to mirror societal attitudes, resulting in leniency or assistance for alcohol abusers. The decision to treat alcohol as a special category might also stem from top management's reflection on their own alcohol consumption practices. In any event, employers unwilling to treat the substances differently or make accommodations are constrained by statutory provisions and common law.

II. PRIVATE SECTOR CHALLENGES

Private sector employers are also active in the field of drug testing. Like the public employers, private employers implementing drug testing programs face challenges in legal and administrative forums. In situations where a collective bargaining contract governs the employer and employee relationship, the parties are bound by the agreement. Provisions in the contract providing for drug and alcohol testing will control the employer's drug screening activities. In instances where the collective bargaining agreement is silent on the issue, the employer in all likelihood will have to bargain with the union before implementing a policy.

The necessity to bargain stems from the requirement in the National Labor Relations Act (NLRA)\(^\text{167}\) that employers and unions bargain in good faith with respect to terms and conditions of employment. The National Labor Relations Board (NLRB) has generally ruled that changes in work rules that affect terms and conditions of employment are mandatory subjects of bargaining.\(^\text{168}\)


\(^{168}\) The parties' bargaining obligation is set out in sections 8(d) and 9(a) of the NLRA. Section 8(d) provides: "For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."

National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1982). Additionally, section 9(a) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .
A. Johnson-Bateman and Star Tribune

In June 1989, the NLRB ruled that drug testing policies affect terms and conditions of employment and, therefore, qualify as mandatory subjects of bargaining. The cases that brought drug testing before the NLRB were Johnson-Bateman Co. and Star Tribune.

In Johnson-Bateman, the company implemented a policy in December 1986 which stated that employees sustaining injuries requiring medical treatment will be given a drug and alcohol test. The policy was triggered by a significant increase in work related accidents and a sharp increase in insurance rates. The union objected, and noted that it was not contacted to negotiate the policy. However, the union had not objected to previous policies instituted by the company which provided for drug and alcohol testing of hirees. Company policies also provided for discipline and discharge of incumbents who consumed or possessed alcohol on company time or premises, or who reported to work while under the influence of alcohol or drugs.

The union filed a complaint, alleging that the testing program related to terms and conditions of employment and was therefore a mandatory subject of bargaining. Therefore, the company's unilateral implementation of the program without notice and without an opportunity to bargain, constituted a violation of Section 8(a)(5) of the National Labor Relations Act. The Administrative Law Judge (ALJ) agreed with the union, and found that the policy to test current employees was not a company rule as contemplated by the management rights clause in the collective bargaining agreement. The ALJ ruled that although the provision reserved to the company the right to issue, change, and enforce rules, the testing policy fell outside the provision. The ALJ also found that the union had not waived its right to bargain about the policy, and unilateral implementation constituted a violation of Section 8(a)(5) of the NLRA.

The NLRB agreed with the Administrative Law Judge, citing the
Supreme Court's standards for determining mandatory subjects of bargaining.\textsuperscript{174} Previously, the Court held in \textit{Fibreboard Paper Products Corp. v. NLRB},\textsuperscript{175} that mandatory subjects of bargaining are matters that are plainly germane to the working environment and not among those decisions which lie at the core of entrepreneurial control.\textsuperscript{176} The NLRB found drug testing analogous to physical examinations\textsuperscript{177} and polygraph testing,\textsuperscript{178} which were mandatory subjects of bargaining. The NLRB found that the testing policy changed the method by which workplace accidents were investigated and comprised a "relatively sophisticated technology, substantially varying both the mode of investigation and the character of proof on which an employee's job security might depend."\textsuperscript{179} On this basis, the NLRB found that drug and alcohol testing requirements were germane to the working environment.

The NLRB next assessed the policy under the "core of entrepreneurial control" standard. It turned to the Supreme Court's language in \textit{Ford Motor Co. v. NLRB},\textsuperscript{180} and Justice Stewart's concurring opinion in \textit{Fibreboard}.\textsuperscript{181} Justice Stewart in \textit{Fibreboard} essentially noted that entrepreneurial questions—what to produce, how to invest capital, and what the basic scope of the enterprise should be—are subjects properly left to management's direction and control.\textsuperscript{182} The NLRB in \textit{Johnson-Bateman} found that the employer's

\begin{itemize}
  \item \textsuperscript{174} \textit{Id.} at 8.
  \item \textsuperscript{175} 379 U.S. 203 (1964).
  \item \textsuperscript{176} \textit{Id.} at 222-23 (Stewart, J., concurring). This standard or conclusion articulated by the Court has done little to illuminate which subjects are mandatory and which are not. However, the decision recognized the NLRB's special expertise in classifying subjects, and set out some considerations to be used when evaluating a particular situation. For example, if the issue is a matter of deep concern to employees, does not usurp management's right to run the business, and is amenable to resolution in the collective bargaining process, a finding of mandatory subject is likely. The Court views bargaining under such circumstances as promoting industrial peace by funnelling into the negotiations process substantial disputes which would otherwise only be resolvable through industrial warfare.
  \item \textsuperscript{177} \textit{Johnson-Bateman}, 295 N.L.R.B. 26, slip op. at 8. For discussions on the physical examination requirement, see Lockheed Shipbuilding Co., 273 N.L.R.B. 171 (1984) and LeRoy Machine Co., 147 N.L.R.B. 1431 (1964).
  \item \textsuperscript{178} \textit{Johnson-Bateman}, 295 N.L.R.B. 26, slip op. at 8. Medicenter, Mid-South Hospital, 221 N.L.R.B. 670 (1975) and Austin Berryhill, Inc., 246 N.L.R.B. 1139 (1979) offer discussions on this issue.
  \item \textsuperscript{179} \textit{Johnson-Bateman}, 295 N.L.R.B. 26, slip op. at 10-11.
  \item \textsuperscript{180} 441 U.S. 488 (1979).
  \item \textsuperscript{181} \textit{Fibreboard Paper Products Corp.}, 379 U.S. at 223. (Stewart, J., concurring).
  \item \textsuperscript{182} \textit{Id.} at 223. Although this standard was noted in the case, the majority found that the company's decision to subcontract bargaining unit work, based on a study that showed cost savings in doing so, fell within the literal meaning of terms and conditions of
\end{itemize}
testing policy "[did] not involve the commitment of investment capital and [was not a decision premised on] changing the scope or nature of the . . . enterprise. It is rather a more limited decision directed toward reducing workplace accidents and attendant insurance rates."183

The second decision, Star Tribune, dealt with testing of job applicants and the union's entitlement to testing information.184 The NLRB found that applicants were not bargaining unit employees as contemplated by the NLRA, and that the testing policy did not "vitality affect"185 the terms and conditions of employment or the working environment of existing employees. As a result, the employer had no statutory duty to bargain.186

For its analysis on whether the NLRA protects applicants, the NLRB turned to the Supreme Court's Pittsburgh Plate Glass187 decision, in which the Court discussed the scope of mandatory subjects of bargaining as it related to retired workers' rights to coverage under a company-provided health insurance plan. The Court found that retired workers were not covered by the statutory definition of "employees" provided in Section 2(3) of the NLRA.188 Hence, the statutory duty to bargain did not extend to terms and conditions of employment in Section 8(d) of the NLRA. The Court felt particularly convinced that subcontracting under the circumstances was a mandatory subject since it required termination of the affected employees. It concluded that the issue was of vital concern to labor and management, and industrial experience showed it was amenable to resolution in the collective bargaining process. Id. at 213-14; see also First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (Employer's decision to terminate business with one of its clients was a decision on the scope and direction of the enterprise and, therefore, not a mandatory subject).

183. Johnson-Bateman, 295 N.L.R.B. 26, slip op. at 12.
185. Id. at 12. The "vitality affect" standard was first reviewed in Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).
186. 295 N.L.R.B. 63, slip op. at 16.
188. Id. at 168. Section 2(3) of the NLRA provides, The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the [NLRA] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time or by any other person who is not an employer as herein defined.

National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1982). A literal reading of the provision suggests that if the employment relationship were severed for some reason not violative of the NLRA, the departing individual ceases to be an employee.

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employment of retired employees' insurance benefits. The Court noted that the term "employee" simply referred to those who work for another for hire.\(^{189}\)

Reasoning from the Court's discussion, the NLRB in *Star Tribune* held that applicants do not fall under the ordinary definition of employee. "Applicants perform no services for the employer, are paid no wages, and are under no restrictions as to other employment or activities."\(^{190}\) The NLRB noted that applicants cannot vote in elections and are not part of the unit for representation purposes. The NLRB further found that applicants did not have an economic relationship with the employer and it was speculative whether such a relationship would arise. The NLRB concluded that applicants did not share a broad enough "community of interest" with active employees to justify their inclusion in the bargaining unit.\(^{191}\)

Next, the NLRB discussed whether the employer was nonetheless obligated to bargain about matters affecting individuals outside the bargaining unit because those matters impacted the terms and conditions of unit employees. The NLRB turned to the Court's *Pittsburgh Plate Glass* decision and its own *United Technologies Corp.* decision for standards on this issue. In *Pittsburgh Plate Glass*, the Court ruled that the appropriate inquiry is whether the nonemployees' interests "vitaly affect" the terms and conditions of employment of unit members. In addition, the Court emphasized that this standard is not satisfied if the impact on unit employees' interests is speculative or insubstantial.\(^{192}\) Referring to *United Technologies*, the NLRB noted:

An indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject. Rather, mandatory subjects include only those matters that materially or significantly affect unit employees' terms and conditions of employment. Similarly, the phrase "terms and conditions of employment" is to be construed in a limited sense and does not include all subjects that may merely be of interest or concern to the

\(^{189}\) *Pittsburgh Plate Glass Co.*, 404 U.S. at 166.

\(^{190}\) *Star Tribune*, 295 N.L.R.B. 63, slip op. at 11.

\(^{191}\) *Id.* The "community of interest" standard was developed by the NLRB in an attempt to carry out its statutory mandate of "unit" determination under Section 9(b) of the NLRA. Since the NLRA provides little guidance on how the appropriate unit for collective bargaining will be determined, the NLRB considers numerous factors when making unit determinations. Those factors include similarity of qualifications, work, wages, benefits and other terms and conditions of employment, contact and interchange of employees, their geographic proximity to each other, their collective bargaining history, and so on. *Pittsburgh Plate Glass Co.*, 404 U.S. at 173.

\(^{192}\) 274 N.L.R.B. 1069 (1985), enforced, 789 F.2d 121 (2nd Cir. 1986).

\(^{193}\) *Pittsburgh Plate Glass Co.*, 404 U.S. at 179.
The NLRB therefore rejected the Administrative Law Judge's conclusion that the composition of the bargaining unit was "vitally affected" by the testing of applicants. The NLRB also disagreed with the conclusion that such testing "vitally affected" workplace safety, which is a mandatory subject of bargaining. The NLRB then discussed whether the union was entitled to applicant testing information. It found that the employer violated sections 8(a)(5) and 8(a)(1) of the NLRA by refusing to furnish information to the union regarding the identity of applicants subjected to the policy and the employer's final determinations vis-à-vis those applicants.

To decide this issue, the NLRB relied on a nondiscrimination clause in the collective bargaining agreement, and the national labor policy denouncing employment discrimination. A provision in the collective bargaining agreement prohibited discrimination in the hiring process. The union claimed it needed applicant testing information to determine whether testing procedures were uniformly applied to male and female applicants. Based on previous NLRB and federal court decisions holding that the elimination of actual or

195. Id. at 15.
196. Id. at 16-17.
197. Id. at 20.
198. Id. at 4. The clause in question provides: "The Publisher prohibits discrimination in employment on the basis of race, color, . . . sex . . . . All phases of employment are covered by this policy, including but not limited to: recruiting, . . . testing and hiring . . . ." Id. Such clauses are generally found in collective bargaining agreements, and serve as some evidence of the employer's commitment to race and gender neutral employment practices. The presence of this provision gives the union a contractual right to challenge employer practices that are arguably discriminatory. This contractual right is in addition to federal rights provided by statutes which prohibit discrimination. See infra note 199.
199. Star Tribune, 295 N.L.R.B. 63, slip op. at 18. The NLRB cited the Court's decisions in Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) and Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Despite its recognition in Emporium Capwell that nondiscrimination is a matter of highest priority, the Court found that the principles of majority rule and exclusivity embodied in section 9(a) of the NLRA outweighed black employees' interests in personally negotiating a remedy with the employer for discriminatory practices. Therefore, Emporium Capwell does not necessarily stand for the proposition that nondiscrimination is paramount in national labor policy. Gardner-Denver is more on point with respect to the supremacy of federal laws prohibiting discrimination over protections afforded by the majority representative and a collective bargaining agreement. In Gardner-Denver, the Court held that an employee's right to sue an employer for discriminatory conduct is not waived, even though the same allegations were made and found without basis in the grievance and arbitration processes. See also Steele v. Louisville & L.R.R., 323 U.S. 192 (1944). Steele is a Railway Labor Act (RLA) case that deals directly with the issue of discrimination. Like the NLRA, the RLA embodies principles of majority rule and exclusivity for the bargaining representative. The Court found that the union's discriminatory conduct towards black employees was irrelevant, invidious, and not authorized by Congress.
suspected sex discrimination is a mandatory subject of bargaining, the NLRB had ample support to conclude that the employer must provide the requested information. It found discrimination in the hiring process so closely linked to discrimination in employment, that limiting the union’s ability to police that process would greatly impede the union in carrying out its statutory obligation. Information about actual or suspected discrimination was therefore found to be necessary and relevant.

Prior to the NLRB’s pronouncements, federal courts had addressed the drug testing issue. In most instances, when employers unilaterally implemented policies while collective bargaining agreements were in existence, unions sought injunctive relief in federal courts. Generally, the district courts responded by having the parties revert to the arbitral forum to resolve this issue. The following cases are examples of this procedure.

In Association of Western Pulp and Paper Workers v. Boise Cascade Corp., the union challenged Boise Cascade’s unilateral implementation of a drug testing policy, alleging that the policy violated employees’ common law privacy rights. The district court ruled that the collective bargaining agreement allowed the union to contest the reasonability of the rules, and that the union should challenge the rules through arbitration in an appropriate forum before resorting to the courts. The request for injunctive relief was therefore denied.

In IBEW Local System Council U-9 v. Metropolitan Edison, the union challenged Metropolitan Edison’s attempt to expand its drug testing program to include random testing. The union was granted a temporary restraining order blocking random testing, pending arbitration of the whole policy. Also, in Local 1900, IBEW v. Potomac Electric Power Co., the union challenged the company’s unilateral revision and implementation of its drug and alcohol policy allowing for random testing of employees. The union contended that the policy violated the collective bargaining agreement. Although a temporary restraining order was granted, a preliminary

201. Id. at 18.
202. Id. at 20.
204. Id. at 185.
205. Id. at 187.
injunction was denied pending arbitration of the policy.\textsuperscript{208}

This deference to nonjudicial forums continues, as evidenced by the Supreme Court's recent decision in \textit{Consolidated Rail Corp. v. Railway Labor Executives' Association.}\textsuperscript{209} In \textit{Consolidated Rail}, the employer, Conrail, unilaterally amended its physical examination policy by adding drug testing to its medical standards. As a result, employees subjected to periodic or return-to-duty physicals were screened for drugs by urinalysis.\textsuperscript{210} The union sued, arguing that this drug testing requirement violated the parties' collective bargaining agreement and was inconsistent with past practice.\textsuperscript{211}

The issue tackled by the Court was whether Conrail's action constituted an assertion of a right under the collective bargaining agreement and was therefore arbitrable, or whether the action was an attempt to create a right, and therefore nonarbitrable. Although the case arose under the Railway Labor Act (RLA),\textsuperscript{212} the underlying policies governing the analysis is similar to that of the NLRA.\textsuperscript{213} Under the RLA, disputes are characterized as "minor" or "major."\textsuperscript{214} Contract disputes are deemed minor and must utilize the compulsory and binding arbitration procedures of the RLA.\textsuperscript{215} Disputes concerning attempts to create new and additional rights are regarded as major, and are controlled by a bargaining, mediation, and economic force procedure.\textsuperscript{216}

\begin{itemize}
\item \textsuperscript{208} \textit{Id.} at 645.
\item \textsuperscript{209} 109 S. Ct. 2477 (1989).
\item \textsuperscript{210} \textit{Id.} at 2479.
\item \textsuperscript{211} \textit{Id.} at 2487. The union's challenge initially dealt with Conrail's use of drug testing to enforce Rule G. The addition of testing to physical examinations came later.
\item \textsuperscript{212} 45 U.S.C. §§ 151-188 (1982).
\item \textsuperscript{213} \textit{See} Terminal R.R. Ass'n v. Trainmen, 318 U.S. 1 (1943) (noting similarity in national interest expressed by both NLRA and RLA). \textit{But see} Chicago & N.W.R. Co. v. Transportation Union, 402 U.S. 570 (1971) (offering word of caution when drawing parallels between the NLRA and RLA).
\item \textsuperscript{214} Both the NLRA and RLA promote the friendly adjustment of disputes through collective bargaining, negotiation, mediation, and arbitration. The idea is that industrial peace can be best achieved through resolutions worked out by the parties, or alternatively, with the involvement or assistance of a nonjudicial neutral.
\item \textsuperscript{215} \textit{Elgin, J. & E. Ry. v. Burley}, 325 U.S. 711 (1945), \textit{aff'd on rehearing}, 327 U.S. 661 (1946). The Court coined the terms "major" and "minor" based on distinctions in the RLA, legislative history of railway labor statutes, and "the history of railway labor disputes." \textit{Id.} at 722-23. The specific characterization of "major" and "minor" cannot be found in the RLA, but is mentioned in the legislative hearings. \textit{Railway Labor Act: Hearings on H.R. 7650 Before the Committee on Interstate Commerce, 73d Cong., 2d Sess.} 47 (1934) (Statement of Comm'r Eastman).
\item \textsuperscript{216} The definition and mechanics of a minor dispute under the RLA are analogous to the grievance arbitration mechanism under the NLRA. \textit{See} 45 U.S.C. § 153 (1982); 29 U.S.C. § 185 (1982).
\item \textsuperscript{217} The definition and procedures for a major dispute are similar to mandatory subjects of bargaining under the NLRA. In both the RLA and NLRA, Congress set out the parties' bargaining and dispute resolution obligations. In the case of the RLA, sections 2 Sixth and 3 First (i) address disputes relating to the application or interpretation of the collective bargaining agreement. 45 U.S.C. §§ 152 Sixth, 153 First (i) (1982); \textit{cf.}
The district court found the testing was implicitly supported by the contract and, therefore, a minor dispute. The court of appeals reversed, holding that the district court improperly interpreted Conrail’s rights under the contract. The Supreme Court reversed, finding the addition of the drug testing to routine physical examinations a minor dispute.

The Court identified several factors supporting Conrail’s right to amend the contractual terms in the parties’ agreement. For example, it was established that the union had historically acquiesced to physical examinations of employees, and that this was now a term implied in the contract. These examinations included some urinalysis testing and screening for drugs, either when the examining doctor felt drugs were being used, or when the employee returned to work from a drug-related absence. Conrail had also modified its medical procedures in the past without challenge from the union.

The union contended that its acquiescence to the drug testing practice was limited to testing “for cause.” In addition, it noted that the previous policy only provided for suspension, while the new policy allowed for discharge. Finally, it argued that the policy was attempting to regulate employees’ off-duty conduct.

The Court responded by suggesting that the union make its arguments at arbitration because the only issue it had to resolve was whether the controversy was a major or a minor dispute. To resolve this issue, the Court assessed the validity of Conrail’s claim that its actions under the agreement were “obviously insubstantial.” It found that “Conrail’s interpretation of the range of its discretion as extending to drug testing is supported by the general breadth of its freedom of action in the past, and by its practice of including drug testing within routine medical examinations in some

supra note 168 (bargaining and dispute resolution obligation under the NLRA). Sections 2 Seventh (29 U.S.C. § 173(d) (1982)) and 6 (45 U.S.C. § 156 (1982)) address attempts to create new rights outside the contract. Congress did not characterize the parties’ disputes or obligations in either the RLA or NLRA, but the Court has. The parties’ obligation and procedures to be followed when disputes qualify as “mandatory” subjects under the RLA is almost identical to that for “mandatory” subjects under the NLRA. As a result, lower federal courts have been using these terms interchangeably.

217. Consolidated Rail, 109 S. Ct. at 1479.
218. See id.
219. Id. at 2485.
220. Id. at 2486.
221. Id. at 2487.
222. Id.
223. Id.
224. Id. at 2487-88.
circumstances.” The broad discretion granted the company, through union acquiescence, apparently convinced the Court that further expansion by Conrail in this area was consistent with past practice.

The Consolidated Rail decision leaves the door open for debate on this issue. One interpretation is to limit the case to its facts and argue that it does not explain the Court's general position on private sector testing. In any event, the Court gave a clear signal that there is more to say on this issue, by granting certiorari to Brotherhood of Locomotive Engineers v. Burlington Northern Railroad. Burlington is another RLA case decided by the Ninth Circuit. This case dealt with an employer's unilateral implementation of a drug policy.

In Burlington, the company, responding to several serious accidents, implemented a new rule of general testing of employees involved in incidents attributable to human error. The rule would not apply when the cause of the accident was clearly known. The company refused to negotiate the policy and the union sued to enjoin its implementation.

The district court held it lacked subject matter jurisdiction, basing its decision on its finding that the dispute was minor. The court noted that the company had a rule prohibiting the possession and use of drugs and alcohol. The rule was neither a part of the collective bargaining agreement nor incorporated into the agreement by reference. Nevertheless, the court found that the union had acquiesced in the rule's enforcement for approximately forty years.

The union conceded that the old rule was an implied contractual term, but argued that its acquiescence was limited to enforcement through sensory policing by supervisors. As a result, employees were only tested when they displayed specific signs of impairment. None-

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225. *Id.*

226. 838 F.2d 1087 (9th Cir. 1988), *cert granted*, 109 S. Ct. 3207 (1989); *see also* Brotherhood of Locomotive Eng'rs v. Burlington N.R.R., 838 F.2d 1102 (9th Cir. 1988) (companion case decided the same day which held that the company's use of sniffer dogs to detect alcohol and drug use is a "major" dispute).

227. *Burlington*, 838 F.2d at 1089. The union's demand that the company negotiate is premised on its belief that implementation of the policy is a "major" dispute under the RLA. If a dispute is major, the RLA requires maintenance of the status quo until statutory procedures are exhausted. 45 U.S.C. § 156 (1982). In addition, federal courts have jurisdiction to grant injunctive relief in furtherance of the statutory mandate.

In resolving the issues presented by this case, the court relied on its factual findings in the companion "sniffer dog" case. *See* Brotherhood of Locomotive Eng'rs v. Burlington N.R.R., 620 F. Supp. 163 (D. Mont. 1985) [hereinafter *Burlington I*], aff'd, 838 F.2d 1102 (9th Cir. 1988); *see also supra* note 226.


229. *Id.* at 174; *see also* *Burlington I*, 620 F. Supp. at 169.


231. *Id.* at 166; *see* *Burlington II*, 620 F. Supp. at 175.
theless, the court found that the new policy was closely related to the type of testing to which the union acquiesced. Hence, the Company was "arguably justified" in instituting the procedure under the implied contract term.

The court of appeals reversed, holding that the dispute was "major." It determined that under the RLA, parties are required "to bargain over any proposal whose primary impact is the loss—or potential loss—of existing employment or employment-related benefits." In effect, these issues would be major disputes or mandatory subjects of bargaining.

The court then used the fourth amendment to provide the rationale for its holding. It reasoned that the same analysis applies in both fourth amendment and contract right cases, since the critical concern of each is employee privacy. Since the fourth amendment distinguishes between suspicion and suspicionless testing, the court concluded that the union's acquiescence to testing based on suspicion is not an adequate basis for generalized testing.

On almost identical facts, the Eighth Circuit reached a different result. In Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad, the court held that Burlington's implementation of the same testing policy to another group of employees was a minor dispute under the RLA. Unlike the Ninth Circuit, this court found that the rule prohibiting possession and use of alcohol or drugs had become an implied term of the parties' collective bargaining agreement. The court also considered that historically, the company tested only when there was specific evidence of impairment, to which the union had always acquiesced.

The court, after reviewing the new testing provisions, concluded that the change in working conditions was minor because the rail-

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232. Burlington II, 620 F. Supp. at 175. The court of appeals discussed what standard should be used to distinguish between "major" and "minor" disputes. Such phrases as "reasonably susceptible," "arguably comprehended," and "not obviously insubstantial," are commonly used. For the most part, the analysis is the same as that used to determine whether a dispute "arose under" the contract in a grievance arbitration setting under the NLRA. See Burlington, 838 F.2d at 1090-92.

233. Burlington, 838 F.2d at 1093.

234. Id. at 1090.

235. Id.

236. Id. at 1092-93.

237. Id. at 1093.

238. 802 F.2d 1016 (8th Cir. 1986).

239. Id. at 1023.

240. Id. at 1022.

241. Id. at 1022-23.
road was still only testing employees "for cause."242 The court viewed the occurrence of an accident or violation of a safety rule as a triggering event upon which the employer could base its decision to test. It noted that general testing would only occur when the persons responsible for an accident or violation remained unidentified.243

Because these private sector cases arguably involve the parties' rights under a collective bargaining agreement, the holdings provide limited answers about private sector testing. However, the Court is apparently of the view that if the employer historically performed some kind of medical testing, the addition of drug testing would not result in a bargainable issue.244 It is open for debate what the parties' obligations are if no medical testing was done in the past and the employer has no drug or alcohol policy.

It is doubtful that the Supreme Court will approve the Ninth Circuit's approach. First, the fourth amendment analysis is inapplicable to the private sector. Second, one cannot equate implied collective bargaining rights to protections afforded by the fourth amendment. The existence of government regulation of railroads, and statutes governing labor relations in this field does not change the private character of the dispute. As a result, the sources of rights and obligations will derive from the parties' collective bargaining agreement and controlling statutory provisions, not the fourth amendment.

As noted earlier, the NLRB ruled that employee drug and alcohol testing is a mandatory subject of bargaining. The NLRB cited the Ninth Circuit's Burlington decision as supporting this proposition.246

242. Id. at 1023.
243. Id.
244. See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 109 S. Ct. 2477, 2479 (1989). The Court notes that it agrees with courts that view the addition of drug testing to physical examinations as minor disputes.
245. Johnson-Bateman, 295 N.L.R.B. 26, slip op. at 12 n.21. Paraphrasing the Ninth Circuit decision in Burlington, the NLRB noted:

The Court determined that the RLA required parties to bargain over any proposal whose primary impact is the loss, or potential loss, of existing employment or employment related benefits. The Court found that since the jobs of employees were jeopardized by the results of the employer's new drug [and] alcohol testing requirement, that requirement was therefore not simply a matter of management prerogative, outside the scope of the employer's bargaining obligation, but was instead a mandatory subject of bargaining under the RLA, one which could not be implemented unilaterally.

Id. at 12 n.21 (emphasis added).

Notwithstanding the Court's caution in Chicago & N.W.R. Co., see supra note 213, that one must be careful in drawing parallels between the NLRA and RLA, it recently relied primarily on the similarity between the two in rendering a major decision in the labor field. In Communications Workers v. Beck, 108 S. Ct. 2641 (1988), the Court limited the purposes for which unions could spend dues and fees collected from nonmembers if they objected on constitutional and statutory grounds. Relying on the legislative similarity between section 2 Eleventh of the RLA and section 8(a)(3) of the NLRA, the Court concluded that the interpretation it previously gave to section 2 Eleventh in Machinists v. Street, 367 U.S. 740 (1961), was controlling. Street essentially held that un-
If the Supreme Court decides that the employer in *Burlington* was simply exercising a right under the collective bargaining agreement, the question of whether an employer must bargain over a "new" testing policy will remain open. A finding that the employer is exercising a right under the contract is consistent with NLRB pronouncements. Under the NLRA, an employer would not have to bargain over a drug and alcohol policy if it was determined that the employer had a contractual right to implement the policy.

The Court's deference to the NLRB's judgment on this issue might be a sound approach. However, it is questionable whether the Court can conclude that private sector employees have similar privacy protections as those afforded by the fourth amendment, absent some contractual or statutory provision providing for such protection. The Court's tendency has been to give more testing flexibility to employers in certain industries, particularly where safety and trustworthiness concerns are paramount. This flexibility is now pivoted against the NLRB and Ninth Circuit rulings. Hopefully, future Supreme Court rulings will draw some clear lines in this somewhat murky area.

### B. Discipline or Rehabilitation

Employers are increasingly implementing new drug testing programs or revising old policies in the face of challenges to their validity. These policies generally provide for some form of discipline, discharge, or rehabilitation for violations. In *Skinner*, an employee who refused to test was withdrawn from covered service for nine months.\(^{246}\) Under the Customs Service program, employees are subject to dismissal if they test positive and cannot offer a satisfactory explanation.\(^{247}\)

Whether an employer's policy provides for discipline, discharge, rehabilitation, or some combination thereof, will depend largely on the employer's philosophy of labor relations. Some policies provide for discharge on the first offense, while others provide for denial of...
an employment opportunity, discipline, or rehabilitation. It can be argued that discharging an employee for violating a drug policy amounts to ignoring the problem and transferring it to another segment of society. Additionally, contentions are made that rehabilitation provides more economic advantages than discharge, and promotes stable labor relations.

It is arguable whether it is an employer's responsibility to address an employee's drug or alcohol problem. Spending hard earned dollars on rehabilitation services as opposed to improving the condition of the business or its owners might be difficult to justify in an entrepreneurial economy. Studies that suggest high recidivism rates for substance abusers might also give management little encouragement. Nonetheless, in certain occupations, providing rehabilitation services can be justified on pure economic grounds. For jobs that require years of training and substantial financial outlay by the employer, it might be less expensive to pay for rehabilitation benefits than to hire and train new employees. However, if the job is dangerous or safety-sensitive, an employer must judge whether having a treated abuser on the job poses a greater economic risk because of possible future malfeasance resulting in lawsuits. One can discuss at length the economic pros and cons of rehabilitation versus discharge. Fortunately, many employers have voluntarily assumed the responsibility of assisting employees with drug and alcohol problems.

Employers offering rehabilitation have generally done so through Employee Assistance Programs (EAPs). EAPs are designed to assist employees experiencing alcohol, drug, emotional, or other personal problems which interfere with job performance. Currently, some employers promote these programs as part of their attempt to resolve the drug abuse problem. The nature and composition of an EAP varies for different employers, but ideally, the principles upon which the EAP is based should reflect the unique circumstances of the employer.

At present, it is estimated that 10,000 employers have EAP's in operation, and that number continues to grow.


249. See Strategic Planning, supra note 248, at 35-41 (model programs for Wells Fargo Bank; Union Carbide; Lockheed Corp.; Toyota; City and County of Ventura, California; and Carpenter Technology Corp.); see also Thorne, Development of an Employee Assistance Program at Washington Metropolitan Area Transit Authority, in Nat'l Inst. on Drug Abuse, U.S. Dep't of Health & Human Servs., Workplace Drug Abuse Policy 89 (1989).

250. See Strategic Planning, supra note 248, at 14-15; What Works, supra
If top management is committed to rehabilitation, the EAP can be an attractive resolution mechanism. The availability of the program and its services can be effectively communicated to employees. Professional assistance is usually provided in the form of medical and social counseling of personnel. Ensuring confidentiality and disclosing information only on a need-to-know basis is also critical. Demonstrated overall commitment and guaranteed confidentiality by management tends to greatly increase employee acceptability of the EAP.251

As a general rule, the employees and their supervisors are primarily responsible for referral. If employees perceive the EAP as a helpful rather than a punitive tool, it is highly likely that the employees will voluntarily disclose their problem. For the supervisor, analysis of job related factors such as tardiness, absenteeism, recurring accidents, quantity and quality of work, long lunch breaks, and theft are helpful for early detection. In addition to performance related factors, the supervisor can assess employees’ physical and emotional conditions. A committed and trained supervisor is usually very familiar with employees’ normal physical and emotional makeups. That supervisor can also be trained to recognize the symptoms of drug and alcohol abuse. In this way, apparent inconsistencies in behavior are detected and addressed at an early stage.252

Once a problem is detected by the supervisor or disclosed by the employee through self-referral, the decision to accept treatment, if that option is available, usually lies solely with the employee. The drug policy should state the employer’s position, in the event the employee chooses to undertake or refuse treatment after a problem is identified. Some policies provide for discharge if the employee refuses to undertake treatment. Undertaking and successfully completing treatment is especially important when an employee’s job responsibilities directly affect the safety and security of other employees, or the public at large. Employers usually have great testing flexibility when safety and security considerations are at work, and the Court’s recent decisions have buttressed the employers’ protection.253

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C. The Criticalness of Privacy

The need to minimize infringement on an employee's dignity cannot be overemphasized. Serious consideration must be given to privacy rights, not only from the legal requirement standpoint, but from a humanistic standpoint as well. Moreover, testing has created a new point of contact between employer and employee, and with it the great propensity to adversely affect the employment relationship.

In both "Skinner" and "Von Raab," the Court focused on this overwhelming issue that goes to the heart of human dignity. In "Skinner," the Court trivialized the impact of requiring an employee to give blood for testing. The Court stayed aloof and gave a "customary health reasons" analysis of blood tests. Such tests were considered safe, commonplace, and without risk, trauma, or pain.

This, however, is not workplace reality. Labor relations personnel with hands-on testing experience can attest to the trauma and destruction, albeit intangible, engendered by drawing an employee's blood to test for drugs or alcohol. The aftermath is particularly devastating in instances when the employee is "clean."

The Court was more appreciative of the impact on these interests with urine collection. Here, the invasion hits closer to home. Certainly the Justices understand human anatomy, and the privacy of human organs. Passing urine is unquestionably safe, commonplace, and without risk, trauma, or pain. Yet, the Court felt that "the procedures, sample collection which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood or breath tests." To further emphasize this point, the Court quoted the "Von Raab" court of appeals' characterization of this issue:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

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254. Two new nonintrusive approaches to drug and alcohol testing are currently being investigated. A new "sweat-patch" test measures alcohol consumption, and a hair analysis test measures drug use. If these testing methods prove to be medically sound for workplace testing, they will, to some extent, reduce employees' privacy concerns. See Montagne, Pugh & Fink, supra note 70, at 1299.


Therefore, steps taken by employers to reduce the offensiveness of testing become all-important. In *Skinner*, the employer reduced the intrusiveness by having outside personnel handle the testing. In addition, a medical environment was provided, and there was no visual observation required for urine specimens. These procedures go a long way to secure an employee's dignity. By having an independent entity handle testing, the employee is not faced with the stigma of being escorted by a supervisor or other employer personnel to a company office or medical department, nor faced with the risk that a fellow employee observes the events. This limits the testing contact between employer and employee, and the end result is greater confidentiality in the testing process.

The indignity worked by the taking of blood or urine in the employment context cannot be equated or analogized to activities performed for customary health related reasons. Employers and employees recognize the unique position they hold and the distinct relationship which exists between management and labor. This relationship historically had socially built-in understandings of what is shielded or private and therefore outside the employer's domain, and what is open to inquiry and investigation, and therefore discoverable within the relationship. Therefore, employers should exercise great caution before treading on privacy rights.

### III. Summary

Because the issue of employment drug testing is volatile, employers should consult experts when developing their policies. Ideally, consideration should be given to the rights of the employee and the general public as the employer strives to achieve a drug-free work environment. An employer's policy should be driven by the employer's conviction that drug and alcohol abuse adversely impacts health, safety, productivity, security, and public trust or confidence in the employer. It should be detailed and specific as to what conduct is proscribed and what discipline, if any, will follow. The employer should remain unequivocal in its expectations under the policy, and should ensure that all employees are aware of the policy and the consequences that flow from its violation. Once implemented, the employer must ensure that the policy is consistently administered.

Educating management is critical in the administration of an effective drug policy. Some employers have training programs

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259. *Id.* at 1418.
designed to assist supervisory personnel in making intelligent decisions about suspected drug or alcohol use. Some programs are comprised of slides, handouts, and lectures covering a wide range of testing issues. For example, slides of the most commonly ingested drugs can be shown to supervisory personnel and discussed. Employers can also discuss the symptoms normally associated with drug use.

Management staff must be cautioned that many of the symptoms associated with illegal drug use are also common to normal ailments; hence, they should take care when investigating for possible drug and alcohol abuse. In addition, use of some drugs does not result in overt signs of impairment. Management personnel should also be educated about the legal and contractual rights of employees in order to avoid a trampling of these rights or the concomitant lawsuits or challenges. Special regard should be given to employees’ privacy interests.

IV. CONCLUSION

Drug abuse has reached epidemic proportions in this country, and drug testing appears to be here to stay. Clearly, the problem is larger than the relationship between any one individual employer and an employee. Drug testing has opened the door for countless societal developments. The country’s workforce, employers, employees, and employees’ representatives are vigorously advocating their positions in various tribunals.

At a minimum, the latest court decisions mean that employers now have greater court-sanctioned freedom to explore employees’ physical conditions in a way that impacts the very essence of human privacy and dignity. Employers can collect information about drug and alcohol use without specific evidence that a substance was ingested, and as a natural extension, can require specimens of bodily fluids if there is objective data that drugs or alcohol were used. However, the cases do not mean that every employer can dispense with the probable cause or articulable suspicion requirement, whether or not they fall under the umbrella of the fourth amendment. In sum, the decisions do not mean that employees’ rights are whittled away to the point that employers can test at any time, for any reason, using any procedure, and utilize the test results as they see fit.

Numerous statutory and common law protections exist to guard against indiscriminate testing by employers. *Skinner* and *Von Raab* serve as general guideposts for when a “triggering event” is not required for lawful testing to occur. These cases also provide some insight to when employers will need specific evidence prior to testing for drug use. However, the cases provide no insight on the extent to which drug testing will impact or erode the traditional relationship
between employee and management.

Maybe as time passes, people will harden and accept testing and related intrusions as a quid pro quo for initial or continued employment. They will then make the necessary mental or psychological adjustments, and the relationship between employer and employee will reach a new level of normalcy. But for now, testing appears to drive a wedge and cause some distancing between employee and management. The effect on productivity and morale must be watched carefully.

In analyzing this problem, one cannot exclude societal interests. Arguably, an employee discharged for drug abuse will not automatically terminate such use on the day of discharge. In all probability, the employee will attempt to collect unemployment compensation benefits in order to survive until new employment is found, if the employee desires. Depending on the basis for discharge, the individual might not qualify for benefits under the jurisdiction's unemployment compensation laws. Regardless of whether benefits are awarded or not, society might be left with an individual with insufficient funds to support a drug habit. Conceivably, such funds will be obtained through criminal activities which the general public must then absorb.