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RANDOM DRUG TESTING IN THE EMPLOYMENT CONTEXT

by Idelle Abrams

I. Introduction

Employer attempts to monitor or regulate the behavior of employees are as old as the employment relationship itself. The elements of employee conduct that an employer may attempt to control often reflect behavior patterns of concern to society as a whole. As drug use in American society has escalated, employers are increasingly concerned about employee drug use. Employers have engaged in the practice of testing for the presence of drugs by analyzing employees' urine specimens for several years. In 1986, President and Mrs. Reagan announced an executive order for a "Drug Free Federal Workplace" aimed at attacking the pervasive problem of drug abuse. The order outlined a program for mass drug testing of federal employees. Intended as a model to be followed by other employers, the order focused attention on the substantial amount of testing currently being conducted in the workplace by private as well as public employers.

Unquestionably, the effects of drug abuse have imposed an enormous social, psychological, and economic burden on our society. Employers have focused primarily on the economic effects of drug abuse. Employers have four major motivations for instituting employee testing programs. The first concern is the hidden cost of employee drug and alcohol abuse as manifested in increased health care expenses, greater absenteeism, and the cost of work-related accidents. Employers are also concerned about their potential legal liability for threats to the safety of the public at large, especially as employers are "more and more frequently . . . being held responsible for the actions of employees." Security issues are a third major problem. Employee theft costs billions of dollars annually and can bankrupt a business. In addition, some employers expect their "employees [to] represent their employers twenty-four hours a day, each day" and are therefore concerned about employees' off-duty activity.

Drug testing raises a host of issues for employees. The right to privacy, considered by many to be essential to individual growth and development, is seriously compromised by the procedures used in random drug testing. The random nature of the testing, done without reasonable suspicion or probable cause, presumes guilt, depriving employees of their civil right to be considered innocent until proven guilty. The high error rate of the most prevalent form of urine testing raises due process issues. The focus on illegal substances raises questions about the purpose of testing, since problems in the workplace are largely the result of alcohol abuse rather than marijuana or cocaine. The value of drug tests that do not measure the level of intoxication or the degree of impairment is questionable. The ability of the tests to register the presence of drugs for days or weeks after use allows the employer to monitor the off-duty behavior of employees. And if employers can randomly test for drugs with impunity, what is to prevent a proliferation of other intrusive procedures and control mechanisms using the same rationale?

In this article I will survey the courts' treatment of drug testing for three different populations: state and federal government employees, private sector employees covered by collective bargaining agreements, and employees at will in the private sector. Keeping in mind the unique characteristics of each of these employee groups, the analysis will include a discussion of the impact of random drug testing on the right to privacy, the constitutional prohibition against unreasonable searches and seizures, and the exercise of employer prerogative.

There is a clear trend in the courts to declare the testing of public sector employees to be invasive and violative of privacy rights, while recognizing the need to weigh the interests of employer and employee. Private sector employees enjoy little protection against arbitrary employer actions that affect their interests, including random drug testing or dismissal for refusing to be tested. I will conclude that the invasiveness of random drug testing does not depend on the identity of the employer. The private sector employee has the same need to be secure from invasions of privacy as the worker who happens to be a government employee.

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II. The Methodology of Testing

There are three drug testing methods available to an employer. The most common test is Syva's EMIIT (enzyme immunoassay) test which is attractive because of its low cost and the fact that it may be performed outside a laboratory by relatively untrained personnel. The elements that make the test attractive also render its usefulness questionable. The design of the test limits its accuracy as does the great potential for operator error and specimen contamination. Indeed, even the test's manufacturer recommends that "[a]ny positive should be confirmed by an alternative method." Studies have indicated that, even when performed by recognized laboratories, the EMIIT test can generate a false positive result as often as 66 percent of the time. Gas chromatography must be performed in the laboratory, but yields a degree of inaccuracy similar to that of the EMIIT test. A mass spectrometer test will deliver accurate results almost 100 percent of the time, but the significantly higher cost of the test dissuades employers from using that method, even to confirm a positive EMIIT test.

The results obtained by these tests are of limited value in the employment context. The EMIIT test can detect the presence of marijuana metabolites up to three weeks after use of the drug and occasionally when the individual's only exposure was as a "passive smoker." Many common over-the-counter drugs can trigger a positive result: Advil and Nuprin test positive for marijuana and Nyquil and Contac may yield a positive result for amphetamines. The test cannot detect intoxication or impairment of the individual in his or her job performance. An employer's proper concern is with the performance of the employee on the job; the exchange made between the employer and the employee is wages for job performance. A test that does not indicate impairment is not relevant to the employer's proper concern of obtaining value for the wages he is paying.

A urine specimen can also divulge significant information about the physical state of an employee, well beyond the possible evidence of drug use. Analysis can detect pregnancy, diabetes, epilepsy, and other medical conditions in addition to prescribed medications and other authorized substances used by the employee.

III. The Right to Privacy

Invasion of privacy is clearly the greatest concern to employees faced with mandatory drug testing. The methodology of collection invades areas of behavior that are unambiguously considered "private" and which, in fact, are usually unlawful if conducted in public.

The value of privacy has been attested to by experts in many fields and "may be linked to goals such as creativity, growth, autonomy and mental health..." While concerns about privacy are generally recognized as worthy, the courts must consider whether privacy is a legal concept as well as a sociological or philosophical one. In other words, has society recognized privacy as a legally protected or protectable right? An analysis of this question would have to begin by defining "privacy" and devising discernable boundaries. The number of discourses on this question are ample evidence of the fact that this is no easy assignment.

The right to privacy was first articulated by Samuel Warren and Louis Brandeis in a seminal article advocating a common law tort that would protect the individual against the unreasonable disclosure of his private affairs. Warren and Brandeis were concerned that "instantaneous photographs and [the] newspaper enterprise have invaded the sacred precincts of private and domestic life." They rallied against the pursuit of gossip and its publication by the press: "To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle." Warren and Brandeis sought to protect the "inviolable personality" of the individual. It is, they said, the prerogative of the private individual to communicate only those facts he wants known to a broad audience.

The publication of this article had a profound effect on subsequent jurisprudence as it was the source of the "private facts" tort. At least 36 states recognize a right to privacy in the wrongful public exposure of private information. In this respect Warren and Brandeis' "advocacy of this new tort created a minor revolution in the development of the common law." However, the exact nature and scope of this revolution, almost 100 years later, are hard to determine. The "private facts" tort collides with the constitutional guarantees of freedom of speech and freedom of the press with the result that plaintiffs rarely win.

Other causes of action advocating the right to privacy arguments articulated by Warren and Brandeis arose from the private facts tort. In 1960, Dean Prosser identified three additional areas of tort law that invoke the right to privacy. These tort actions include (1) misappropriation of another's name or likeness; (2) unreasonable intrusion upon the seclusion of another; and (3) publicity that unreasonably places another in a false light before the public.

A constitutional right to privacy, as opposed to the common law right, was first described in Griswold v. Connecticut as a right derived from the penumbra of the guarantees of the First, Third, Fourth, Fifth, and Ninth Amendments. Congress endorsed this constitutional right to privacy when it enacted the Privacy Act of 1974 and declared that "Congress finds that... the right to privacy is a personal and fundamental right protected by the Constitution of the United States."
IV. The Fourth Amendment Guarantee Against Unreasonable Search and Seizure

The Fourth Amendment to the Constitution “more than any other explicit constitutional provision reflects the existence of [some right to privacy and personhood].” The significance of this Amendment has been described as “second to none in the Bill of Rights.” The Fourth Amendment was a response to the common practice of authorities in England and the colonies “to conduct random searches of homes and businesses in search of evidence of law violations.” The Amendment declares that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The scope of protection afforded by the Fourth Amendment depends on the judicial interpretation of “search and seizure” and “reasonableness.” The Court’s current analysis of search and seizure rests on the decision in Katz v. United States that freed the definition of search and seizure from the requirement of physical invasion. In Katz, the Court held that the plaintiff had a justifiable privacy expectation that his telephone conversation, conducted from a telephone booth, would not be subject to electronic surveillance. The Court asserted that “once it is recognized that the Fourth Amendment protects people — and not simply ‘areas’ — against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”

In his concurrence in Katz, Justice Harlan described the rule currently governing Fourth Amendment analysis: “[T]here is a two fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” The protection of the Fourth Amendment can now be invoked in situations in which individuals have a “justifiable,” “reasonable,” or “legitimate” expectation of privacy. Absent such an expectation, there is no “search” within the meaning of the Amendment as it has been interpreted by the Court.

V. Testing Employees in the Public Sector

A scant three months after President Reagan announced the executive order instituting random drug testing for federal employees in “sensitive” positions, the courts demonstrated a “clear trend toward declaring the tests unconstitutional” under the Fourth Amendment. This trend clearly continues, a year and a half later. Collection of a urine specimen has been seen by the courts to be analogous to the involuntary taking of a blood sample, which was recognized by the Supreme Court in Schmerber v. State of California to be within the meaning of the search and seizure provisions of the Fourth Amendment. Based on Schmerber, most federal courts have found the compulsory collection of a urine sample to fall within the definition of a search and seizure regardless of the actual degree of direct observation that is involved in the procedure.

In order to “safeguard the privacy and security of individuals against arbitrary invasions by government officials,” the Fourth Amendment “imposes a standard of reasonableness upon the exercise of discretion by government officials.” Judges have generally found random urinalysis testing for drugs by government agencies to be beyond the bounds of reasonableness. One federal district court judge vociferously denounced random testing saying, “This dragnet approach, a large-scale program of searches and seizures made without probable cause or even reasonable suspicion, is repugnant to the United States Constitution.” Another district court judge described the interests at stake when he said, “In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.”

The threshold question for Fourth Amendment analysis is whether a demand for a urine sample is a search. The next step is to determine the bounds of “reasonableness” in conducting such a search, since the Fourth Amendment prohibition applies only to unreasonable searches. Generally, “[t]he Supreme Court has held that warrantless searches are per se unreasonable under the fourth amendment — subject only to a few specifically established and well-delineated exceptions,” one of which appears to be a class of cases involving government employees. “Reasonableness” can be construed by “balancing the need to search against the invasion which the search entails.” When the government is the employer, determining reasonableness “involve[s] a balancing of the individual’s expectation of privacy against the government’s right as an employer [engaged in the] performance of its statutory responsibilities.”

Applying the two-fold requirement articulated in Katz to the collection of a sample for drug testing, the district court in McDonell v. Hunter held that “urine is discharged and disposed of under circumstances where the person certainly has a reasonable and legitimate expectation of privacy.” Katz’s holding that it is not only areas but people that are protected by the Fourth Amendment, led the McDonell court to conclude that “[o]ne clearly has a reasonable and legitimate expectation of privacy in such personal information contained in his body fluids.”

Testing by the government, according to the court in McDonell, can be done only when there is a “reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts” that a specific individual has engaged in drug or alcohol abuse. The
The search, first, must be “justified at its inception,” and second, must be “reasonably related in scope to the circumstances which justified the interference in the first place.” Therefore, one court has upheld government mandated testing of bus drivers after a serious accident or if there is sufficient evidence to suspect them of substance abuse. However, testing teachers, police, or firefighters en masse without any evidence that would implicate an individual in the suspicious activity, is not justified at its inception so it is not within the authority of the state. Testing of this sort might be an effective way to ensure an unimpaired work force, but it is unreasonable and therefore a violation of Fourth Amendment protections. Nor may the government promulgate regulations requiring all train crew members to undergo testing after an accident when such testing is not based on “specific articulable facts [which] give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment.” A drug-free workplace cannot be achieved by denying the employees their constitutional rights. In the words of the McDonell court, “the constitutionality of a search cannot rest on its fruits.”

VI. Testing Employees Covered by Collective Bargaining Agreements

Once we move to the private sector the analysis of drug testing changes dramatically. Individuals employed by private individuals cannot appeal to the Constitution for protection. The rights granted to citizens by the Constitution protect them against “State aggression” only. The Constitution, said the Court in The Civil Rights Cases, offers no protection against the “wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong.” The Fourth Amendment was specifically excluded as a basis for a cause of action against a private party in Burdeau v. McDowell. The Court said: “It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure as whatever wrong was done was the act of individuals in taking the property of another.”

The individual employed in the private sector can only look to statutory provisions or the common law of torts to protect his rights as an individual. The individual who is a member of a union, however, will be shielded from some employer actions by the terms of the collective bargaining agreement. The employer is under an obligation to bargain in good faith with the union regarding all the terms and conditions of employment. Randomly testing all employees for drug use is considered a definite change in the conditions of employment and must be the subject of negotiation during collective bargaining. This has been an effective means by which to prevent employers from instituting random testing programs for unionized employees.

However, testing that is not random or that comports with prior guidelines for testing does not have to be renegotiated. The Brotherhood of Locomotive Engineers brought suit against the Burlington Northern Railroad Company in response to the allegedly “unilateral implementation of its urine testing policy.” Railway workers are unionized under the Railway Labor Act (RLA) and, according to the terms of the RLA, a “major” dispute must be resolved through the collective bargaining mechanism. The district court recognized that an attempt by Burlington Northern to implement random testing of employees, i.e., testing that is not supported by a “modicum of evidence” of substance abuse, would constitute a “major” dispute because it would break with the prior practice of testing based on sensory surveillance. As such it would be “subject to the status quo provisions of 45 U.S.C. § 156” and the formulation of a testing policy would be a mandatory subject for discussion in the collective bargaining process. However, since the company was only amending the testing that had already been in place the court found the practice “arguably justified” under the terms of the agreement extent between the Brotherhood and the company.

However, the Ninth Circuit, reversing the district court, found that the new testing policy is a “clear change in working conditions . . . and thus, by definition, a major dispute.” The Court of Appeals based its decision on two considerations. First, the court found “critical differences between the old method and new method” of testing. The old method, based on sensory surveillance, was “voluntary, and required particularized suspicion,” while the new method, which would test anyone “involved in an operating rule violation,” is “mandatory, and requires only generalized suspicion.”

Second, the court found that the new method presented “serious privacy intrusions.” In discussing this concern the court appealed to Fourth Amendment doctrine. Though recognizing that the railroad company is not a government agency and “is not subject to the restrictions of the Fourth Amendment” it found that the concern of the employees was the same whether the employer was the government or a company bound by a collective bargaining agreement. The privacy expectations in both instances “are related: Although the source of the invasion is different, the privacy interest is the same.” The court, in a significant statement, concluded: “We decline to assume that [the union] members implicitly granted [the company] the authority to invade their privacy in ways the government could not.”

Arbitrators, in their determinations, have also found a requirement to bargain collectively before random drug testing can be imposed on employees. Recent rulings by arbitrators found that the commissioner of the National Football League could not impose a drug testing plan outside the collective bargaining agreement and could not punish players (by imposing fines) who had refused to be
tested for drugs.85

A company that dismisses an employee for drug related activity will often be held to a higher standard of proof than in other dismissal actions. Arbitrators tend to require employers to support drug charges by “clear and convincing evidence,” a harsher standard than the “preponderance” of the evidence that is usually accepted. The higher standard is applied, in part, because possession of a controlled substance would be a criminal offense and in recognition of the fact that an employee discharged for drug-related activity will not easily find another job.86

In interpreting the ambiguous terms of a collective bargaining agreement, an arbitrator may impose conditions and requirements on the employer that better serve the intent of the provisions.87 An arbitrator’s decision may call for an employee to be given the chance to rehabilitate himself before termination is effective.88 In contrast to many employer wishes, arbitrators have also refused to treat drug use as a more serious offense than alcohol intoxication.89

The collective bargaining agreement, on the other hand, may limit an employee’s ability to pursue remedies outside the agreement. The grievance mechanism provided for under the collective bargaining agreement will preclude a court action on a tort or contract claim by an employee covered by the agreement.90 Nevertheless, studies indicate that “arbitrators have overturned more drug related discharges than they have sustained.”91 A collective bargaining agreement, therefore, seems to offer real protection to an employee charged with drug use.

VII. Drug Testing in Private Employment

Employees in the private sector who are not covered by collective bargaining agreements (or some other contractual arrangement) are essentially at the mercy of their employers. “Employment at will” took root in the United States in the late nineteenth century92 with the result that employees “ceased to have legal rights in their employment.”93 Employment at will construes the employment relationship as one that is freely entered into by both parties and can be terminated unilaterally by either party at any time.94 While employment at will is still the reigning theory in labor law, it has been qualified by legislative exceptions — e.g., child labor laws, minimum wage provisions, equal opportunity requirements — and judicial ones, for example, invalidating discharges that violate public policy.95

However, it is still true that “many of the rights and privileges which are considered so important to a free society that they are constitutionally protected from government encroachment are vulnerable to abuse through an employer’s power.”96 No issue can highlight this vulnerability more than the one under discussion here. While random drug testing by a government employer, performed without reasonable suspicion, has been determined to be an illegal search,97 private employers are subject to no such qualifications and testing in the private sector has expand-
first applied to employer actions that contravened a statutory policy. In Petermann v. International Brotherhood of Teamsters Local 396, the court granted a cause of action to an employee who was fired for refusing to commit perjury at his employer's behest. Courts have also allowed wrongful discharge claims when an employer fires an employee for filing a workers' compensation claim because the discharge violates the employee's right to maintain a claim for compensation.

The courts have not limited wrongful discharge actions to violations of express statutory policies. In Monge v. Beebe Rubber Co., the New Hampshire court recognized a tort of abusive discharge when a female employee claimed she was discharged for failure to provide sexual favors to her foreman. The absence of an express prohibition did not inhibit the court from finding that the employer had acted against the public policy of the state. Courts have also supported the claims of "whistleblowers," employees who assert that the company is engaging in some form of fraudulent activity.

In a decision that could have a great impact on the rights of employees subject to random drug tests, the Court of Appeals in Novosel v. Nationwide Insurance Company found that an employer had wrongfully discharged an employee who had asserted his First Amendment right to freedom of political expression. Novosel, an employee of Nationwide Insurance Company for fifteen years, had a faultless work record prior to his termination.

In October 1981, the employer was encouraging employees to lobby for the "No-Fault Reform Act," then before the Pennsylvania House of Representatives. Novosel alleged that he was discharged for failing to lobby for the act and for his "opposition to the company's political stand." The court found that "taking into consideration the importance of the political and associational freedoms of the federal and state Constitutions . . . a cognizable expression of public policy may be derived in this case from either the First Amendment of the United States Constitution or Article I, Section 7 of the Pennsylvania Constitution." The court endorsed the employee's First Amendment argument, even though it was being used within the employment at will context, saying that "the protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim." This is the first case to characterize a constitutional right as a "clearly mandated public policy," that is, one that "strikes at the heart of a citizen's social right, duties and responsibilities."

This decision also heralds the breakdown of the public/private distinction. The effort to distinguish different arenas as either public or private arose during the sixteenth and seventeenth centuries. With the development of the nation-state "ideas of a distinctly public realm began to crystallize." The response to the growth of this realm was a "contervailing effort to stake out distinctively private spheres free from the encroaching power of the state." In the nineteenth century the public/private dichotomy grew to be increasingly important as the market became the focus of social and economic life and the participants sought to insulate its activities from government intervention. The separation of legal doctrine into public and private law freed the market from the strictures of government control.

Today government power reaches everywhere. There is not now, if there ever was, a distinctly private realm. The government plays an increasingly larger role in supplying wealth to a significant segment of the population. This "largess," said Charles Reich in *The New Property*, is affecting "the underpinnings of individualism and independence. . . . It is helping to create a new society." The expanding influence of the government is seen not only in the distribution of "welfare state" benefits such as unemployment insurance and social security, but in the other intrusions government has made into the private realm. Government is a major employer, a major consumer of goods, a distributor of subsidies to private business, and the owner and operator of public property. In addition, through its power to license, it controls who can become a doctor, open a restaurant, or drive a car. Conversely, "private" individuals and corporations perform some of the functions of government in providing various goods and services. "The result of all this," said Reich, "is a breaking down of distinctions between public and private and a resultant blurring or fusing of public and private."

Other commentators have echoed Reich's ideas and expanded on them. The rise of "corporativism," the growth of large, powerful organizations "whose internal procedures and external contracts constitute a species of law making," has changed the texture of the private realm, according to one writer. These entities wield considerable power, often dictating the conduct of the government while affecting entire communities and thousands of lives. Yet, though clearly significant actors in the public arena, these corporations are still nominally "private" and are treated as such by the courts.

The public/private distinction is maintained in Fourth Amendment analysis even though the "right of people to be secure . . . against unreasonable searches and seizures" is not limited, by the terms of the Fourth Amendment, to those searches and seizures performed by the government. However, the Supreme Court, in *Burdeau v. McDowell*, looked at the origin and history of the fourth amendment and held that it does not apply to searches and seizures performed by private parties that do not involve state action. Classifying a party or action as private is not an easy task. As Judge Friendly has said, "If we now know more about the location of the border between public and private action, this is rather because the court has picked out more reference points than because it has elaborated any satisfying theory."

While courts must look for state action beyond the
labels applied to a party, either "public" or "private," to prevent government circumvention of Fourth Amendment protections, a search by a private entity that cannot be said to constitute "state action" is not subject to constitutional standards. However, the state action doctrine is as vague as the public/private distinction and the courts are not always consistent in their use of the doctrine. In Novosel, for example, the court said, "although Novosel is not a government employee, the public/private cases do not confine themselves to the narrow question of state action. Rather the cases suggest that an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities."122

The public/private distinction seems even less defensible in the labor law context. Besides the enormous power exercised by employers today, government regulation of the employment relationship — including minimum wage laws, the forty-hour work week, race and sex discrimination provisions — and judicial modification of employment at will leave no doubt that the "private contract of employment is no longer deemed entirely private."123

The public interest is also implicated in the employer/employee relationship, as the court in Monge clearly recognized. "In all employment contracts," the court stated, "whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment and the public's interest in maintaining a proper balance between the two."124 The public, it would seem, would have an equally significant interest in protecting employee privacy interests in the employment relationship. The language of the court in Novosel, therefore, persuasively argues for a public policy exception protecting at-will employees from employer activities that are recognized as clear violations of the Fourth Amendment when performed by government agencies against government employees.125

Another avenue an employee may explore is the attempt to invoke the privacy tort formulation, articulated by Prosser, to support his action against employer activity that is considered invasive. "Unreasonable intrusion upon the seclusion of another" is the action that most closely approximates the analysis the Court uses when considering testing of government employees. The respect for the seclusion of the employee when providing a sample for testing has already been the focus of concern for the courts in the governmental context, as has the intrusiveness of the collection procedure. Whether the intrusion was reasonable, in the context of private employment, could be discerned by the court in much the same way it now balances the competing considerations of the public employer and employee. When it weighs the evidence, or lack of same, implicating the employee in drug use, the court considers the effect on public safety and describes the employee's expectations of privacy. By adhering to this familiar method, the court would effectively be abiding by the terms of the search and seizure analysis as it is applied in the public sector.

Employees bringing wrongful discharge actions have occasionally succeeded in asserting an "implied covenant of good faith and fair dealing,"126 said to be implied in all contracts including employment contracts. The cases in which plaintiffs prevailed on this ground were distinguished as extreme cases of employer misconduct127 and "as yet there is no discernable trend toward adoption of a general requirement of good faith and fair dealing as a limitation on an employer's power to terminate employment at will."128 However, a powerful case can be made for a requirement of good faith and fair dealing when the issue is drug testing. The strong possibility that an employee would be wrongly accused of drug use, combined with the stigma that would attach to that individual, the criminal aspect of the accusation and the emotional distress that would result could be considered severe enough employer misconduct for an employee to assert that the employer has an obligation to act in good faith before discharging an employee for drug use.

Legislation, whether it be the use of current legislation or the promise of proposed legislation, may offer another avenue of protection for the employee required to undergo testing. The Rehabilitation Act of 1973129 prohibits employment discrimination against handicapped individuals. Regulations promulgated pursuant to the Act included alcoholics and drug addicts in the definition of a "handicapped individual."130 However, a 1978 amendment to the Act131 made clear that this protection did not extend to "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 reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."132 Forty-five states and the District of Columbia also have laws prohibiting discrimination against handicapped employees in the private sector.133

Whether the courts would allow an employee who tested positive for drugs to argue that he or she is an addict and therefore is protected by the Act is unclear. In Beazer v. New York Transit Authority134 the Supreme Court held that the Transit Authority had a legitimate concern for the safety of others, one of the affirmative defenses provided under the 1978 Act, with respect to addicts who were still undergoing treatment. However, employees whose jobs do not implicate the safety of other individuals have been found to have valid claims under the Act.135

The specter of mandatory drug testing in the private sector has already begun to generate a legislative response. However, if the history of Congressional attempts to regulate lie detector tests is any indication, federal regulation of private-sector drug testing will not be achieved easily. The use of polygraph tests in the employment context "now dwarfs the number of tests conducted for law-
enforcement purposes." Polygraphs, like drug tests, are generally considered to be an invasion of an employee's right to privacy. Employers nevertheless make extensive use of the polygraph to detect employee deception, especially employee theft. This use continues despite the serious questions that have been raised about the accuracy and reliability of polygraph evidence. Questions about the value of polygraph testing have led a majority of jurisdictions to hold that polygraph results are inadmissible in a criminal proceeding notwithstanding the stipulation of the parties. Arbitrators have also generally refused to admit polygraph results into evidence. "After over 85 years of use, lie detectors have not been scientifically established as providing reliable information on a person's trustworthiness or innocence." Nevertheless, Congress has consistently failed to pass legislation that would regulate the use of polygraphs in employment, despite repeated attempts to do so. Employees will, however, find some protection at the state level.

VIII. Conclusion

Drug abuse is a severe problem in American society. Traffic in illicit drugs is a multi-billion dollar industry that destroys lives and damages businesses and property. However, beyond the fact that testing for drugs is no panacea for the drug problem, it violates some of our most deeply held principles—the right to privacy, the belief that the innocent shall not be condemned with the guilty, the appeal to act in good faith. The courts have found random drug testing to be an egregious abuse of employer power and have had no trouble declaring random testing to be unconstitutional when performed by government employers. The Ninth Circuit has found that the Fourth Amendment privacy analysis applies as well to workers covered by collective bargaining agreements. The circumstance of employment in the private sector, rather than in the public sector, does not significantly change the experience of being an employee or the level of intrusiveness of the testing procedure. The courts have compiled a body of precedent that qualifies employment at will, including the public policy exception, the implied contractual requirement of good faith and fair dealing, and the recognition of the harshness of employer power articulated in Novosel. These principles impose on employers a limited duty to terminate only when there is just cause. They also present a solid basis on which the court can build an analysis that holds private employers to standards, recognized in the constitutional analysis, of reasonable suspicion for drug testing. Judicial determinations along these lines would comport with the general treatment by the courts of drug testing in other employment arenas.

NOTES

1. The employment relationship has it roots in the master/slave status relationship in which the slave was considered the property of the master. See J. Atkeson, Values and Assumptions in American Labor Law (1983).
3. "The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces..." Id. at 32889.
5. Id. at 407. An extreme example of employer liability is Otis Engineering Corp. v. Clark, 688 S.W.2d 307 (Tex. 1983), in which the court held that an employer who sent an intoxicated employee home was arguably negligent for failure to detain the employee. The employee was involved in an accident on the way home which killed him and several passengers in the other car. The court asserted the right of the families of the victims to sue the company for wrongful death claiming that "changing social standards and increasing complexities of human relationships in today's society justify imposing a duty upon an employer to act reasonably when he exercises control over his servants." Id. at 310.
6. Lehr & Middlebrooks, supra note 4, at 408.
9. For a general description of the chemical process of the EMIT, gas chromatography, and mass spectrometry tests in detecting marijuana metabolites, see Bible, supra note 8, at 311-14.
10. Id.
11. Jones v. McKenzie, 628 F. Supp. 1500, 1503 (D.D.C. 1986), rev'd and vacated in part, 833 F.2d 335 (D.C.Cir. 1987). The district court granted plaintiff's motion for summary judgment, holding the employer liable for the failure to perform a follow-up test using an alternate method. The court concluded that the employee termination was arbitrary and capricious and "so clearly violated District of Columbia law." 628 F. Supp. at 1506. The Court of Appeals reaffirmed that "the school system could not constitutionally test its employees for drugs in the manner Jones was tested," 833 F.2d at 339 (emphasis in original), but recognized that when there is a compelling safety interest the employer could test using another method.
13. Bible, supra note 8, at 313.
17. Id. The Taylor court said: "I find that there is no substantial relationship between a positive urine test and an impairment at the time of testing."
19. Gavison, supra note 7, at 444.
20. See A. Westin, Privacy and Freedom (1967); Gavison, supra note 7; Gerety, Redefining Privacy, 12 Harv. C.R.-C.L. L. Rev. 233 (1977); Note, supra note 18; Prosser, Privacy, 48 Calif. L. Rev. 383 (1960).


23. Id. at 195.

24. Id. at 196.

25. Id. at 205.

26. They recognized that not all private facts can or should be protected. Matters of public or general interest are not insulated by the right to privacy doctrine: "To whatever degree and in whatever connection a man's life has ceased to be private . . . to that extent the protection is withdrawn." Id. at 215.


28. Id. at 292.

29. Prosser, supra note 20, at 387. These four categories of right to privacy torts (including Warren and Brandeis's private-facts tort) were later incorporated into Restatement (Second) of Torts at §§ 652 A-E (1977).

30. Note, Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy, 13 J. Legis. 269, 281-82 (1986). Some states do not recognize any of the forms of the right to privacy. There is no common law right to privacy in New York, for example. See Freihoffer v. Hearst Corp., 65 N.Y.2d 135, 480 N.E.2d 349, 490 N.Y.S.2d 735 (1985). The only statutory provisions for the right to privacy are in sections 50 and 51 of the Civil Rights Law of New York which protects an individual from the improper appropriation of his or her "name, portrait or picture." In Freihoffer the Court of Appeals interpreted this statute to protect individuals against unauthorized commercial use only. 65 N.Y.2d at 140.

The Second Circuit discussed the right to privacy in New York in a recent drug testing case. The plaintiff in Mack v. United States, 814 F.2d 120 (2d Cir. 1987), was a special agent of the FBI. He was subjected to urinalysis and subsequently discharged for alleged use of cocaine. The court rejected the plaintiff's cause of action for invasion of privacy following Freihoffer's assertion that New York does not recognize a common law tort of invasion of privacy.

31. 381 U.S. 479 (1965).

32. The relationship between the common law right to privacy and the constitutional right is not clearly understood. Few commentators have attempted to analyze this relationship. See Gerety, supra note 20, at 233, 233 n.3.


34. Id. at 1896.


37. Geraghty, Pro Se, 15 Student Lawyer 7, 7 (1986).

38. The contours of the Fourth Amendment, as an aspect of constitutional law, are inherently subject to judicial definition. See Cooper v. Aaron, 358 U.S. 1, 18 (1958); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).


40. Id. at 353.

41. Id. at 361 (Harlan, J., concurring).
through less intrusive means).


65. Id.

66. McDonell, 612 F. Supp. at 1120. The court applied a Fourth Amendment analysis in McDonell for all the employee plaintiffs including those who refused to undergo urinalysis. However, at least one court declined to undertake an analysis of Fourth Amendment rights when the plaintiff had refused to submit to urinalysis, arguing that he had not been searched. "The court agrees that there can be no fourth amendment violation when there has been no actual search." Everett v. Nap.

67. 109 U.S. 3 (1883).

68. Id. at 17.

69. 256 U.S. 465 (1921).

70. Id. at 475.


73. 620 F. Supp. at 174.

74. 45 U.S.C. §§ 151 et seq.

75. 620 F. Supp. at 175.

76. Id.


78. Brotherhood of Locomotive Engineers, slip op., No. 85-4137 (9th Cir. Feb. 11, 1988).

79. Id.

80. Id.

81. Id.

82. Id.

83. Id.

84. Id.


87. Id. at 430.


89. Id. at 195.

90. Strachan v. Union Oil Co., 769 F.2d 703, 704 (5th Cir. 1985).

91. Geidt, supra note 88, at 195.


93. Id. at 1085.

94. It has been said that the employment at will relationship is not bound by contract and this is what accounts for the ability to leave at will. However, at least one commentator has said that this is an incorrect view of the employment at will relationship. William H. Winship, Employment at Will: The Employment at Will Doctrine, 132 U. Pa. L. Rev. 1082, 1083-85 (1984).

95. Id. at 1085.

96. It has been said that the employment at will relationship is not bound by contract and this is what accounts for the ability to leave at will. However, at least one commentator has said that this is an incorrect view of the employment at will relationship. "In reality, every employment relationship is a contractual relationship. The distinguishing feature of at-will employment is simply the limited nature of the contract. The history of at-will employment reveals an almost complete absence of recogni-

In Sola v. Lafayette College, 804 F.2d 40 (1986), the Third Circuit cited Novosel for the proposition that "courts that have recognized wrongful discharge claims have involved infringements on statutory and constitutional rights." Id. at 42 (emphasis added). The lower courts have not recognized a cause of action arising from the Constitution for private sector employment. In Krushinski v. Roadway Express Inc., 627 F. Supp 994 (M.D. Pa. 1985), the court said that Novosel did not hold that a cause of action arises directly from the Pennsylvania Constitution. Nor has the constitutional right to freedom of association been held to create a cause of action for wrongful discharge. Ferguson v. Freedom Forge Corp., 604 F. Supp. 1157 (W.D. Pa. 1985). Freedom of association did "not rise to the same public policy level as the interest of the employee in Novosel to be free to express his political views." Id. at 1160.

126. 1982 (ABA) Labor and Employment Law Committee Reports 18.


129. The Act applies not only to employees of the federal government but also to private sector employees whose employers are government contractors or recipients of federal financial assistance.

130. See 45 C.F.R., pt. 84, app. A, at 404 (1978) (regulations of Department of Health, Education, and Welfare); 29 C.F.R. § 32.3(b)(iii) (1984) (regulations of the Department of Labor): "[T]he term 'physical or mental impairment' includes but is not limited to such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism."


134. Rothstein, supra note 12, at 432.


137. See Roberts, supra note 95.


139. It is generally conceded that polygraphs have an error rate between 10 and 25 percent. See Twoomey, Compelled Lie Detector Tests and Public Employees: What Happened to the Fifth Amendment?, 21 S. Tex. L.J. 375, 376 (1980).

140. Id.