

Legal Issues Involved in Private Sector Medical Testing of Job Applicants and Employees

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I. INTRODUCTION

The subjects of alcohol and drug abuse in the workplace and the acquired immune deficiency syndrome (AIDS) health crisis have received national attention during the past year. They have escalated from major public health concerns to major national, if not international, political concerns as well.

The impact of substance abuse on the nation's work force is staggering. It has been said that absenteeism among problem drinkers is up to 8.3 times greater than among other employees. It has further been said that almost forty percent of industrial fatalities and forty-seven percent of industrial injuries can be linked to alcohol abuse. When drug and alcohol abuse are combined, annual bottom line monetary losses approach one hundred billion dollars. Such a monetary loss translates into an annual cost of from \$500 to \$1000 per employee.¹

The statistics regarding the AIDS health crisis are equally foreboding.² Of the approximately 30,400 persons in the United States who have been diagnosed as having AIDS, over half have already died.³ Estimates of the number of persons in the United States who have been exposed to the AIDS virus range from 500,000 to as high as 2,000,000.⁴ Increased health insurance costs,⁵ losses in productivity, and lower morale will almost certainly result as the disease continues to take its toll.

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¹T. DENENBERG & R.V. DENENBERG, *ALCOHOL AND DRUGS: ISSUES IN THE WORKPLACE* 5, 7 (1983).

²Dr. James W. Curran, head of the AIDS Branch of the federal Centers for Disease Control in Atlanta, was recently quoted as saying that AIDS "is killing young men at a much higher rate than anything else that kills young men in our country." Altman, *New Fear on Drug Use and AIDS*, N.Y. Times, Apr. 6, 1986, at 1, col. 2.

Health and Human Services Secretary Otis R. Bowen has recently predicted that a worldwide AIDS epidemic will become so serious that it will dwarf in comparison other previous medical disasters such as the Black Plague, typhoid and smallpox. Indianapolis Star, Jan. 30, 1987, at 1, col. 3.

³N.Y. Times, Feb. 5, 1987, at A19, col. 1.

⁴*The AIDS Conflict*, NEWSWEEK, Sept. 23, 1985, at 17.

⁵Researchers estimate that the cost of treating AIDS patients, although much lower than originally anticipated, could still represent over two percent of the nation's health-care bill by 1991. Dallas Times Herald, Dec. 12, 1986, at A22, col. 1.

The media and political attention directed to these issues has become relentless,⁶ virtually transforming programs related to them into emotional and moral crusades. Many employers have responded to this widespread publicity and public concern over both substance abuse and AIDS by developing and implementing medical testing programs.⁷ These programs raise serious legal issues—issues that are only now being defined and litigated.

This Article will focus, in very general terms, on the use of medical testing programs to screen private sector employees and job applicants for substance abuse or for the presence of AIDS antibodies.⁸ The rapidly evolving central legal issues surrounding the implementation of such medical testing programs will be addressed first, followed by a discussion of some of the more significant legal issues involved when an employer relies on medical test results in making employment decisions.

II. LEGAL ISSUES RAISED BY THE IMPLEMENTATION OF MEDICAL TESTING PROGRAMS IN THE PRIVATE SECTOR WORKPLACE

A. Constitutional Issues

Employees and job applicants who are reluctant to submit to a blood or urine test administered as part of an employer's medical testing

⁶See PRESIDENT'S COMMISSION ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME (1986). The Commission recommended that "[g]overnment and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness of such a testing program." *Id.* at 485. See also the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. _____, enacted Oct. 27, 1986. This law mandates the creation of alcohol/drug abuse prevention, treatment, and rehabilitation programs for federal employees.

The recent well-publicized collision of an Amtrak passenger train and three Conrail locomotives near Baltimore, Maryland, on January 4, 1987, resulted in sixteen people being killed and 175 others being injured. During the investigation that followed, it was reported that both the Conrail engineer and brakeman showed traces of marijuana in their blood and urine. *Indianapolis Star*, Jan. 15, 1987, at 1, col. 1. This tragedy has served as the catalyst for further congressional consideration of new mandatory drug testing procedures in the federally regulated transportation industry, with several members of Congress having subsequently introduced legislation requiring the drug screening of airline and locomotive crews. See *Daily Labor Report (BNA)* No. 15, Jan. 23, 1987, at A3-A4.

⁷In 1985, nearly twenty-five percent of the Fortune 500 corporations routinely used urinalysis testing of employees and job applicants to detect illegal drug abuse. This percentage was only ten percent in 1982. *The Ruckus Over Medical Testing*, *FORTUNE*, Aug. 19, 1985, at 57. However, one recent survey has concluded that training supervisors to recognize signs of employee substance abuse may be a more effective way to curtail such abuse than urinalysis testing. See *Daily Labor Report (BNA)* No. 1, Jan. 2, 1987, at A3.

⁸Current medical testing techniques only indicate whether an individual's blood possesses AIDS antibodies. Presence of AIDS antibodies indicates only that an individual has experienced past exposure to the AIDS virus. It does not *conclusively* establish that the individual is a carrier of active virus, although the probability that the individual is is substantial. Nor does it conclusively establish that the individual will develop symptoms of AIDS related complex (ARC symptoms) or suffer the full blown disease state itself.

program frequently claim that these tests violate their fourth amendment right to be free from "unreasonable searches and seizures."⁹ Such tests might at first blush seem to be a search and seizure within the meaning of the fourth amendment.¹⁰ However, the United States Supreme Court has long held that such constitutional restraints apply to private, non-governmental entities only when their actions contain a "governmental nexus."¹¹ In a private employment context, an employer will almost never subject itself to such fourth amendment limitations unless it involves a law enforcement agency in the implementation of its testing program—thereby "entangling" a governmental entity in what would otherwise be a purely private action.¹² However, such a "governmental nexus" will also be found where a private entity is performing a "traditional governmental function"¹³ or is so closely regulated by the state that its actions are seen as "state-compelled."¹⁴

In designing a medical testing program for a private sector employer, it is useful to consider the precise circumstances under which such programs have been upheld in the public sector, where employers are subject to fourth amendment limitations. The public sector testing programs that have recently withstood constitutional attack have specifically limited the circumstances under which testing of employees and job applicants can take place. For example, in *Sanders v. Washington Metropolitan Area Transit Authority*,¹⁵ the United States District Court for the District of Columbia dismissed the fourth and fourteenth amendment claims of Transit Authority employees who were fired after blood and urine tests showed the presence of drugs and alcohol in their systems. The employer limited the administration of these tests to instances where an employee was involved in a serious accident or had returned from a period of sick leave.

The Seventh Circuit Court of Appeals has also held, in *Division 241 Amalgamated Transit Union v. Suscy*,¹⁶ that the blood and urine tests required by a public transit authority of its bus drivers were *not* unreasonable searches under the fourth amendment and were not violative of these employees' constitutional rights.¹⁷ These tests were limited by company policy to instances where drivers were directly involved in a

⁹U.S. CONST. amend. IV.

¹⁰See *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (D. Iowa 1985), *modified*, 1 Indiv. Empl. Rights Cas. (BNA) 1297 (8th Cir. 1987).

¹¹See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹²See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

¹³See *Evans v. Newton*, 382 U.S. 296 (1966).

¹⁴See *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

¹⁵Civ. Act. No. 84-3072 (D.D.C. Jan. 9, 1986); see also *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. 1985); *Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, No. L-09500-185E (N.J. Super. Ct. Mar. 20, 1986).

¹⁶538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976); see also *Brotherhood of Maintenance of Way Employees Lodge 16 v. Burlington N. R.R. Co.*, 802 F.2d 1016 (8th Cir. 1986); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985).

¹⁷*Suscy*, 538 F.2d at 1267.

serious accident or were suspected of being under the influence of an intoxicating liquor or a narcotic.¹⁸

In contrast to these cases, public employer testing programs providing for *random* drug testing or the blanket testing of employees *en masse*, without requiring at least a reasonable suspicion that tested employees are under the influence of or are using illicit drugs, have generally been struck down as violative of the fourth amendment.¹⁹

Private sector employees and job applicants may also challenge the implementation of medical testing programs under the theory that such programs violate state constitutional guarantees of freedom from "unreasonable searches." However, as with federal constitutional claims, private employers should be able to raise the defense of no "governmental nexus" to defeat these challenges to their testing programs. In Indiana, courts have long interpreted the state constitutional "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure"²⁰ to apply *only* to actions by the state and not to actions, however unauthorized, of *private* individuals.²¹

B. Statutory Issues

To date, no federal statute or Indiana law expressly forbids a private sector employer from instituting a testing program designed to detect substance abuse or the presence of AIDS antibodies. However, the states of Wisconsin and Massachusetts forbid employers from requiring job applicants or employees to submit to testing for AIDS as a condition of employment,²² while the state of Oregon forbids an employer from requiring an employee to submit to a breathalyzer test without a showing that the employer had reasonable grounds to believe the employee was

¹⁸*Id.*

¹⁹See *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875 (E.D. Tenn. 1986); *Penny v. Kennedy*, 1 *Indiv. Empl. Rights Cas.* (BNA) 1047 (E.D. Tenn. 1986); *National Treasury Employees Union v. von Raab*, No. 86-3522 (E.D. La. Nov. 14, 1986); *AFGE v. Weinberger*, 1 *Indiv. Empl. Rights Cas.* (BNA) 1137 (S.D. Ga. 1986); *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986); *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985); *Caruso v. Ward*, 506 N.Y.S.2d 789 (1986).

But see McDonell v. Hunter, 1 *Indiv. Empl. Rights Cas.* (BNA) 1297 (8th Cir. 1987), where the Eighth Circuit Court of Appeals recently expanded the circumstances under which the Iowa Department of Corrections could test its employees for substance abuse to include *systematic random* urinalysis testing and testing based upon a "reasonable suspicion" that an employee has used a controlled substance within the 24-hour period prior to such required test. See also *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S. Ct. 577 (1986), where the Third Circuit Court of Appeals upheld a drug testing program that required licensed thoroughbred race horse jockeys and other race track employees to submit to *random* post-race urine tests.

²⁰IND. CONST. art. 1, § 11 (1978).

²¹See *Zupp v. State*, 258 Ind. 625, 283 N.E.2d 540 (1972); *Antrup v. State*, 175 Ind. App. 636, 373 N.E.2d 194 (1978).

²²See WIS. STAT. §§ 103.15, 146.025 (1985); Labor L. Rep.-Empl. Prac. (CCH) No. 281, at 4 (Sept. 22, 1986).

under the influence of an intoxicant.²³ Furthermore, several municipalities have enacted ordinances that limit an employer's right to test employees randomly for drug abuse.²⁴

C. Common Law Issues

A significant legal concern for private sector employers is the ever-increasing variety of civil tort actions which are being brought by employees and job applicants as a result of employer implementation of mandatory medical testing programs.²⁵ An employer instituting such a testing program may face tort liability on such theories as:

1. *Invasion of the Right of Privacy.*—The common law right of privacy exists in varying degrees for all persons. Although not an absolute right, it does include the right to be free from *unreasonable* intrusions.²⁶ In *Continental Optical Co. v. Reed*,²⁷ the Indiana Court of Appeals adopted the following definition of this common law right: "The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibility."²⁸ In an employment setting, the use of medical testing after an industrial accident, poor performance, gross insubordination, or other serious work-related problem should *not* ordinarily result in a meritorious suit for invasion of privacy, because

²³OR. REV. STAT. § 659.225 (1981).

²⁴*See, e.g.*, San Francisco, Cal., Ordinance No. 527-85 (1986); Daily Labor Report (BNA) No. 169, Sept. 2, 1986, at A7. However, on December 8, 1986, the New Jersey Assembly passed Assembly Bill No. 2850, which would *permit* employers to test both public and private sector employees for drugs unless such testing was forbidden by a collective bargaining agreement. The bill must still be approved by the state Senate and signed by the Governor before it becomes law. Daily Labor Report (BNA) No. 1, Jan. 2, 1987, at A2.

²⁵However, tort claims by employees or their union representatives may be limited or barred through pre-emption by federal or state statutes. *See, e.g.*, *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985) (employee's various tort claims stemming from a company drug investigation held to be pre-empted by the National Labor Relations Act); *Moore v. General Motors*, 739 F.2d 311 (8th Cir. 1984) (employee's tort claim held to be pre-empted by the Labor Management Relations Act); *Folz v. Marriott Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984) (former employee's tort claim held to be pre-empted by the Employee Retirement Income Security Act of 1974); *Mein v. Masonite Corp.*, 485 N.E.2d 312 (Ill. 1985) (former employee's tort claim held to be pre-empted by the Illinois Human Rights Act).

²⁶*See generally* RESTATEMENT (SECOND) OF TORTS, § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.').

²⁷119 Ind. App. 643, 86 N.E.2d 306 (1949).

²⁸*Id.* at 648, 86 N.E.2d at 308 (quoting Annotation, *Right of Privacy*, 138 A.L.R. 22 (1942)).

in these instances a *reasonable* basis may exist for such a medical "intrusion."

While no Indiana court has specifically ruled on the issue of whether mandatory drug testing violates an employee's common law right of privacy, where a medical screening test is performed in an *improper* manner, court decisions from other jurisdictions suggest that grounds may exist for an action alleging an invasion of privacy. For example, in *O'Brien v. Papa Gino's*,²⁹ the First Circuit Court of Appeals recently upheld a damage award of almost \$450,000 to an employee terminated after he failed a polygraph test which he was required to take when his employer suspected him of off-duty illegal drug use.³⁰ The jury found that the employer-hired polygraph examiner violated the employee's right of privacy by asking questions about private matters unrelated to his employment.³¹

2. *Intentional Infliction of Emotional Distress*.—An employer who does not give employees or job applicants "adequate notice" before requiring them to submit to medical testing may risk liability for the intentional infliction of emotional distress. In many states, such a cause of action is premised upon the "unreasonableness" of the employer's actions, without regard to whether or not the employee has been physically injured.³² The law in Indiana regarding this common law right has long been to the contrary, holding that damages are recoverable *only* when there has been a psychic injury to the plaintiff and a physical manifestation resulting from that psychic injury.³³ However, in *Moffett v. Gene B. Glick Co.*,³⁴ the United States District Court for the Northern District of Indiana recently recognized an exception to this general rule in cases where "(1) there is a tort which invades a legal right of the plaintiff; (2) which is likely to provoke an emotional disturbance or trauma; and (3) the defendant's conduct is willful, callous, or malicious."³⁵ It remains to be seen whether Indiana courts will accept this newly-created exception to the general rule.

3. *Assault and Battery*.—An employer may be liable for assault and battery committed by its agents who engage in medical testing if they "force" an employee or job applicant to take a medical test against his or her will or if they otherwise wrongfully touch such person. For example, in *State v. Hamilton*,³⁶ an employer was held liable for injuries caused by an employer-hired polygraph examiner when that examiner

²⁹780 F.2d 1067 (1st Cir. 1986).

³⁰*Id.* at 1068.

³¹*Id.* at 1072.

³²*See, e.g.,* Norman v. General Motors Corp., 628 F. Supp. 702 (D. Nev. 1986).

³³*See* First Fed. Sav. & Loan Ass'n v. Stone, 467 N.E.2d 1226, 1235 (Ind. Ct. App. 1984); Gaskins v. Runkle, 25 Ind. App. 584, 58 N.E. 740 (1900).

³⁴621 F. Supp. 244 (N.D. Ind. 1985).

³⁵*Id.* at 284.

³⁶42 Fair Empl. Prac. Cas. (BNA) 1069 (N.Y. Sup. Ct. Dec. 19, 1986).

fondled a female applicant while conducting a pre-employment polygraph test.³⁷

4. *False Arrest or Imprisonment.*—An employer may also be liable for false imprisonment if its medical testing agents unreasonably detain an employee in order to administer a medical test or for false arrest if its agents make a “citizen’s arrest” based upon their erroneous assumption that an individual is under the influence of a controlled substance.³⁸

D. *Collective Bargaining Relationship Issues*

Private sector employers whose employees are represented by a labor union may be prohibited from unilaterally implementing an employee medical testing program by either the National Labor Relations Act or restrictive language contained in their collective bargaining agreements.³⁹

Under sections 8(a)(5) and 8(d) of the National Labor Relations Act, an employer must meet and bargain in good faith with the union representing its employees with respect to wages, hours, and other terms and conditions of employment.⁴⁰ While the National Labor Relations Board (NLRB or Board) has not yet ruled on the precise question of whether there is a general duty to bargain over the implementation of a medical testing program designed to detect substance abuse or the presence of AIDS antibodies,⁴¹ the Board has ruled that the institution of polygraph testing programs, psychological stress examinations, pulmonary or auditory testing programs, or general physical examinations does affect terms and conditions of employment and is therefore a mandatory subject of bargaining.⁴² By analogy, it appears quite likely that, absent a clear and unequivocal union waiver, a private sector employer is required to give prior notice to the union of its proposed

³⁷*Id.*

³⁸*See, e.g.,* Black v. Kroger Co., 527 S.W.2d 794 (Tex. Civ. App. 1975) (plaintiff recovered over \$25,000 in damages for false imprisonment when her employer’s agent detained her and accused her of theft); *see also* Hill v. Georgia Power Co., 122 L.R.R.M. (BNA) 2779 (11th Cir. 1986).

³⁹*See, e.g.,* Daily Labor Report (BNA) No. 209, Oct. 29, 1986, at A7 (Arbitrator Richard R. Kasher ruled that NFL Commissioner Rozelle’s unilateral implementation of random drug screening tests for league players violated the terms of the parties’ collective bargaining agreement).

⁴⁰29 U.S.C.S. §§ 151-187 (Law. Co-op. 1975).

⁴¹*But see* California Cedar Prods. Co., 123 L.R.R.M. (BNA) 1355 (1986), where an NLRB Associate General Counsel recently advised an NLRB Regional Director that an employer had no statutory duty *to bargain* with a union over the implementation of a new substance abuse policy. This ruling may be limited to the facts in this case, where the parties’ collective bargaining agreement allowed the employer to make “reasonable rules” regarding the possession of alcoholic beverages or drugs and required the employer only to *advise* the union thereof. *See generally* NLRB General Counsel Memorandum No. GC 86-11 (Nov. 24, 1986).

⁴²*See* Lockheed Shipbuilding Co., 273 N.L.R.B. 171 (1984); Gerry’s I.G.A., 238 N.L.R.B. 1141 (1978); Medicenter, Mid-South Hosp., 221 N.L.R.B. 670 (1975); LeRoy Mach. Co., Inc., 147 N.L.R.B. 1431 (1964).

implementation of a medical testing program and to bargain with the union in good faith concerning such a proposal if the union so requests.

In the event an employer decides unilaterally to institute a medical testing program *without* engaging in prior good-faith bargaining with the union, the most likely forum for a review of this decision is before a labor arbitrator. This forum is likely because the NLRB has a deferral policy under which it will defer ruling on a "duty to bargain" allegation pending resolution of a dispute under the parties' contractual dispute settlement procedures.⁴³ Courts are reluctant to enjoin an employer's unilateral actions when the union is able to pursue a contractual remedy.⁴⁴

Arbitrators will look to several factors when determining whether an employer's unilateral implementation of a medical testing program is permissible under a collective bargaining agreement. These factors include: the express language of the agreement, the history of contract negotiations between the parties, and whether there has been a past practice of permitting the employer unilaterally to change working conditions. In *American Standard*,⁴⁵ Arbitrator Katz relied upon a broad management rights clause in the contract and a provision therein which gave management the right to require employees to submit to fitness for duty medical examinations in upholding the discharge of an employee who refused to submit to a medical screening test.⁴⁶ In contrast, Arbitrator O'Brien, in *Southern Pacific Transportation Co.*,⁴⁷ found that the parties'

⁴³See *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); see also *United Technologies Corp.*, 268 N.L.R.B. 557 (1984). However, if an employer's unilateral institution of a drug testing program arguably results in the modification of *existing* collective bargaining agreement language, the *Collyer* deferral doctrine may not apply in a dispute over the existence of such a contract modification. See *Anaconda Co.*, 224 N.L.R.B. 1041 (1976), *enforced mem.*, 578 F.2d 1385 (9th Cir. 1978).

⁴⁴See *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R. Co.*, 802 F.2d 1016 (8th Cir. 1986); *IBEW, Local 1900 v. Potomac Elec. Power Co.*, 121 L.R.R.M. (BNA) 3287 (D.D.C. 1986); *Oil, Chem. & Atomic Workers Local 6-10 v. Amoco Oil Co.*, Civ. No. A1-86-186 (D.N.D. Oct. 27, 1986); *Oil, Chem. & Atomic Workers Local 2-124 v. Amoco Oil Co.*, No. C86-354 (D. Wyo. Nov. 10, 1986); *Association of W. Pulp & Paper Workers v. Boise Cascade Corp.*, 644 F. Supp. 183 (D. Or. 1986). *But see* *Utility Workers Union of Am., Local 246, No. CV86-8250-HLH (CTx)* (C.D. Cal. Feb. 9, 1987); *IBEW Local Sys. Council U-90 v. Metropolitan Edison*, No. 84-4426 (D. Pa. Aug. 6, 1986); *Murray v. Brooklyn Union Gas Co.*, No. 7692/86 (N.Y. Sup. Ct., Kings Co., Apr. 1, 1986); *Oil, Chem. & Atomic Workers Union Local 2-286 v. Amoco Oil Co.*, No. 86-C-09880 (D. Utah Oct. 29, 1986).

⁴⁵77 Lab. Arb. (BNA) 1085 (1981) (Katz, Arb.); see also *Concrete Pipe Prod. Co., Inc.*, FMCS No. 86K/1729b (1986) (Caraway, Arb.) (upheld the discharge of an employee who refused to comply with a drug testing program that had been unilaterally implemented by his employer without union objection).

⁴⁶77 Lab. Arb. (BNA) at 1087-88.

⁴⁷79 Lab. Arb. (BNA) 618 (1982) (O'Brien, Arb.); see also *Faygo Beverages, Inc. and Teamsters, Local Union No. 337*, 86-1 Lab. Arb. Awards (CCH) ¶ 8302 (June 30, 1986) (Ellman, Arb.); *Metropolitan Edison Co.*, AAA No. 14 300 093886 (Oct. 9, 1986) (Aarons, Arb.); *Association of W. Pulp & Paper Workers Local 180 and Boise Cascade Corp.*, Daily Labor Report (BNA) No. 12, Jan. 20, 1987, at A4, where Arbitrator Kagel found that an employer's drug testing program violated its collective bargaining agreement because the program subjected employees who refused to submit to such testing to disciplinary punishment. Arbitrator Kagel ruled that this provision of the program ran counter to a contractual requirement that discipline be imposed only for "just cause,"

fifty-year-old past practice of using visual observation to determine whether employees were under the influence of alcohol prevented the employer from unilaterally changing this practice by requiring suspect employees to submit to a blood alcohol test.⁴⁸

III. LEGAL ISSUES RAISED BY THE USE OF MEDICAL TEST RESULTS TO MAKE EMPLOYMENT DECISIONS

A. *Constitutional Issues*

Private sector job applicants who are not hired or current employees who are discharged based upon medical test results obtained as part of an employer's medical screening program may claim that such actions violate their fifth amendment right not to be deprived of their liberty or property without "due process of law."⁴⁹ However, such employment decisions, when made by a private employer, should not raise constitutional issues absent the showing of some nexus between these actions and a governmental entity.

In contrast, public sector *non-probationary* employees do have a property interest in their jobs and a constitutional right to due process when they are terminated from public employment. Even when this constitutional right exists, however, the Supreme Court has held that it only requires an employer to provide such employees with oral or written notice of the charges against them, an explanation of the employer's evidence, and an opportunity to present their side of the story.⁵⁰ The Court has held that public sector *probationary* employees who are discharged have only a constitutionally protected "liberty interest" in not being discharged in a manner that creates a false and defamatory impression that stigmatizes and forecloses them from other employment opportunities.⁵¹

B. *Statutory Issues*

Several federal and state statutes, discussed below, limit a private sector employer's use of medical test results as the basis for not hiring a job applicant or for terminating the employment of a current employee.

1. *Title VII of the Civil Rights Act of 1964.*—Title VII of the Civil Rights Act of 1964⁵² prohibits an employment practice that has an adverse impact on one or more protected classifications (race, color, religion, sex, or national origin) unless an employer can demonstrate a legitimate business necessity for the practice. Under these statutory cri-

in that it improperly shifted the evidentiary burden by forcing an employee, required to submit to a drug test under a threat of discipline, to prove his innocence.

⁴⁸79 Lab. Arb. (BNA) at 627.

⁴⁹U.S. CONST. amend. V.

⁵⁰See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

⁵¹See *Codd v. Velger*, 429 U.S. 624 (1977); *Paul v. Davis*, 424 U.S. 693 (1976).

⁵²42 U.S.C.S. §§ 2000e to e-17 (Law. Co.op. 1978).

teria, an employer could be required to defend its medical testing program if, for example, a disappointed black job applicant could demonstrate that more blacks than whites were excluded as a result of the employer's no-alcohol, no-drugs policy.

In *Toledo v. Nobel-Sysco, Inc.*,⁵³ the United States District Court for the District of New Mexico recently held that an employer violated Title VII by refusing to hire a member of the Native American Church because the job applicant had a religious practice of using peyote, a stimulant drug.⁵⁴ The court held that despite the employer's policy of not hiring truck drivers who used illegal drugs, the employer had a duty to "accommodate" the applicant and not allow him to drive while under the influence of peyote, rather than simply refusing to hire him based upon his religious practices.⁵⁵

However, in *New York City Transit Authority v. Beazer*,⁵⁶ the United States Supreme Court dismissed a claim alleging that the Transit Authority's policy of excluding all methadone users from employment based upon safety considerations violated Title VII, even though eighty-one percent of the employees referred to the Transit Authority's medical consultant for suspected drug abuse under this policy were black or Hispanic.⁵⁷

2. *The Rehabilitation Act of 1973.*—The Rehabilitation Act of 1973⁵⁸ applies to certain federal contractors, subcontractors, and employers who receive federal financial assistance. Section 503 of this Act requires enterprises with a federal contract or subcontract of \$2,500 or more to take affirmative action to hire and advance in employment "qualified handicapped individuals."⁵⁹ Section 504 of the Act prohibits any enterprise receiving federal financial assistance from discriminating against otherwise qualified "handicapped individuals."⁶⁰ Under both of these sections, a "handicapped individual" is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment."⁶¹ This definition of a "handicapped individual" was amended by Congress in 1978 to exclude, in an employment context,

any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by

⁵³41 Fair Empl. Prac. Cas. (BNA) 282 (D.N.M. 1986).

⁵⁴*Id.* at 289.

⁵⁵*Id.*

⁵⁶440 U.S. 568 (1979).

⁵⁷*Id.* at 594.

⁵⁸29 U.S.C.S. §§ 701-800 (Law. Co-op. 1982).

⁵⁹*Id.* § 793(a).

⁶⁰*Id.* § 794.

⁶¹*Id.* § 706(7)(B).

reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.⁶²

An employer subject to this Act risks liability if it refuses to employ a person whose test results show may be an alcohol or drug abuser and thus possibly handicapped, unless the employer is able to show that such abuse would prevent the person from performing his job duties or would pose a threat to the safety or property of others.⁶³ For example, in *Healey v. Bergman*,⁶⁴ a current alcoholic was held not to be per se disqualified as a "handicapped individual" under the Act, despite the fact that he would need to miss sixty days of work due to his confinement in a detoxification center.⁶⁵ The United States District Court for the District of Massachusetts found that this factual situation did not automatically mean that the employee could not perform his job.⁶⁶ While no court has to date specifically held that a current drug addict is a "handicapped individual" under the Act, several courts, including the Seventh Circuit Court of Appeals, have stated in dictum that individuals with *current* problems of alcohol or drug abuse qualify as "handicapped individuals."⁶⁷

The question of whether an employee or job applicant infected with the AIDS virus is a "handicapped individual" entitled to protection under this Act has not yet been finally decided.⁶⁸ However, the Justice Department has taken the position that discrimination based upon the disabling effects of AIDS violates section 504 of the Act, but that the Act's protection *does not extend* to employees infected with the AIDS virus who are discriminated against solely as a result of an employer's

⁶²*Id.*

⁶³Furthermore, it appears that *former* alcoholics and drug addicts are "handicapped individuals" under this Act, due to their record of having had major life activities substantially limited by their substance abuse. *See, e.g.,* Traynor v. Walters, 606 F. Supp. 391 (S.D.N.Y. 1985) (former alcoholic); Johnson v. Smith, 39 Fair Empl. Prac. Cas. (BNA) 1106 (D. Minn. 1985) (former drug addict); Tinch v. Walters, 573 F. Supp. 346 (E.D. Tenn. 1983) (former alcoholic); McGarvey v. District of Columbia, 468 F. Supp. 687 (D.D.C. 1979) (former drug addict).

⁶⁴37 Fair Empl. Prac. Cas. (BNA) 1589 (D. Mass. 1985).

⁶⁵*Id.* at 1590.

⁶⁶*Id.* at 1595.

⁶⁷*See* Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); Davis v. Bucher, 451 F. Supp. 791, 797 n.4 (E.D. Pa. 1978). *But see* Heron v. McGuire, 803 F.2d 67 (2d Cir. 1986) (police officer addicted to heroin was ruled *not* to be a "handicapped individual" under the Act).

⁶⁸*See* Arline v. School Bd., 772 F.2d 759 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1123 (1987) (holding that a contagious disease (tuberculosis) is a "handicap" under the Act). This ruling could be cited as precedent for the inclusion of other contagious diseases, such as AIDS, within the class of handicaps protected by this Act. *See also* Thomas v. Atascadero Unified School Dist., No. 886-609 AHS (BY) (C.D. Cal. Nov. 17, 1986) (district judge ruled that AIDS is a "handicap" under the Act).

belief that such employees are capable of transmitting the virus to other employees.⁶⁹

3. *The Vietnam Veterans Readjustment Act.*—The Vietnam Era Veterans' Readjustment Assistance Act of 1972⁷⁰ may also limit a private employer's use of medical test results in making employment decisions. Section 402 of the Act requires businesses that have certain federal contracts of \$10,000 or more to "take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era."⁷¹ The Act defines a "special disabled veteran" as "(A) a veteran who is entitled to compensation under laws administered by the Veterans' administration for a disability . . . or (B) a person who was discharged or released from active duty because of a service-connected disability."⁷² Failure to employ or retain such a veteran on the basis of a test result showing possible alcohol or drug abuse or the presence of AIDS antibodies may violate this Act if such a condition was service-connected and resulted in discharge or release from active duty.

4. *Employee Retirement Income Security Act of 1974.*—While not primarily a fair employment statute, another federal law that limits a private employer's use of medical test results to screen out employees posing high health cost risks, such as alcoholics, drug addicts, or AIDS victims, is the Employee Retirement Security Act of 1974 (ERISA).⁷³ Section 510 of the Act forbids an employer from discharging an employee "for the purpose of interfering with the attainment of any right to which [that employee] may become entitled" under an employee benefit plan.⁷⁴ The Seventh Circuit Court of Appeals, in *Kross v. Western Electric Co.*,⁷⁵ found that an employee's allegation that he was discharged for the purpose of denying him continued participation in a company-provided medical insurance plan stated a claim under section 510 of ERISA.⁷⁶

5. *State and Local Laws.*—Private employers must also be aware of state and local laws that prohibit discrimination against handicapped individuals. There is a clear split of authority between the states as to

⁶⁹Daily Labor Reporter (BNA) No. 122, June 25, 1986, at A8. However, despite the Justice Department's position, recent court decisions suggest that an employer may *not* be justified in refusing to hire or retain a person diagnosed as or suspected to be an AIDS victim out of fear that such person will transmit the disease to third parties. In this regard, see *Phipps v. Saddleback Valley United School Dist.*, No. 474981 (Orange Cty. Sup. Ct. Feb. 20, 1986); *District 27 Community School Bd. v. Board of Educ.*, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (1986); *see also Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, No. 86-4235 (E.D. La. filed Sept. 29, 1986).

⁷⁰38 U.S.C.S. §§ 2011-2014 (Law. Co-op. 1981).

⁷¹*Id.* § 2012(a).

⁷²*Id.* § 2011(1).

⁷³29 U.S.C.S. §§ 1001-1461 (Law. Co-op. 1982).

⁷⁴*Id.* § 1140.

⁷⁵701 F.2d 1238 (7th Cir. 1983).

⁷⁶*Id.* at 1242-43.

whether alcohol and drug abuse should be considered a "handicap" under state handicap statutes,⁷⁷ whereas the states appear to be in agreement that a person with AIDS is a covered "handicapped individual."⁷⁸ The states of California and Florida, as well as several municipalities, have enacted specific laws forbidding employers from discriminating against anyone who has tested positive for AIDS antibodies.⁷⁹

C. Common Law Issues

Just as private sector employers face an ever-increasing variety of civil tort actions brought as a result of the promulgation and implementation of mandatory medical screening programs, employees and job applicants are also bringing causes of action alleging injuries suffered as a result of an employer's use of the test results obtained from such testing programs. In this regard, recent cases have involved allegations that an employer is liable for:

1. *Invasion of the Right of Privacy.*—As noted by the United States District Court for the Southern District of Iowa in *McDonnell v. Hunter*:⁸⁰

[B]oth blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs. One clearly has a reasonable and legitimate *expectation of privacy in such personal information contained in his body fluids*.⁸¹

An employer may be held to have violated an employee's right of privacy by unreasonably disclosing that employee's medical test results.

⁷⁷See, e.g., *Connecticut Gen. Life Ins. Co. v. DILHR*, 18 Fair Empl. Prac. Cas. (BNA) 1447 (Wis. 1979) (handicap); *Welsh v. Municipality of Anchorage*, 676 P.2d 602 (Alaska 1984) (alcoholism not physical handicap).

⁷⁸A recent National Gay Rights Advocates survey found that 33 states accept AIDS-related discrimination complaints and that 21 of these states have formally declared "that AIDS-based discrimination is prohibited under handicap laws." *Daily Labor Report* (BNA) No. 182, Sept. 19, 1986, at A-16.

See 2 Empl. Prac. Guide (CCH) ¶ 5014 (Florida); ¶ 5020 (Oregon); ¶ 5023 (Maine); ¶ 5025 (Massachusetts); ¶ 5026 (New Jersey) (1986); *Daily Labor Report* (BNA) No. 179, Sept. 16, 1986, at A4, No. 182, Sept. 19, 1986, at A16. See also *Shuttleworth v. Broward County*, No. 85-6623-CIV (S.D. Fla. settlement reached Dec. 5, 1986) (employer alleged to have discriminatorily fired an employee diagnosed as having AIDS settled the case by agreeing to rehire the employee and pay him almost \$200,000); *Racine Educ. Ass'n v. Racine United School Dist.*, ERD Case 50279 (Wisconsin, DILHR, Apr. 30, 1985); *Doe v. Sinicola & Sons Excavating, Inc.*, No. 86-320825NZ (Oakland Cty. Cir. Ct. filed Oct. 9, 1986) (employee fired after having been diagnosed with AIDS filed a \$10 million lawsuit against his former employer alleging a violation of state handicap discrimination laws).

⁷⁹See CAL. HEALTH & SAFETY CODE § 199.38 (West Supp. 1986); FLA. STAT. § 381.606 (West 1986); Los Angeles Municipal Code, ch. III, art. 5.8, §§ 45.80-45.93; San Francisco Municipal Code, Part II, ch. VIII, art. 38, §§ 3801-3816 (1985); Austin, Texas, Ordinance, *Daily Labor Report* (BNA) No. 250, Dec. 31, 1986, at A3.

⁸⁰612 F. Supp. 1122 (D. Iowa 1985).

⁸¹*Id.* at 1127 (emphasis added).

For example, in *Bratt v. IBM Corp.*,⁸² the Massachusetts Supreme Court found that under a state statute forbidding unreasonable interference with a person's privacy, an employer's disclosure of private medical facts about an employee through an intra-corporate communication was sufficient publication to invade that employee's right of privacy.⁸³

2. *Negligence.*—Employees and job applicants have also sought to recover damages for the negligence of employer-hired medical testing agents who have allegedly erroneously interpreted medical test results. For example, in *Olson v. Western Airlines*,⁸⁴ the California Court of Appeals ruled that a disappointed job applicant could sue a potential employer for the negligence of an employer-hired physician who erroneously diagnosed the applicant as being prediabetic.⁸⁵ Also, in *Armstrong v. Morgan*,⁸⁶ an employee who was fired as a result of an employer-hired physician's report which inaccurately diagnosed him as being in poor physical condition was able to sue the physician for damages caused by his negligence.⁸⁷

An employer may also be liable for negligently hiring or failing to supervise adequately an employee whose medical test results show to be a possible alcohol or drug abuser or to be a carrier of the AIDS virus⁸⁸ and who later injures or causes the injury of another due to such abuse or infection. For example, in *Colwell v. Oatman*,⁸⁹ an employer was found to have been negligent in hiring a laborer from a temporary employment service who, due to his intoxication, caused the injury of another employee.⁹⁰ Moreover, in *Otis Engineering Corp. v. Clark*,⁹¹ an employer settled a case for more than \$600,000 where it was alleged that the employer negligently supervised an intoxicated employee by letting him drive his automobile from company property.⁹²

An employer may also be held liable for negligently failing to warn others of known workplace health hazards, as well as for negligently failing to disclose to an employee test results showing that he may be infected with a harmful or infectious disease, such as AIDS. For example,

⁸²392 Mass. 508, 467 N.E.2d 126 (1984).

⁸³*Id.* at 515-16, 467 N.E.2d at 134.

⁸⁴143 Cal. App. 3d 1, 191 Cal. Rptr. 502 (1983).

⁸⁵*Id.*, 191 Cal. Rptr. at 507-08.

⁸⁶545 S.W.2d 45 (Tex. Civ. App. 1976).

⁸⁷*Id.* at 47.

⁸⁸*See Doe v. American Airlines*, No. 86 L 19638 (Cook Cty. Cir. Ct. Sept. 2, 1986) (woman bitten by an airline ticket agent who later tested sero-positive for AIDS is suing the airline for \$12 million in damages based on a "negligent hiring" theory).

⁸⁹32 Colo. App. 171, 510 P.2d 464 (1973).

⁹⁰*Id.* at 176-77, 510 P.2d at 466-67.

⁹¹668 S.W.2d 307 (Tex. 1983); *see also* *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal. 2d 69, 70 Cal. Rptr. 136 (1968). *But see* *Chesterman v. Barmon*, 82 Or. App. 1, 727 P.2d 130 (1986).

⁹²The intoxicated employee was involved in a fatal traffic accident shortly thereafter. 668 S.W.2d at 308.

in *Union Carbide & Carbon Corp. v. Stapleton*,⁹³ the plaintiff recovered damages from his former employer for the employer's negligence in not informing him of the results of a company-administered X-ray test which showed the presence of a tubercular condition.

3. *Defamation*.—An employer also faces liability for defamation if it wrongfully labels an employee or job applicant as a substance abuser or an AIDS victim based upon its erroneous interpretation of medical test results. For example, in *Houston Belt and Terminal Railway Co. v. Wherry*,⁹⁴ an employee was awarded \$200,000 in damages because his former employer had falsely reported that the employee had methadone in his blood.⁹⁵ Further analysis showed the original test results to be inaccurate and that the employee actually had another substance chemically similar to methadone in his blood.⁹⁶

4. *Wrongful Discharge*.—An employer whose employees are not represented by a union must be cognizant of their common law contractual rights when deciding whether to terminate them on the basis of adverse medical test results. Such employees may allege contractual protection based upon an express written contract, an oral contract, or a contract implied by a company personnel manual or employee handbook. Indiana courts have so far refused to find an implied employment

⁹³237 F.2d 229 (6th Cir. 1956). See generally RESTATEMENT (SECOND) OF AGENCY § 492 (1958). However, if an employer informs his work force of the presence of an AIDS-infected employee, he may be faced with co-workers who refuse to work with that employee out of fear for their own safety. Such concerted activity is protected conduct under section 7 of the National Labor Relations Act if it is based upon a "reasonable" fear of a real danger of death or serious injury. See 29 U.S.C.S. § 157 (Law. Co-op. 1975); 29 C.F.R. 1977.12(b)(2) (1986). Such concerted activity may also be protected under section 502 of the Labor Management Relations Act if it is based on "objective evidence" of exposure to an "abnormally dangerous condition." See *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 386-87 (1974); 29 U.S.C.S. § 143 (Law. Co-op. 1975). Finally, under the Occupational Safety and Health Act of 1970, an employer cannot retaliate against employees who refuse to be exposed to a health hazard they have asked the employer to correct if they in good faith "reasonably believe" it poses a danger of serious injury or death. See *Marshall v. Babcock & Wilcox Co.*, 7 O.S.H. Cas. (BNA) 2021 (E.D. Mich. 1979); 29 U.S.C.S. § 660(c)(1) (Law. Co-op. 1982); see also *Minnesota Dep't of Corrections*, 85 Lab. Arb. (BNA) 1185 (1985) (Arbitrator Gallagher held that a prison guard who refused to conduct pat searches of inmates because of his fear of becoming contaminated with AIDS was wrongfully discharged for insubordination. The employer was found to have been partially responsible for the guard's fear of contracting AIDS by having earlier distributed a memo which stated that "No one really knows all the ways AIDS is transmitted, so be careful.").

A better approach for an employer would be to educate its workforce on the medical facts regarding the transmission of the AIDS virus and the unlikelihood of an employee becoming infected through normal workplace conduct. Such education may make later employee refusals to work with an AIDS victim unprotected activity under these above-mentioned statutes, as such refusals would not be based upon a "reasonable" fear of danger derived from "objective" evidence.

⁹⁴548 S.W.2d 743 (Tex. Civ. App. 1976), cert. denied, 434 U.S. 962 (1977).

⁹⁵*Id.* at 746.

⁹⁶*Id.*

contract to have been created by an employee handbook or personnel manual,⁹⁷ but courts in other states have found that such documents create employment contracts.⁹⁸ If an employment contract is found to exist, an employer may be limited by its terms to discharging employees only for "just cause" or in accordance with specified contractual disciplinary procedures.⁹⁹

D. Unemployment Compensation Issues

An employee discharged on the basis of medical test results showing the on-duty presence of alcohol or illegal drugs may be eligible for benefits under state unemployment compensation laws, unless the employer can demonstrate that such misconduct was "willful" and impaired the employee's ability to perform his job duties.¹⁰⁰ For example, the Indiana Employment Security Division Review Board upheld the benefits claim of an employee who reported for work after consuming alcoholic beverages.¹⁰¹ The Board found that the employer's evidence of pre-work alcohol consumption did not prove that the employee was "under the influence" while at work so as to justify his discharge for "misconduct."¹⁰² The Board specifically found that there was no evidence that the employee's "control of his facilities" was impaired by his on-duty alcohol intoxication.¹⁰³

E. Collective Bargaining Issues

Private sector employers whose employees are represented by a union face the prospect of having employees who are discharged on the basis

⁹⁷See *Mead Johnson & Co. v. Oppenheimer*, 458 N.E.2d 668, 671 (Ind. Ct. App. 1984); *Shaw v. S.S. Kresge Co.*, 167 Ind. App. 1, 7, 328 N.E.2d 775, 779 (1975). *But see* *Bueth v. Britt Airlines, Inc.*, 787 F.2d 1194, 1197 (7th Cir. 1986) (court recognized the tort of wrongful discharge "in retaliation for exercising a statutory right or performing a statutory duty").

⁹⁸See, e.g., *Pelizza v. Reader's Digest Sales & Serv.*, 624 F. Supp. 806 (N.D. Ill. 1985); *Brookshaw v. South St. Paul Feed, Inc.*, 381 N.W.2d 33 (Minn. Ct. App. 1986).

⁹⁹See, e.g., *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (employee discharged without a hearing in violation of the employer's dispute resolution procedures was found to state a cause of action for wrongful discharge); *see also* *King v. Electronic Data Sys. Corp.*, No. 17039 (Mont. Co. Cir. Ct. Aug. 14, 1986), where an AIDS victim is suing his employer for wrongful termination on the theory that the company's employment manual created an "employment contract" which was violated when he was discharged on account of his illness.

¹⁰⁰For example, in *Jacobs v. California Unemployment Ins. Appeals Bd.*, 25 Cal. App. 3d 1035, 1039, 102 Cal. Rptr. 364, 367-68 (1972), an employee's excessive absenteeism caused by alcoholism was held to be "non-volitional." However, the state of Oregon has recently adopted a policy which cuts off unemployment benefits to persons seeking work who refuse to submit to drug tests required by prospective employers or who are fired for refusing to submit to drug tests ordered by employers for reasonable cause. *Daily Labor Report (BNA) No. 183*, Sept. 22, 1986, at A8.

¹⁰¹*Alcoa v. Review Bd. of Ind. Employ. Sec. Div.*, 426 N.E.2d 54 (Ind. Ct. App. 1981).

¹⁰²*Id.* at 60.

¹⁰³*Id.*

of medical test results grieve the appropriateness of such discipline. Frequently, such cases are taken to labor arbitration. In general, arbitrators require proof of a reasonably discernible connection between an employee's off-duty activities and the employer's business interests when upholding disciplinary penalties.¹⁰⁴ This is especially critical in drug or alcohol-related cases, where the activities of the employee under scrutiny may have occurred long before he reported to work. For example, in *CFS Continental, Inc.*,¹⁰⁵ an employer's discipline, based solely upon a positive test result showing marijuana use, was overturned by Arbitrator Lumbley because that drug test could not distinguish between on-duty and off-duty use and did not conclusively show that the employee had used marijuana *while on the job*.¹⁰⁶ Moreover, in *Boone Energy*,¹⁰⁷ Arbitrator O'Connell reinstated eight of ten employees who were discharged after testing positive for drugs, finding that these tests merely indicated *past* exposure to drugs and did not establish that the employees were under the influence of drugs at the time the test samples were taken.¹⁰⁸

The continued applicability of these on-duty/off-duty principles may arguably be in question as a result of the recent Fifth Circuit Court of Appeals decision in *MISCO v. United Paperworkers International Union*.¹⁰⁹ In *MISCO*, an arbitrator reinstated an employee who had been

¹⁰⁴Furthermore, an employer's work rule prohibiting employee drug use must be "reasonable" on its face in order to survive arbitral scrutiny. See *Henry Vogt Mach. Co.*, Am. Arb. Ass'n Report 333.3, Dec. 15, 1986, at 4; *Schien Body & Equip. Co., Inc.*, 69 Lab. Arb. (BNA) 930, 935-36 (1977) (Roberts, Arb.).

¹⁰⁵*CFS Continental, Inc. and Teamsters, Local Union No. 117, Driver Sales & Warehouse*, 86-1 Lab. Arb. Awards (CCH) ¶ 8070 (1985) (Lumbley, Arb.). *But see* *Union Oil of Cal.*, 87 Lab. Arb. (BNA) 297 (1985) (Boner, Arb.); *Indianapolis Power & Light Co. and Electrical Workers (IBEW), Local 1395*, 86-2 Lab. Arb. Awards (CCH) ¶ 8507 (May 9, 1986) (Arbitrator Volz upheld the discharge of an employee who had tested positive for illegal drug use despite union contentions that the employee had not possessed or used drugs while on the employer's time or property and that the employee's off-duty use of marijuana had not impaired his work performance). See also *Police Dep't and Grievant*, 87-1 Lab. Arb. Awards (CCH) ¶ 8035 (July 26, 1986) (Riker, Arb.).

¹⁰⁶86-1 Lab. Arb. Awards (CCH) at ¶ 8070.

¹⁰⁷85 Lab. Arb. (BNA) 233 (1985) (O'Connell, Arb.); see also *Kroger Co. and Bakery, Confectionery & Tobacco Workers, Local 372-A*, 86-2 Lab. Arb. Awards (CCH) ¶ 8407 (June 19, 1986) (Wren, Arb.); *Weyerhaeuser Co.*, 86 Lab. Arb. (BNA) 182 (1985) (Levin, Arb.); *Hayes-Albion Corp.*, 76 Lab. Arb. (BNA) 1005 (1981) (Kahn, Arb.).

¹⁰⁸85 Lab. Arb. (BNA) at 237.

¹⁰⁹768 F.2d 739 (5th Cir. 1985), *cert. granted*, 55 U.S.L.W. 3472 (U.S. Jan. 13, 1987) (No. 86-651); see also *Douglas & Lomason Co. and Aluminum, Brick & Clay Workers, Local 212*, 86-1 Lab. Arb. Awards (CCH) ¶ 8027 (1985) (Nicholas, Arb.) (Arbitrator Nicholas held the penalty of discharge for an employee found smoking marijuana on company premises to be consistent with a public policy against allowing employees to operate dangerous machinery while "under the influence," and that such a public policy could not be contravened by arbitral award). *But see* *Northwest Airlines, Inc. v. Airline Pilots Ass'n*, No. 85-6228 (D.C. Cir. Jan. 6, 1987) (slip opinion), where the District of Columbia Circuit Court of Appeals reversed a lower court's decision that the enforcement of an arbitration award ordering the reinstatement of an airline pilot who had violated

discharged after being found on company premises in another employee's car which was filled with marijuana smoke and in which marijuana was found. The district court vacated the arbitrator's decision, finding that it was contrary to a well-defined public policy against the operation of dangerous machinery by persons under the influence of drugs, and the court of appeals affirmed.¹¹⁰ Whether courts in general will recognize a "well-defined" public policy against alcohol or drug use remains to be seen.

Employers must also be aware that arbitrators have been wary of upholding an employee discharge based solely upon the results of a single medical test, because drug testing procedures are not error-free.¹¹¹ An arbitrator will often resolve all doubts about the accuracy of such a test in the employee's favor and may require the employer to meet stricter standards of proof in this type of case. For example, in *Pacific Motor Trucking*,¹¹² Arbitrator D'Spain found a discharge based upon the results of a blood alcohol test showing that an employee had a blood-alcohol level of 0.19% to be improper.¹¹³ Arbitrator D'Spain discounted the results of this test because the medical laboratory report pertaining to it did not verify the date on which the lab had received the employee's blood specimen and because "chain of possession" doc-

a company rule against consuming alcohol within twenty-four hours of duty, but who had subsequently completed an alcohol treatment program, would jeopardize public safety and be inconsistent with public policy. The Court of Appeals ruled that if the pilot could obtain FAA recertification, the enforcement of this arbitration award would not violate public policy. *Id.* See also *Premium Bldg. Prod. Co. v. United Steelworkers*, 616 F. Supp. 512 (N.D. Ohio 1985), *aff'd*, 798 F.2d 1415 (6th Cir. 1986) (in refusing to vacate an arbitration award that reinstated an employee who had been caught smoking marijuana, district court held that public policy does *not* require, in all cases, that employees caught smoking marijuana in the work place be discharged).

¹¹⁰*Misco*, 768 F.2d at 740.

¹¹¹See, e.g., *Chase Bag Co. and Amalgamated Clothing and Textile Workers Union, Local 377T*, 87-1 Lab. Arb. Awards (CCH) ¶ 8001 (May 24, 1986) (Strasshofer, Arb.); *Georgia-Pacific Corp. and United Paperworkers Int'l Union, Local Union No. 335*, 86-1 Lab. Arb. Awards (CCH) ¶ 8155 (April 7, 1985) (Clarke, Arb.).

For this reason, an employer's selection of a clinical testing laboratory is all important. Regretfully, Indiana does not require certification or state-approval for clinical laboratories. Cf. IND. CODE ANN. § 20-12-34-5 (West 1984). But see 42 U.S.C.S. § 263(a) (Law. Co-op. 1978) (requiring federal licensure of clinical laboratories engaged in interstate commerce); 21 C.F.R. §§ 600-680 (1986). See generally *Wall St. J.*, Feb. 2, 1987, at 1, col. 6.

¹¹²86 Lab. Arb. (BNA) 497 (1986) (D'Spain, Arb.); see also *Georgia-Pacific Corp.*, 86 Lab. Arb. (BNA) 411 (1985) (Clarke, Arb.). However, when adverse test results are combined with other indicia of improper employee alcohol or drug use, arbitrators are more likely to uphold disciplinary actions taken against such employees. See *Dixie Container Corp. and United Paperworkers Int'l Union, Local 699*, 86-2 Lab. Arb. Awards (CCH) ¶ 8599 (Oct. 23, 1986) (Fishgold, Arb.); *Rohr Indus., Inc. and International Ass'n of Mach.*, Local Lodge 964, 86-2 Lab. Arb. Awards (CCH) ¶ 8389 (Mar. 11, 1986) (Hardbeck, Arb.); *Georgia Power Co.*, 87 Lab. Arb. (BNA) 800 (1986) (Byars, Arb.); *Tennessee River Pulp & Paper Co.*, 68 Lab. Arb. (BNA) 421 (1976) (Simon, Arb.).

¹¹³86 Lab. Arb. (BNA) at 498.

umentation was not kept on that specimen.¹¹⁴ Moreover, in *Pacific Bell*,¹¹⁵ Arbitrator Schubert required an employer to prove that a discharged employee had used illegal drugs by "clear and convincing evidence" rather than by the normal "preponderance of the evidence" arbitral standard of proof.¹¹⁶

Furthermore, when an employer has an employee assistance counseling program in operation, arbitrators have generally found a discharge based upon substance abuse to be improper unless the employee has had an opportunity to participate in that rehabilitation program.¹¹⁷ However, in *Rohr Industries, Inc.*,¹¹⁸ Arbitrator Hardbeck upheld the discharge of an employee who had tested positive for PCP where the employee knew about yet failed to avail himself of an existing employer-sponsored employee assistance program.¹¹⁹

IV. CONCLUSION

The private sector employer in Indiana must combat both the fact of increasing substance abuse and the fear of a spreading AIDS epidemic.

It would appear that the only legal limitations placed upon a non-unionized private sector employer wishing to implement a workplace medical testing program involve the methodology used. Such an employer must carefully design its medical testing program so as to preclude both the "governmental entanglement" which brings constitutional restrictions into play and the unexpected, unreasonable, or unnecessary actions of its testing agents which give rise to common law actions in tort.

A unionized employer has an additional responsibility. It must bargain in good faith with the union representing its employees over the promulgation and implementation of such a medical testing program, unless the right to implement such a program unilaterally has been contractually retained by management or the union has waived its right to bargain over this issue.

¹¹⁴*Id.*

¹¹⁵87 Lab. Arb. (BNA) 313 (1986) (Schubert, Arb.). *But see* Roadway Express, 87 Lab. Arb. (BNA) 224 (1986) (Cooper, Arb.) (Arbitrator Cooper found that public safety considerations warranted the use of the lesser "preponderance of the evidence" standard of proof in a case involving the discharge of a truck driver based upon the positive results of a drug screening test).

¹¹⁶87 Lab. Arb. (BNA) at 315-16.

¹¹⁷*See, e.g.*, Indianapolis Rubber Co., 79 Lab. Arb. (BNA) 529 (1982) (Gibson, Arb.); Kerr-McGee Ref. Corp. and Oil, Chem. & Atomic Workers, Local 4-245, 86-2 Lab. Arb. Awards (CCH) ¶ 8454 (July 2, 1986) (Caraway, Arb.).

¹¹⁸Rohr Indus., Inc. and International Ass'n of Mach., Local Lodge 964, 86-2 Lab. Arb. Awards (CCH) ¶ 8389 (Mar. 11, 1986) (Hardbeck, Arb.); *see also* United Food & Commercial Workers Local 115 and Lick Fish & Poultry, Case No. 08-29-86 (1986) (Arbitrator Concepcion upheld the discharge of an employee who reported for work under the influence of an illegal drug despite a union plea for rehabilitation in lieu of discharge).

¹¹⁹86-2 Lab. Arb. Awards (CCH) at ¶ 8389.

The private sector non-unionized employer's use of the results obtained from its substance abuse testing program in making employment decisions is also generally limited only by methodological concerns. An employer's testing program must be designed to insure that there will be no negligent or premature disclosure of test results and must require confirmational testing of any initially positive test results prior to the initiation of any adverse employment actions. Furthermore, where a person testing positive for substance abuse is found to be an alcoholic or drug addict protected as a "handicapped individual" under federal or state law, the employer must be prepared to show, as a condition precedent to the imposition of adverse employment actions, that such substance abuse has prevented that person from performing his job duties. A unionized employer faces the added responsibility of establishing a connection between an employee's substance abuse and the employer's business relationship in order to have a disciplinary action taken against such an employee upheld in the arbitral forum.

In contrast, because of the protected "handicapped" status afforded AIDS victims under most applicable federal and state laws, test results showing that an employee or job applicant is infected with the AIDS virus will be legally useless to an employer unless they are accompanied by proof that such person is unable to perform his job duties because of AIDS. For this reason, it would appear that AIDS screening tests are, for the most part, unwarranted in the private sector workplace.

In accordance with the current state of the law as it impacts on workplace medical testing programs, it is suggested that a private sector employer in Indiana should:

1. Establish and publicize a clearly written "no-alcohol, no-drugs" policy.
2. Negotiate, if necessary, a broad management rights clause and specific language in its collective bargaining agreement giving management the right to conduct employee medical testing. Negotiate with the union concerning this substance abuse policy and testing program as required by law.
3. Provide each employee and job applicant with a medical testing consent form which defines the purpose and scope of the company's medical testing program and which gives notice that an adverse test result will lead to disciplinary punishment up to and including discharge.
4. Establish a scientifically accurate medical testing program that does not involve public law enforcement personnel.
5. Limit testing to job applicants, regularly scheduled employee physical examinations, and instances where there exists a "reasonable suspicion" of on-duty employee performance impairment as a result of alcohol or drug use.
6. Require that medical testing be done privately and respectfully.
7. Establish strict "chain of custody" procedures for the collection and retention of test samples.
8. Make absolutely certain that the fact of testing and test results are kept confidential and placed in a file separate from regular employee personnel files.

9. Require initial adverse test results to be confirmed by a second independent analysis.

10. Establish and publicize the existence of a sound and thoughtful substance abuse rehabilitation service or employee assistance program.

11. Be consistent in the application of the testing program and the discipline imposed thereunder.

12. Train supervisors to recognize an employee under the influence of alcohol or drugs and to gather and record all relevant evidence available that may establish that employee's performance impairment independent of medical test results.

13. Review current personnel policies and insurance programs to determine whether changes are necessary to address the AIDS issue before it actually arises in the workplace.

14. Establish an employer-sponsored AIDS education program to answer questions and calm fears about this medical problem in lieu of conducting medical tests to detect the AIDS virus.

