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To Test or Not To Test: Is That the Question?
Urinalysis Substance Screening of At Will Employees

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NOTE

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URINALYSIS SUBSTANCE SCREENING OF
AT WILL EMPLOYEES

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CONCLUSION

Mandatory drug testing programs have a lot more to do with defending anti-drug cultural norms by espousing homilies than with serious analysis of employee productivity. The question is whether there is a substantial fit or match between the perceived problem and the proposed solution. 1

The question... is not whether drug use, off-duty or on-duty is incompatible with... employment. Rather, the question is by what means is it permissible to come by evidence of such drug use.  

The use of intoxicants 3 is a practice at least as old as civilization. 4 The people of the United States have a long history of intoxicant use. 5 Efforts to control the distribution of intoxicants within the United States predate the Constitution. 6 Most efforts to control intoxicants in the United States have focused on controlling the supply of particular intoxicants. 7 Despite these efforts, the use of illegal

3. The terms "intoxicant" and "substance" will be used interchangeably throughout this Note. They will be used to indicate all types of chemicals, legal and illegal, that could be labeled drugs. These terms will include over-the-counter drugs such as aspirin and alcohol, as well as illegal drugs such as cocaine and heroine. In short, the terms will encompass any chemical that may, in some manner, affect an individual's psychological, emotional, intellectual, or physical functioning.
5. See W. RORABAUGH THE ALCOHOLIC REPUBLIC 5-20 (1979). Rorabaugh describes the drinking habits of Americans in the period between 1750 and 1850. The attitude of the period is best reflected in the words of one New Englander:

There's scarce a Tradesman in the Land,
That when from Work is come,
But takes a touch, (sometimes too much)
of Brandy or of Rum.

6. See RORABAUGH, supra note 5, at 67-68. These efforts included an excise tax on rum and molasses. To mollify rum distillers, a tax was also assessed on whiskey. Id.

The Commission on Organized Crime suggested that efforts needed to be made...
substances has increased in the last twenty-five years.8

In March, 1986, the President's Commission on Organized Crime suggested a new tactic: controlling the demand for drugs.9 A cornerstone of this demand-side control was the Commission's recommendation that employers randomly test employees for the use of illegal substances.10 After announcing a campaign against drugs, President Reagan signed an executive order designed to facilitate the institution of mandatory urinalysis substance screening of all federal to reduce the demand for drugs. Id. at 431-37, 482-86. The use of urinalysis screening reflects a new approach in the efforts to control illegal drugs: demand-side controls. As a part of the effort to reduce the demand for drugs, the commission recommended that:

[T]he President should direct the heads of all Federal agencies to formulate immediately clear policy statements, with implementing guidelines, including suitable drug testing programs, expressing the utter unacceptability of drug abuse by Federal employees. State and local governments and leaders in the private sector should support unequivocally a similar policy that any and all use of drugs is unacceptable. Government contracts should not be awarded to companies that fail to implement drug programs, including suitable drug testing. No Federal, State, or local government funds should go directly or indirectly to programs that counsel "responsible" drug use or condone illicit drug use in any way. Laws in certain States which "decriminalized" the possession of marijuana constitute a form of such condonation, and should be reconsidered.

Id. at 483.

As part of the effort to reduce the demand for illegal drugs, President Reagan signed an executive order instituting mandatory testing of federal employees. Minneapolis Star and Tribune, Sept. 16, 1986, at 1, col. 1. Reagan said that the federal workplace should be "a model" for the campaign against drugs. Id.

8. Susser, Legal Issues Raised by Drugs in the Workplace, 36 LAB. L.J. 42, 42 (1985). See Lead Report, Drug Screening by Sports Employers Reflects Emerging Pattern of Testing, 4 EMPLOYEE REL. L. WEEKLY (BNA) 387, 387 (March 31, 1986). While this is attributable to a wide range of factors, it is also true that there are simply more illegal drugs today than 1776. See supra note 7 and accompanying text. See also Wisotsky, Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition, 1983 WIS. L. REV. 1305, 1310-14 (discussing the hysteria that led to legislation criminalizing the non-medical possession of cocaine). See generally Bonnie & Whitebread, The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition, 56 VA. L. REV. 971 (1970) (historical reasons for the criminalization of marijuana); Cahannes, supra note 4, at 501-02 (intoxicants are now available virtually anywhere, at virtually any time).

In 1962, about four percent of the population had used illegal substances. Note, Jar Wars: Drug Testing in the Workplace, 23 WILLAMETTE L. REV. 529, 529-30 (1987). A 1982 National Institute on Drug Abuse study estimated that in the month before the survey, 100.2 million Americans consumed alcohol; 20 million, marijuana; 4.2 million, cocaine; 2.8 million, non-medical stimulants; 1.6 million, non-medical sedatives; 1.1 million, non-medical tranquilizers; and 1 million, hallucinogens. Alcohol & Drugs in the Workplace: Costs, Controls, & Controversies, SPECIAL REPORT (BNA) at 11 (1986) [hereinafter Alcohol & Drugs].

9. America's Habit, supra note 5, at 431-33, 463, 482-86.

10. Id. at 483, 485. The purpose of the proposal was to reduce the financial resources of organized crime. Id. at 5-13.
employees.11

Nationwide, employers are subjecting employees to urinalysis substance screening with increasing frequency.12 The testing of employees and prospective employees is not a new practice,13 but the addition of urinalysis substance screening to the battery of tests given is both recent14 and controversial.15 This controversy has re-


12. Lead Report, supra note 8, at 387; Gampel & Zeese, Are Employers Overdosing on Drug Testing?, BUS. & SOC'Y REV., Fall 1985, at 34. Nearly 25% of the Fortune 500 companies screen employees for drug use. Companies using screening programs include Burlington Northern, I.B.M., Boise Cascade, American Airlines, General Motors, Storer Communications, and the New York Times. See also Hartsfield, Medical Examinations as a Method of Investigating Employee Wrongdoing, 36 DEF. L.J. 251, 251 (1987). Minnesota employers using screening programs include: the Minneapolis Star & Tribune, see Rubenstein, Worker Drug Screening to Get Legal Test, MINN. L.J. Mar. 27, 1987, at 1, col. 1; Domino's Pizza, see Twin Cities Reader, July 1-7, 1987, at 12, col. 1; and Stone Container, id. at 13, col. 1. Screening has also given rise to a new black market—"clean" or "drug-free" urine. Id. at p. 13, col. 2-3. Prospective testees can get black market urine in any form they want: powdered, frozen, or "the real thing." Id.

Employers are utilizing screening in two contexts: random screening, and "for cause," or "incident-driven" screening. The second is not particularly controversial. No one is arguing that employees have a right to be intoxicated on the job. The first, however, is highly controversial. In random screening, either all employees, or employees chosen at random are subjected to screening. Throughout this Note, the word "screen" indicates a test that is used to determine substance use by an individual employee.

13. Note, Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy, 13 J. LEGIS. 269, 269 (1986). Testing methods include polygraphs, see infra notes 181-82 and accompanying text, intelligence tests, personality profiles, and physical exams. Although each test has a specific purpose, generally the tests are used to increase the efficiency of present employees or to weed out potentially bad employees.


sulted in a flurry of legislation\(^\text{16}\) and litigation.\(^\text{17}\) This activity has

Legal Collision Between the Rights of Employers and Workers, Nat'l L.J. April 7, 1986, at 1, col. 1 (drug testing does not address real issues).

While commentators have taken different positions on the advisability of screening programs, virtually all commentators have discussed the privacy aspects of such programs. Commentators have also frequently discussed the accuracy of screening programs. See infra notes 66-85 and accompanying text.

16. A majority of the bills and proposals that have been considered by state legislatures limit the action an employer may take as a result of drug testing. In addition, employees are granted certain rights through the regulation of the manner and circumstances of testing and confidentiality requirements. EQUAL OPPORTUNITY ADVISORY COUNCIL, MEMO. No. 87-82 (June 11, 1987) (on file at William Mitchell Law Review office). The City of San Francisco's ordinance, enacted in 1985, was the first drug testing law. Drug testing laws have subsequently been enacted in Connecticut, Iowa, Minnesota, Montana, Rhode Island, Utah, and Vermont. Id. at 2-5.

Over thirty state legislatures are considering or have considered proposed laws aimed at placing limits on testing employees for substance abuse. Id. at 1. Jurisdictions that have not yet adopted substance screening laws, but are actively considering them, include California, Colorado, New Jersey, New York, and Oregon. Id. at 5-10; see also McGovern, Employee Drug Testing Legislation: Redrawing the Battlegrounds in the War on Drugs, 39 STAN. L. REV. 1453 app. B (1987) (comparing 1987 drug testing legislation); Comment, Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool for Helping Resolve the Nation's Drug Problem if Competing Interests of Employer and Employee Are Equitably Balanced, 25 DUQ. L. REV. 597, 932-55 nn. 2015-084 (1987) (discussing recently enacted drug testing statutes).


Statutory drug testing provisions limit testing in three ways: who and when an employer can test; how the testing may be done and by whom; and employee privacy protections. With the exception of Utah, all recently enacted statutes prohibit random testing or limit it to situations where an employee's job is a safety sensitive position. 1987 Conn. Legis. Serv. § 7; 1987 Iowa Legis. Serv. § 730.5(1); MONT. CODE ANN. § 39-2-304(1)(b); MINN. STAT. § 181.951 subd. 4; R.I. GEN. LAWS § 28-6.5-1; VT. STAT. ANN. § 513(b). Most statutes limit drug testing of employees to a “for cause” situation. See 1987 Conn. Legis. Serv. § 6; 1987 Iowa Legis. Serv. § 730.5(1)(a); MINN. STAT. § 181.951 subd. 5; MONT. CODE ANN. § 39-2-304(1)(c); R.I. GEN. LAWS § 28-6.5-1(A); VT. STAT. ANN. § 513(c)(1). Minnesota also allows testing during routine physical exams, but not more than once a year. MINN. STAT. § 181.951 subd. 3. Most states allow drug testing of prospective employees with sufficient notice. See 1987 Conn. Legis. Serv. § 3; 1987 Iowa Legis. Serv. § 1(7)(a); MINN. STAT. § 181.953 subd. 6; MONT. CODE ANN. § 39-2-304(1)(b) (allowing preemployment testing for safety-sensitive positions); VT. STAT. ANN. § 512(b)(2). Utah permits drug testing of nearly any employee at any time. UTAH CODE ANN. § 34-38-3.

Some statutes provide that testing can be carried out only by an independent laboratory, see Iowa Legis. Serv. § 730.5(1)(c); MINN. STAT. § 181.953; VT. STAT. ANN. § 514(4), while others appear to allow employers to test their own employees, see Conn. Legis. Serv. § 2; MONT. CODE ANN. § 39-2-304(2)(e); R.I. GEN. LAWS § 28-6.5-1(D); UTAH CODE ANN. § 34-38-6(4). All statutes except Montana make at least some mention of standards to be met by the entity conducting the tests. See 1987
been prompted by the fact that there are differing legal standards applicable to different classes of employers.\textsuperscript{18}

Generally, an employer's freedom to institute a screening program is determined by its status.\textsuperscript{19} The status of an employer can be broadly defined by the category of the employment: 1) public sector employment;\textsuperscript{20} 2) private sector unionized employment;\textsuperscript{21} and, 3) private sector non-unionized (at will) employment.\textsuperscript{22} At least

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\item Conn. Legis. Serv. § 2; 1987 Iowa Legis. Serv. § 730.5(3)(f); MINN. STAT. § 181.953; UTAH CODE ANN. 34-38-6(5); VT. STAT. ANN. § 514(4), (6)(a). All statutes require confirmation tests. See 1987 Conn. Legis. Serv. § 2; 1987 Iowa Legis. Serv. § 730.5(1)3(d); MINN. STAT. §§ 181.950 subd. 9, 181.953 subd. 3; MONT. CODE ANN. § 39-2-304(3); R.I. GEN. LAWS § 28-6.5-1(E); UTAH CODE ANN. § 34-38-6, subd. 5; VT. STAT. ANN. §§ 514(6)(A), (B), 515. Most employ chain of custody requirements for body tissue or fluid handling. See MINN. STAT. § 181.953 subd. 5; MONT. CODE ANN. § 39-2-304(2)(d); UTAH CODE ANN. § 34-38-6(4); VT. STAT. ANN. § 514(5).
\item Some of the statutes require that employers make available to employees a written drug testing policy. See MINN. STAT. §§ 181.951(b), 181.952; UTAH STAT. ANN. § 34-38-7; VT. STAT. ANN. § 514(2). All statutes except Rhode Island's provide for confidentiality of test results. See 1987 Conn. Legis. Serv. §§ 3, 5; 1987 Iowa Legis. Serv. § 730.5(8); MINN. STAT. § 181.954; MONT. CODE ANN. § 39-2-304(2)(f); UTAH CODE ANN. § 34-38-11; VT. STAT. ANN. § 516. Most statutes grant or limit the actions that employers may take as the result of drug tests. See 1987 Iowa Legis. Serv. § 730.5(3)(f); MINN. STAT. § 181.953 subd. 10; MONT. CODE ANN. § 39-2-304(4); UTAH CODE ANN. § 34-38-8; VT. CODE ANN. § 513(c)(3). Finally, most statutes limit what body component samples may be tested. See 1987 Iowa Legis. Serv. § 730.5(1)1; MINN. STAT. § 181.950 subd. 5; UTAH CODE ANN. § 34-38-2(6); VT. CODE ANN. § 514(3).
\item See cases cited infra note 107.
\item See A. KNAPP & B. ERVIN, DRUG TESTING IN THE WORKPLACE, Minnesota Senate Report, 6-8 (Jan., 1987). See also infra notes 19-22, 106-30 and accompanying text.
\item Weinberger, 651 F. Supp. at 736-37.
\item The term "public sector employer" is used broadly in this Note. For the purposes of this Note, a public sector employer is one whose actions are held to constitutional standards. Constitutional protections will not usually arise unless there is state action. There will always be state action when the government is the employer. A private employer may be held to constitutional standards if there is a sufficient connection to the government. Note, supra note 8, at 554-55. See also Comment, supra note 16, at 651-89 (discussing state action in drug screening situations). See generally Ayers, Constitutional Issues Implicated By Public Employee Drug Testing, 14 WM. MITCHELL L. REV. 337 (1988). For the purposes of this Note, a private sector employer is any employer who is not a public sector employer.
\item For the purposes of this Note, a unionized employer is any private sector employer who has signed a collective bargaining agreement. See generally Schmedemann, Unions and Urinalysis, 14 WM. MITCHELL L. REV. 277 (1988). Many public sector employers have signed collective bargaining agreements. In fact, public sector unions have led the court battles against urinalysis screening. See infra notes 111-17 and accompanying text. The distinction is important. Public sector employers are bound by constitutional standards, while private sector employers generally are not. See id.
\item The term "at will employer" will refer to the non-public sector employer whose employees have signed neither a collective bargaining agreement nor a per-
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sixty-seven percent, and probably nearer to eighty percent, of American workers are at will employees.23 In spite of that fact, much of the scholarly analysis and virtually all of the case law concerns urinalysis substance screening of public sector employees. There is a dearth of literature and case law concerning urinalysis screening of at will employees. This Note will attempt to fill that information gap by focusing on urinalysis substance screening of the at will employee.

Part I of the Note examines the reasons given by employers for instituting screening programs. Part II analyzes the goals employers attempt to reach by instituting screening in light of screen accuracy and the inherent limitations of screening programs. Part III briefly explores the standards for the implementation of screening programs developed by the judiciary for the public and private sectors. Part IV examines the potential liabilities of at will employers who institute screening programs. Part V analyzes the Minnesota legislation regulating screening programs. Part VI suggests guidelines for instituting screening programs in the at will sector. The Note concludes with recommendations for refinement of the Minnesota legislation regulating screening programs.

I. Employer’s Reasons for Screening

Employers generally point to four factors as justification for substance screening. First, employers contend that substance use has a direct economic impact on business, largely attributable to lost productivity. Second, employers fear liability may attach because of traditional employer responsibility for the acts of employees. Third, employers fear losses attributable to employee theft and disclosure of business secrets. Finally, employers assert that conduct by em-

23. See Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1410 n.32, 33 (1967). Professor Blades’ figures were based on evidence gathered during the early 1960’s. The decline in union membership indicates that the actual percentage of the American workforce who are at will employees is closer to 80%. See also Kovach, Organized Labor’s Deteriorating Condition, 36 LAB. L.J. 850, 850 (1985) (1985 union membership was 18.8% of the workforce); Tomlinson, Future Labor Law Trends: A Look at the Second Half of the 1980’s, 36 LAB. L.J. 300, 300 (1985) (union membership was 18.8% of the workforce in 1984). The figures only disclose the union/non-union member status of the workforce and do not take into account the number of employees who have signed employment contracts. See supra note 21.
ployees during off-work hours impacts their on-the-job fitness.24 The theme underlying these factors is an employer’s desire to run a business more profitably by eliminating, or reducing, costs associated with labor.

A. Direct Economic Impact of Substance Use

There is no question that substance use has some economic impact on employers.25 The debate about the extent of that impact calls into question the reasonableness of screening to enhance profits.26 The “economic impact” rationale is most frequently used to encompass four specific employer concerns about on-the-job substance use.

24. See Lehr & Middlebrooks, Work-Place Privacy Issues and Employer Screening Policies, 11 Employee Rel. L.J. 407, 407-08 (1985). The heart of these rationales is their relationship to business’ profitability. The incongruity of implementing screening for illicit substances distresses some critics, in view of the historic tolerance of alcohol in the workplace. Compare Rorabaugh, supra note 5, at 19 (describing the “elevens,” a liquor break equivalent to a coffee break) with Alcohol & Drugs, supra note 8, at 8 (citing research setting the cost of alcohol abuse to business at twice the level of the cost of illegal drugs). One of the complaints of screening opponents is that screening seems to be aimed only at those who use illegal drugs. They ask why an employee impaired by illegal substances should be penalized more harshly than an employee impaired by legal substances. The point is that they are both impaired.

25. Geidt, supra note 14, at 181-82 (referring to studies that show that alcohol and drug abuse cost businesses tens of billions of dollars each year). See Alcohol & Drugs, supra note 8, at 8-9 (citing Research Triangle Institute figures that estimated the cost of alcohol and drug abuse at $99 billion in productivity losses, $8.1 billion in health service charges and another $81 billion in alcohol and drug related accidents in 1983-84).

26. Alcohol & Drugs, supra note 8, at 9. One of the difficulties in deciding what the costs attributable to substance abuse to business is determining what exactly is meant by “lost productivity.” At least one industry specialist is skeptical: “Most of the figures that I see . . . are often produced by . . . people whose jobs depend on [treating substance abuse]. . . . I’m not saying there isn’t a problem, I’m just saying the statistics sometimes make you wonder how they gather the information, and what their real purpose is in doing so.” Id. Most of the figures used to demonstrate the economic impact of substance abuse are extrapolations made by companies and individuals who have a financial stake in the employee assistance or drug consulting business. See, e.g., Bensinger, Drugs in the Workplace: Employers’ Rights and Responsibilities, WASH. LEGAL FOUND. (Apr. 1984). Peter Bensinger is a former head of the Drug Enforcement Administration and currently a partner in Bensinger, DuPont and Assoc., one of the leading consulting firms for private industry in the area of substance abuse in the workplace. Id. at iii-iv.

use. First, employers contend that an employee whose substance screen is positive is *per se* unproductive. Critics contend that employees should be judged on actual job performance, not on the presence or absence of certain metabolites in their urine. These critics particularly point to the inability of screens to detect current impairment.

The second concern is embodied in employer dissatisfaction with employee absenteeism attributable to substance abuse. Studies show that substance abusing employees have a significantly higher absentee rate than non-abusers. Employers also contend that employees who fail to show up for work due to substance abuse affect productivity as much as, if not more than, employees who arrive at work in an impaired condition or employees who become impaired after arrival.

Third, employers contend that by eliminating the substance abusing employee, they will realize significant savings in the form of re-

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27. See Lehr & Middlebrooks, *supra* note 24, at 407-08.
29. See Donnelly, *supra* note 28, at 213. The two dominant workplace screening procedures are both immunoassay techniques. Weisner, *Urinalysis: Defense Approaches*, 15 ADVOCATE 114, 115 (Mar.-Apr. 1983). The Radio Immunoassay (R.I.A.) involves low level radiation. The Enzyme Immunoassay (E.I.A.) does not. Because it uses radiation, the R.I.A. *must* be performed in a laboratory. Using E.I.A. techniques, the Syva Company has developed a desktop drug detection device. See DOGOLLOFF & ANGAROLA, URINE TESTING IN THE WORKPLACE 20-21 (1985). Neither of the tests measures the amount of a drug in the urine. The body breaks chemicals down into compounds called metabolites. The immunoassay tests detect the metabolites of specific drugs. Each drug has its own metabolite. The similarity of these metabolites to natural metabolites, or metabolites from non-intoxicating substances is a cause of "false positive" screens. Comment, *Admissibility of Biochemical Urinalysis Testing Results for the Purpose of Detecting Marijuana Use*, 20 WAKE FOREST L. REV. 391, 397-98 (1984). See also infra notes 66-85 and accompanying text. The Emit test is essentially an "off-on" test. Emit tests can be set to read positive at various nanograms of a substance per milliliter of urine. The test then registers a positive reaction for concentrations of the substance at or above the setting. The military sets tests to register positive at 100 ng/ml. Some employers set positive readings as low as 50 ng/ml. The setting of a test can determine, in part, the number of "false positive" results. See DOGOLLOFF & ANGAROLA, *supra* at 21-24.
30. See, e.g., Note, *supra* note 13, at 274-75; Weisner, *supra* note 29, at 118. While the effect of most drugs lasts for minutes or a few hours, they are detectable long after use. For example, marijuana metabolites are detectable in urine up to eighteen days after light use. McBAY, *supra* note 14, at 649.
31. See Ver Ploeg, *Drug Testing in the Workplace*, 43 BENCH & BAR 14, 14 (Nov. 1986). Substance users have an absenteeism rate sixteen times higher than non-using employees, use sick leave more often and are late to work more often. Note, *supra* note 8, at 534.
32. Alcohol & Drugs, *supra* note 8, at 7-9. Alcoholics use up to ten times the normal amount of sick leave. Up to 40% of industrial fatalities and 47% of industrial injuries can be linked to alcohol. Id. See also *supra* note 31.
duced health care costs. Studies have shown that employees involved in substance abuse have greater health care needs and costs than non-abusing employees.33

Finally, employers are concerned about their duty to provide a safe working environment. Workers' compensation costs are a significant part of an employer's cost of doing business.34 Moreover, when an accident is precipitated by an employee impaired because of substance use, an employer may be subjected to liability in addition to worker's compensation.35

B. Employer Responsibility for Acts of Employees

The concept that employers are liable for the acts of employees acting within the scope of their employment is well established law.36 Employers have a duty to investigate the backgrounds of employees whose actions impact on the safety of others.37 Employer liability may arise in situations where an employee's actions immediately cause injury to a third party, or when the injury is realized at a later time.38

Immediate liability arises when an employee, under the influence of an intoxicant, causes a physical injury.39 A typical example of immediate liability is the intoxicated employee who causes a traffic accident. Of particular concern are individuals engaged in employment where a minor mistake in judgment could cause major injuries.40

33. Lehr & Middlebrooks, supra note 24, at 407.
35. Bensinger, supra note 26, at 2, 7-8.
36. See, e.g., Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11 (Minn. 1979) (employer held liable for fire caused by an inebriated employee's negligent smoking). Gatzke was discussed in Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306, 310 (Minn. 1982). Marston refined the concept that an employee need only be partially furthering an employer's interests for the employer to be liable for the employee's actions. Id. at 311.
37. See Ponticas v. K.M.S. Investments, 331 N.W.2d 907, 911 (Minn. 1983). The scope of the investigation required is proportional to the risk of injury to third parties and the severity of risk encountered. Id. at 913. In enacting the drug testing statute, the Minnesota Legislature has removed the legal duty to screen employees for substance use. Drug & Alcohol Testing in the Workplace, 1987 Minn. Laws Ch. 388, § 2, subd. 7 (codified at MINN. STAT. § 181.951 subd. 7 (1987)). In many situations the law prohibits testing. See infra notes 240-311 and accompanying text (discussing requirements for screening that employers must comply with). Obviously, if an employer is prohibited by law from making a particular type of investigation, it is reasonable not to do so.
38. See Bensinger, supra note 26, at 2.
39. See Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983) (employer liable for accident caused by intoxicated employee sent home from work).
40. The concern is that employees who are intoxicated when making crucial decisions will be unable to make them, will make them too slowly or will make the wrong decision. See Bensinger, supra note 26, at 2-3.
Employment categories frequently mentioned are surgeons, airline pilots, and nuclear power plant workers.41

Attenuated liability arises when an intoxicated employee’s actions create a situation that will cause injury at a later time.42 An intoxicated employee might be responsible for a product defect that causes an injury to the consumer.43 More typically, an intoxicated employee will cause injury of an economic nature, such as a mathematical error, causing a company to lose money.44

C. Disclosure of Business Secrets and Employee Theft

Employers believe screening will reduce losses attributable to employee theft and the disclosure of business secrets. Costs to businesses from employee thefts are significant.45 Employers have a legitimate interest in curtailing costs attributable to employee theft.46 There is, however, no evidence that substance abusing employees are responsible for a disproportionate share of employee theft.47 Furthermore, it is doubtful that screening for substance use is anything more than a “quick fix” that fails to address the real

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42. See Bensinger, supra note 26, at 1 (substance abuse can affect the public through the product produced or service provided). See also Englade, Who’s Hired And Who’s Fired, STUDENT LAW., Apr. 1986, at 20, 22 (discussing bookkeeping errors bringing company to edge of bankruptcy).
43. See Bensinger, supra note 26, at 1.
44. Englade, supra note 42, at 22 (the list of service providers who have no impact on safety but can impact on a business’ financial health is lengthy). See D’Aquila, The Legal Perils of Alcohol and Drugs in the Workplace, HENNEPIN LAW., Jan.-Feb. 1987, at 6, 20-21 (discussing initiation of drug testing due to fears of financial losses).
45. Some businesses thrive on advising companies of ways to cut down on employee theft. Hoffer, A New Focus on Drugs, NAT. BUS., Dec. 1986, at 57, 59.
47. Studies have shown that substance-abusing employees are more likely to steal. See Ver Ploeg, supra note 31, at 14. This author has located no studies, however, comparing the dollar amounts of thefts by abusing and non-abusing employees. Interview with Professor Christine Ver Ploeg, Professor of Law at William Mitchell College of Law, Labor Arbitrator (Sept. 18, 1987) (Professor Ver Ploeg knows of no such study). Other causes of employee theft, such as gambling losses, account for large business losses. Id. See also POLYGRAPHS & EMPLOYMENT, SPECIAL REPORT (BNA) at 10 (1985) (citing a study by Clark and Associates in 1979 of 1,400 Minneapolis-St. Paul department store employees) [hereinafter POLYGRAPHS & EMPLOYMENT]. The forms of employee theft are:
causes of employee theft.\textsuperscript{48}

Disclosure of business secrets may arise for the same reasons as employee theft. In such a situation, an employee sells a business' secrets, either to a competitor or to an intermediary.\textsuperscript{49} Employers further theorize that the substance abusing employee may, while intoxicated, inadvertently reveal confidential information.\textsuperscript{50}

\textbf{D. Impact of Off-Work Behavior on Job Fitness}

One of the most controversial employer rationales for urinalysis substance screening is the notion that employees are twenty-four hour-a-day representatives of the employer.\textsuperscript{51} Employers assert that acts of employees reflect on the employer.\textsuperscript{52} Inherent in this theory is the idea that an employee can never engage in acts disapproved of by the employer.\textsuperscript{53}

In the union workplace, discharge for on-the-job misconduct is a well settled management right, while discharge for off-the-job behav-

\begin{itemize}
  \item 57\% — abuse of employee discounts
  \item 12\% — taking merchandise
  \item 9\% — claiming more hours than worked
  \item 5\% — undercharging at the register
  \item 4\% — claiming excess expenses
  \item 2\% — damaging merchandise
  \item 2\% — taking money
\end{itemize}

\textit{Id.}

48. \textit{See} Polygraphs & Employment, supra note 47, at 14 (discussing polygraphs). Better ways to protect company assets are: "good recordkeeping; attractive discounts for company products; a healthy organizational climate; loss prevention systems that protect assets without abusing employees; good management; and senior management that is honest in its dealings with both employees and customers." \textit{Id.}

49. \textit{See} Lehr & Middlebrooks, supra note 24, at 408.

50. \textit{See} id.

51. \textit{See} Dawson & Hill, Discharge for Off-Duty Misconduct in the Private and Public Sectors, ARB. J., June 1985, at 25. "A common argument presented by management [justifying discharge for employee off-duty behavior] is that the employee's off-duty conduct causes injury or harm to the company." \textit{Id.} Many commentators believe employees have a right to expect employers to respect employee privacy. \textit{See}, e.g., Barnes & White, Employee Privacy Rights "Everything You Always Wanted to Know — But Shouldn't", 64 MICH. B.J. 1104, 1110-11 (1985) (the authors argue that employees have a right to privacy in personal information that employers cannot permissibly invade). \textit{See also} Englade, supra note 42, at 24 (discussing case involving employee fired for off-duty drug use); Gambel & Zeese, \textit{supra} note 12, at 38 (most employment contracts forbid only on-the-job intoxication); Stille, \textit{supra} note 15, at 23-24 (detailing ways urinalysis intrudes on privacy); Susser, \textit{supra} note 46, at 49 (arbiter ruling that off-duty employee not required to submit to testing); VerPloeg, \textit{supra} note 31, at 20 (arbitrators increasingly distinguishing between on-job and off-job substance use); \textit{Note, supra} note 13, at 276-80 (arguing that employees have a legitimate privacy interest in information discoverable through urinalysis).

52. Dawson & Hill, \textit{supra} note 51, at 24-25.

ior is an unresolved issue. Generally, to justify a discharge for off-the-job conduct, the employer must show a nexus between the behavior and the workplace. The behavior must: 1) impact on the employee's ability or suitability for an assigned task; 2) impact on the employer's business; 3) result in the refusal of other employees to work with that employee; or, 4) adversely impact on the employer-employee relationship.

Unless at least one of these factors is present, an employer generally cannot dismiss a union employee with impunity. Even when one of these factors does exist, the employer must show a concrete relationship between the factor and an inability to continue the employment relationship.

An at will employer is currently not constrained in discharging an employee for off-duty conduct. The very nature of at will employment is that neither party needs any reason for terminating the employment relationship. Guidelines developed in other sectors of employment may find their way into the at will sector. Finally, even though the at will employer may avoid liability under a wrongful discharge theory, the employer may still bear some financial responsibility through unemployment compensation.

55. Bensinger, supra note 26, at 3.
56. Dawson & Hill, supra note 51, at 24-25.
57. Id. See also Comment, supra note 16, at 845-89 (discussing dismissals for off-work behavior and case studies of disputes between unions and employers involving the "just cause" standard for dismissal).
58. Dawson & Hill, supra note 51 at 35 (determination of discharge is dependent upon the extent to which the misconduct affects the employment relationship —mitigating factors such as good work record may offset potential discharge). But see Geidt, supra note 14, at 195-96 (usually an off-duty conviction will not result in a discharge, although some arbitrators do recognize the conduct as adversely affecting the business).
59. See supra note 22.
60. Id.
61. The employer may be liable for unemployment compensation taxes attributable to benefits paid to a discharged employee. See infra notes 254-83 and accompanying text. See also Glide Lumber Prods. Co. v. Smith, 86 Or. App. 669, 741 P.2d 907, 910-11 (1987) (testing positive for marijuana on a urinalysis test not grounds for denial of unemployment compensation benefits), rev'd on other grounds, Glide Lumber Prods. Co. v. Employment Div., 87 Or. App. 152, 741 P.2d 904, 906-07 (reversed and remanded to determine if employee's voluntary departure was for good cause and therefore compensable); Philomath Forest Prods. Co. v. Employment Div., 86 Or. App. 678, 741 P.2d 912, 914 (1987) (testing positive for amphetamine and cocaine use not grounds for denial of unemployment compensation benefits); MINN. STAT. § 268.06 subd. 6 (1986) (computation of assessments on an employer for unemployment compensation taxes based on "experience ratio," which is calculated by the benefits paid to former employees of that employer); Note, Other Considerations: Workers' Compensation, Unemployment Compensation, and Chain of Custody, 23 WILAMETTE L. REV. 585, 590-97 (1987) (discussing requirement of willful misconduct prior to dis-
II. Screen Accuracy & Screen Result Utilization

Underlying the employer rationales for urinalysis substance screening just enumerated is the assumption that the means (urinalysis) will achieve the end (a drug free work force). A similar assumption underlies employers' arguments in favor of polygraph testing. These assumptions have been rejected by legislatures as well as the judiciary. As in polygraph examinations, urinalysis screening is suspect in two critical areas: accuracy and utilization of results.

A. Screen Accuracy

Part of the measure of the success of any screening program will be its cost effectiveness. The 1980 development of the EMIT test by Syva Company made urinalysis screening affordable to businesses. The key to an effective screening program is to accurately qualification of employees from unemployment compensation benefits). Compare MINN. STAT. § 268.09 subd. 1(b) (Supp. 1987) (misconduct is conduct "not amounting to gross misconduct connected with work or... misconduct which interferes with and adversely affects employment") with MINN. STAT. § 268.09 subd. 1(2)(b) (1986) (employee discharged for chemical dependency who has not made efforts to obtain and maintain treatment is disqualified from receiving benefits).

62. Gampel & Zeese, supra note 12, at 37. The authors point out that urine testing does not measure impairment or intoxication, so that a positive result is unrelated to employment.

63. Note, supra note 13, at 277-79. See also Polygraphs & Employment, supra note 47, at 10. "The most critical untested assumption, ... is that the information collected through screening can accurately predict future theft behavior beyond what would be expected by chance." (quoting BAUMER & ROSENBAUM, COMBATING RETAIL THEFT: PROGRAMS AND STRATEGIES (1984), speaking about polygraph testing). The assumption is that in identifying employees likely to steal, employers can effectively limit employee thefts. Analogously, employers utilizing urinalysis substance screening assume that urinalysis screening will identify employees likely to abuse substances; and identifying those employees will limit employee substance use in the workplace and thereby increase employer profit by minimizing costs. Experts in the area of employee theft, however, emphasize the importance of established management policies and procedures in theft prevention, rather than screening. Id. (citing BAUMER & ROSENBAUM, COMBATING RETAIL THEFT: PROGRAMS & STRATEGIES (1984)).

64. See supra note 16. See also infra notes 181-83 and accompanying text.

65. Note, supra note 13, at 277-79. Result utilization encompasses not only the question of what information the employer may legitimately attempt to learn by screening an employee, see supra notes 51-53 and accompanying text, but also how the employer may use information revealed in screens.

66. See Spitzer, Drug Screening: Usually Unnecessary, Frequently Unreliable and Perhaps Unlawful, INDUS. LABOR REL. RPT., 21, 22-23 (Spr. 1986) (estimates of costs to industry for drug abuse, which in turn affect estimates of cost savings through testing, are derived from assumptions and statistics based upon drug treatment programs).

identify all employees who are abusing substances. Similarly, an effective program should not mistakenly identify employees who are not using substances. Anything less than perfection affects the cost effectiveness of a program. Critics of screening programs have focused on two weaknesses of the EMIT test: inaccurate results and the inability of the test to detect present impairment.

generally used as a confirmatory test because of its accuracy, may cost as much as $200 per sample. Many employers do not choose confirmatory testing due to its high cost. Id. at 568.

Spitzer, supra note 66, at 22-23. A basic assumption is that screening programs are focused on identifying substance users so employers will not have to bear the costs associated with drug use in the workplace. See supra note 66 and accompanying text. See also Note, supra note 13, at 272. Employers fear that an employee who uses illicit substances might use them in the workplace. If not identified through screening, the employer will have to bear the costs associated with that employee’s substance use. So long as screening costs an employer less than it saves, a screening program is cost effective. See POLYGRAPHS & EMPLOYMENT, supra note 47, at 11-12 (discussing the cost effectiveness of polygraphs).

A hidden cost of screening, sometimes not considered in an employer’s economic evaluation of the issue, is the damage inflicted on employee relations by the implementation of a screening program. The mere request that an employee submit to a screen casts a cloud over that employee. Alcohol & Drugs, supra note 8, at 33. This can lead to increased suspicion between employers and employees, and among employees. See Zeese, supra note 26, at 820. This situation can become worse when a supervisor dislikes an individual employee and requires that employee to take one or more screens. See id. Even when the employee’s test results are negative, other employees may believe that the employee would not have been selected without good cause. Particularly galling to many employees is that urinalysis screening reverses the usual presumptions regarding innocence: the employee is presumed guilty until proven innocent. Stone, Mass Round-Up Urinalysis and Original Intent, 11 NOVA L. REV. 733, 743 (1987).

69. See, e.g., Miller, supra note 15, at 205-06 (EMIT tests are inaccurate and imprecise); Alcohol & Drugs, supra note 8, at 29 (urine tests cannot show impairment); Stone, supra note 68, at 740-41 (EMIT tests are unreliable and frequently result in false positive results which are damaging to the employee). Despite all of the discussion in various articles about the ramifications of false positive screen results, see, e.g., Miller, supra note 15, at 205-07; Waple, Drug Tests: Issues Raised in the Defense of a “Positive” Result, 11 NOVA L. REV. 751, 759 (1987), little concern is shown about false negatives. See Dubowski, Drug-Use Testing: Scientific Perspectives, 11 NOVA L. REV. 415, 445 (1987). “The frequency of occurrence of false negative test results is unknown, for all practical purposes, because negative test results are rarely repeated or confirmed by further analysis.” Id. This can probably be explained by noting that false positives will result in action against an individual, while a false negative does not. See DOGOLOFF & ANCAROLA, supra note 29, at 23. The only mention of false negative results and their prevention arises within the context of discussions centering on the need for observation of employees while collecting the specimen in order to prevent sample adulterations. See, e.g., Note, Employee Drug Testing - Issues Facing Private Sector Employers, 65 N.C.L. REV. 832, 839 (1987) (the only sure way to guarantee the integrity of the urine sample is to have a witness observe the subject during testing). For a discussion of the inability of screens to detect impairment, see infra notes 77-82 and accompanying text.
Inaccurate results can be false positive or false negative. False positive results identify employees not using substances as users. False negative results identify employees using substances as nonusers. Either result may arise from sample handling errors. False positives also arise because a formidable number of chemicals have similarities to the substances that testing is designed to detect. False negatives also appear because of sample tampering or the inherent imprecision of the screen. They may also appear because different individuals metabolize substances at different rates and individual substances metabolize at different rates. Although Syva claims EMIT tests are 95% accurate under laboratory conditions, they have been found to be up to 100% inaccurate.

The inability of screens to detect present impairment is nearly as controversial as their inaccuracy. Urinalysis screens do not mea-

70. Alcohol & Drugs, supra note 8, at 30. A 1981 study by the Center for Disease Control found false-negative results as high as 100% in testing for the presence of cocaine and amphetamines. False-positives ran as high as 37% on amphetamines. See id.


72. See Von Raab, 649 F. Supp. at 389. Quoting testimony of Dr. Arthur McBay, the court listed over-the-counter cold and pain medicines that will trigger false positives. Included in the list are: Advil, Motrin, Nuprin, Nyquil and Contac. Dr. McBay, a toxicologist who holds a Ph.D. in pharmaceutical chemistry, pointed out that the tests cannot distinguish between the legal drug codeine and the illegal drug heroin. Id. See also Note, supra note 14, at 1459 n.52 (aspirin can also cause false-positives).

73. See Zeese, supra note 26, at 819. For example, urine samples may be tampered with by adding salt or other substances to change the pH of the urine. Id. Other methods include: refusing to give the first urine of the day or drinking large quantities of liquids to dilute the sample. See id. Finally, positive test results may be avoided by substituting another's substance-free urine for one's own. Id. See also supra note 12.

74. See Note, supra note 14, at 1459 (substance use habits, stress, weight, diet, menstrual cycle and other factors make results vary).

75. Id. at 1460 n.56 (95% is the figure given by the test's manufacturer).

76. Rothstein, Screening Workers for Drugs: A Legal and Ethical Framework, 11 Employee Rel. L.J. 422, 426-27 (1985). False positive results for Methadone ranged as high as 66% while false negatives for amphetamines, cocaine, codeine and morphine ranged as high as 100%. Id. A troubling aspect of testing is that substance screens are now being marketed for use in the workplace, instead of in the laboratory. Id. at 427. This allows personnel, relatively untrained in drug testing, to hold the power of job termination in their hands. Id.

77. See Note, supra note 13, at 274. See also McBay, Efficient Drug Testing: Addressing the Basic Issues, 11 Nova L. Rev. 647, 649 (1987). A person is usually considered impaired by a substance when under the influence of the substance. See id. Even that broad definition can be inaccurate because there are some substances that improve performance. Id. Cocaine, an illegal substance, and caffeine, a legal substance, in small doses do not impair and can enhance performance. Id. at 652. In one test
sure the amount of a substance in a person’s blood. The screens do not indicate a certain level of impairment at the time of testing. Urine contains only chemicals being discharged from the body. Positive urine screens indicate only that at some time prior to the screen administration, the individual was exposed to the substance whose metabolite has been targeted. Screens do not necessarily indicate that an individual is a substance user, or that an individual is, was, or will be impaired by substance use while working.

Similarly, a negative screen indicates only that an individual has no metabolites in the urine at the moment of the screen, not that the individual will not use intoxicants in the future. An employer utilizing screening is doing so to identify employees who might use

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drivers drove a course before and after smoking marijuana. Most of the drivers remained close to their initial scores and two drivers improved their scores after smoking marijuana. Wisotsky, supra note 1, at 775 (citing Knepper, Puff, the Dangerous Drug, CAR & DRIVER, June 1980, at 43; Thompson, High Driving, CAR & DRIVER, Mar. 1980, at 30).

The employer rationale that screening is justified to reduce the number of employees working while impaired is subject to attack when the employer tests only for illegal drugs and not for alcohol. See McBain, supra at 650-51 (most urine tests have been for the purpose of detecting marijuana metabolites); Wisotsky, supra note 1, at 768-70 (many private testing programs apply only to illegal drugs and disregard alcohol, the major source of employee impairment). If the only reason for testing for substances is to find illegal drug use, employers begin acting for the government. Id. at 777.

78. See Note, supra note 13, at 274 (a positive urine test is only evidence that the person being tested at some time prior to the test ingested the drug).

79. See id. See also Englade, supra note 42, at 23-24. Accord Note, supra note 14, at 1457 nn.39-40 (metabolites do not indicate that a person was “high” at time of testing —only that substance was used recently).

80. See Note, supra note 14, at 1458 n.44 (the kidney removes waste from body fluids and deposits it into the urine to be excreted). See also Dubowski, supra note 69, at 432-35, 523-25 (describing the process by which drugs are absorbed into the body, distributed through the blood system, take effect on the body and are then excreted from the body). The very fact that a chemical (or its metabolite) is being discarded from the body is indicative of the fact that the body is not, at that moment, under the influence of that particular chemical. Id.

81. Note, supra note 14, at 1457 n.40. With the exception of alcohol, there is no data correlating the urine concentration of particular substances with intoxication. Dubowski, supra note 69, at 519-20. Another concern is that screens do not distinguish between active and passive exposure. Id. at 527. Passive exposure can result in a positive urinalysis screen. Id. An example of passive exposure is “inhalation of ambient air by a nonsmoking person in the vicinity of heavy marijuana smokers. . . .” Id. See Sonnenstuhl, Tice, Staudenmeir & Steele, Employee Assistance and Drug Testing: Fairness & Injustice in the Workplace, 11 NOVA L. REV. 709, 721 (1987) [hereinafter Sonnenstuhl] (train conductors often fear walking through marijuana-smoke filled cars because, by inhaling the fumes, they could test positive during urinalysis screening).

82. See Spitzer, supra note 66, at 23-24.

83. See Donnelly, supra note 28, at 213 (a urine test may not show a positive result when a person is intoxicated, but may produce positive results weeks later as the body discharges metabolites). The very nature of a urine screen is to delve into an
intoxicants on the job. The failure to identify users damages the effectiveness of the entire screening program.

B. Utilization of Screen Results

Urinalysis can convey a significant amount of information about an individual. The ability of screens to reveal non-work related information concerns many critics of screening programs. As well as detecting intoxicants, urinalysis can reveal the individual's medical history for a wide array of ailments. Employees, after giving the sample, have no control over which tests are performed on it. Thus, employees cannot limit specimen usage simply to the detection of substance use.

While the immediate goal of any screening program is to reduce substance use in the workplace, it is assumed that this reduction will accomplish the goals embodied in the employer rationale. In utilizing screen results to achieve those goals, there are several options available to the employer: 1) referral to authorities for prosecution; 2) discipline; and 3) rehabilitation.

Few, if any, employers will give information gleaned in substance screening to authorities for use in prosecution. It is questionable,
in view of screen accuracy problems, whether such information would be admissible in a prosecution.94 Additionally, an employer might be subjected to tort liability if a screen result was inaccurate.95 Most frequently, information in employer hands about substance use will only be passed on to law enforcement if it indicates sales of illegal drugs.96

Currently, many employers resort to discipline alone in using screen results.97 Some employers simply discharge an employee who tests positive for substance use.98 These employers reason that doing so will assure them of a drug free workforce.99 Other employers apply progressive discipline, that can culminate in termination.100 Employers use discipline alone either because they look upon the substance abuser as having a moral deficiency, or because they do not provide an employee assistance program.101

Some employers utilize substance screening programs to direct employees into employee assistance programs.102 Employers do so believing that in the long run employee assistance programs are more cost effective than either discharge or progressive discipline.103 Experts urge a combination of progressive discipline, employee assistance programs, and abuse awareness programs.104 While commentators do not believe these programs are a panacea, they do believe that employers must take a more sympathetic view of employee substance use. These commentators maintain that the problem of substance use in the workplace has a more complex origin than sim-

95. See Alcohol & Drugs, supra note 8, at 65-66 (discussing Houston Belt & Terminal Ry. Co. v. Wherry, 548 S.W.2d 743 (Tex. Ct. Civ. App. 1977), where employer was liable for defamation). See also supra notes 162-215.
96. Lehr & Middlebrooks, supra note 24, at 408-09. See Bensinger, supra note 26, at 7-8.
97. Rothstein, supra note 76, at 434 (providing a list of the essential components of a comprehensive drug abuse program).
98. See Note, supra note 13, at 275-76; Alcohol & Drugs, supra note 8, at 22.
99. See Geidt, supra note 14, at 197 (some arbitrators are more willing to order rehabilitation for alcohol abusers than abusers of other substances).
100. Rothstein, supra note 76, at 434 (experts believe that a drug abusing employee should be given rehabilitation rather than punishment).
101. See Sonnenstuhl & Tice, Lessons From EAP's for Drug Screening, INDUS. LAB. REL. RPR. 25, 27-29 (Spr. 1986).
102. Rothstein, supra note 70, at 434.
103. Id. at 434-35 (in addition to the cost savings, there are human savings such as the ability to rehabilitate and restore an employee to a healthful and productive state).
104. Sonnenstuhl & Tice, supra note 101, at 29.
ple moral deficiency.105

III. JUDICIAL STANDARDS FOR SCREENING

The ability of employers to take action in relation to their employees is represented by a continuum. At will employers are least constrained. Unionized employers are constrained by the labor agreements they have signed. Public employers are constrained by the Constitution.

Privacy106 and the constitutional protections of the fourth amendment107 have been the focus of many of the court battles over screening of employees. Most of these battles have taken place between the government and its employees, in part because private sector employees seeking constitutional protection of privacy rights

105. See Rothstein, supra note 76, at 435 (potential causes of substance use in the workplace include stress, repetitive work and boredom).

106. As a group, the following articles trace the development of the notion of individual privacy in an ever more industrialized, impersonal society. See Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L. Rev. 962, 963 (1964) (proposing a general theory of individual privacy to reconcile various theories of legal development); Gross, The Concept of Privacy, 42 N.Y.U.L. Rev. 34, 35 (1967) (providing an account of the various uses of the word privacy); Hermann, Privacy, the Prospective Employee and Employment Testing: The Need to Restrict Polygraph and Personality Testing, 47 Wash. L. Rev. 73, 77 (1971) (discussion of privacy cases); Note, Torts, Privacy: Minnesota As a Model, 4 WM. MITCHELL L. Rev. 163, 164-75 (1978) (describing privacy in a sociopsychological context). See generally Prosser, Privacy, 48 Calif. L. Rev. 383 (1960) (discussion of privacy in connection with a famous person); Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890) (extensive discussion of the privacy right).

107. See, e.g., Shoemaker v. Handel, 795 F.2d 1136, 1141-43 (3d Cir. 1986) (state racing commission’s random selection of jockeys for drug testing qualifies as an administrative search exception to the fourth amendment’s requirement for warrant), cert. denied, 107 S. Ct. 577 (1986); Capua, 643 F. Supp. at 1513 (urinalysis of city fire fighters constitutes a search under the fourth amendment); Jones v. McKenzie, 628 F. Supp. 1500, 1508-09 (D.D.C. 1986) (firing of bus attendant based on a positive urinalysis was a violation of fourth amendment right against warrantless searches); Allen v. City of Marietta, 601 F. Supp. 482, 488-91 (N.D. Ga. 1985) (unwarranted urinalysis of municipal utility employees not a violation of fourth amendment); Storms v. Coughlin, 600 F. Supp. 1214, 1217-21 (S.D.N.Y. 1984) (random urinalysis of state prison inmates not a violation of fourth amendment if conducted in a reasonable manner); City of Palm Bay v. Bauman, 475 So.2d 1322, 1325-27 (Fla. Dist. Ct. App. 1985) (urine testing of police officers constitutes a justified search under reasonable suspicion standard, which is something less than the probable cause standard); In re Patchogue-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888, 889-90 (1986) (school district’s requirement that teachers seeking tenure submit urine samples was an unconstitutional search under the fourth amendment). Cf. Everett v. Napper, 632 F. Supp. 1481, 1484 (N.D. Ga. 1986) (firing of fire fighter after refusing to submit to urinalysis did not constitute a search under the fourth amendment because plaintiff never took the ordered test).
have a difficult time meeting the requirement of state action.\textsuperscript{108} While results of public sector cases on screening have little direct impact on either union or at will employers,\textsuperscript{109} trends and reasoning from public sector cases tend to flow into other segments of the labor market.\textsuperscript{110}

\section{A. Public Sector Employees}

The fourth amendment provides that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."\textsuperscript{111} The primary purpose of the fourth amendment is to safeguard individual privacy and security by imposing a standard of reasonableness on the actions of government officials.\textsuperscript{112} In analyzing fourth amendment issues in substance screening cases, courts have balanced the employee's expectation of privacy against the employer's need for testing.\textsuperscript{113} This balancing test has often triggered application of a modified search and seizure analysis\textsuperscript{114} and has resulted in decisions halting programs that were

\begin{itemize}
\item \textsuperscript{108} See Alcohol \& Drugs, supra note 8, at 60 (state action requirement may not be safe harbor for private sector employers).
\item \textsuperscript{109} See generally Comment, supra note 16, at 651-91.
\item \textsuperscript{110} Ver Ploeg, supra note 31, at 17 (guidelines established in the public sector have a way of drifting into the private sector); Comment, supra note 16, at 691.
\item \textsuperscript{111} U.S. CONST. amend. IV.
\item \textsuperscript{112} See Miller, supra note 15, at 212.
\item \textsuperscript{113} See Weinberger, 651 F. Supp. at 733-36.
\item \textsuperscript{114} Miller, supra note 15, at 216-18. In applying a search and seizure analysis, courts must first determine whether an individual has a constitutionally protected interest at stake. That determination consists of a two-pronged analysis. Initially, the court must determine whether or not the individual has a reasonable expectation of privacy. Then the court must determine if that expectation is one society is willing to recognize. See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In determining whether an expectation of privacy exists, courts have used an objective standard based on society's recognition of a legitimate privacy expectation in the area involved. Miller, supra note 15, at 213 n.50.
\item Second, the reasonableness of the intrusion is appraised. In assessing the reasonableness of the intrusion of random substance screening, courts have adopted the factors set out in Schmerber v. California, 384 U.S. 757 (1966). The Schmerber court relied heavily on the fact that the blood sample was being taken by professional medical personnel in a hospital. Id. at 771-72. Urinalysis screens are rarely given by highly trained workers. That is part of their attractiveness; you don't have to spend very much money to open a testing lab. See Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) (challenge to the U.S. Army's screening program); Capua, 643 F. Supp. at 1511-12 (fire department conducted mass urinalysis testing using bonded testing agents provided by the city); Jones, 628 F. Supp. at 1502-03 (employer required urinalysis as part of standard physical examination); Shoemaker, 619 F. Supp. at 1094-95 (racing commission used Breathalyzer and had jockeys urinate into bottles to be tested at an independent laboratory); Allen, 601 F. Supp. at 484 (employees urinated into jars and employer sent jars away for analysis).
\end{itemize}
particularly egregious in violating employee rights.\textsuperscript{115} The ultimate determination of a search's reasonableness requires a judicious balancing of the intrusiveness of the search against its promotion of a legitimate employer interest.\textsuperscript{116} The factors courts have fashioned for determining the reasonableness of testing can be expressed as follows: 1) the likelihood that intoxication will be found is high, or actual intoxication is extremely hazardous; 2) the testing procedures are reliable; and 3) the manner of test administration would not be repugnant to the average person.\textsuperscript{117}

B. Private Sector, Unionized Employees

Occupying a middle ground in the screening continuum is the private sector employer who has signed a collective bargaining agreement. Unionized businesses, while generally not bound by constitutional standards, usually are limited in their actions toward employees by the terms of the collective bargaining agreement.\textsuperscript{118} Labor agreements generally require employers to bargain for changes in working conditions.\textsuperscript{119}

Although there is no uniformity in the decisions, courts approaching the issue of substance screening in the union context have generally held that these programs must be implemented within the guidelines of the bargaining agreement.\textsuperscript{120} Some courts have granted injunctions prohibiting implementation until the parties have agreed on the details of the program.\textsuperscript{121} Other courts have allowed the implementation of a program subject to the final results of the bargaining process.\textsuperscript{122} Still other courts have allowed implementation and held that employees must exhaust their administrative remedies before judicial review will be available.\textsuperscript{123}

\textsuperscript{115} We\textsubscript{in}berger, 651 F. Supp. at 732. \textit{But see} McDonell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987) (allowing a restricted random testing system).

\textsuperscript{116} Capua, 643 F. Supp. at 1513-14. \textit{See also} Von Raab, 649 F. Supp. at 387.

\textsuperscript{117} See, e.g., Weinberger, 651 F. Supp. at 731-37 (discussion of government's reasons for wanting urinalysis testing and the court's reasons for holding that such testing was unconstitutional in this case). \textit{See also} Ayers, \textit{supra} note 20, at 347-48.

\textsuperscript{118} See Schmedemann, \textit{supra} note 21, at 280-81.


C. At Will Employees

The Bill of Rights does not protect an individual from the acts of another individual, or from the acts of a business. At will employers are generally not subject to constitutional standards in their actions toward employees. Constitutionally, the at will employer may screen employees at any time.

At will employees have relatively few protections from the actions of employers. In very general terms, the at will employer may hire or fire for good reason, for no reason, or for a reason that is morally wrong. Thus, it appears that an at will employer may discharge an employee for refusing to submit to, or failing a substance screen.

Under the at will rule, absent statutory restrictions, an employer has an unfettered hand in hiring and firing. In pre-employment situations, absent a statute, the employer is free to ask virtually any question designed to elicit almost any information, even if it can only be revealed through a pre-employment physical. Prospective employees are free to refuse to divulge any information, just as the employer is free to refuse to hire that person.

IV. Potential Liability of At Will Employers in Instituting Substance Screening

At will employers who have initiated substance screening pro-

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124. See generally Blades, supra note 23. But see Alcohol & Drugs, supra note 8, at 60 (when private conduct flagrantly abuses constitutional rights the judiciary will find ways to circumvent the state action requirement).

125. See generally Blades, supra note 23.


128. See, e.g., Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1360 (1986) (an employee who was fired after failing both initial and confirmatory test had no cause of action against his employer).


130. See Rothstein, supra note 76, at 427-28.
grams have found themselves in court. As workplace screening for substance use spreads and lawyers become more attuned to the issues presented by such programs, the number of lawsuits is sure to rise. The at will employer who relies on the at will doctrine as the basis of a defense against an employee’s suit arising out of a screen is apt to wind up on the losing side of the lawsuit.

At will employers instituting urinalysis substance screening programs may face liability in several areas. First, employers may face liability because courts have created contractual modifications of the at will relationship. Second, an employer may face a variety of potential liabilities arising out of tort causes of action. Finally, an employer could face liability in the implementation of a screening program based on a statutory cause of action.

A. Contract Based Modifications of the At Will Relationship

1. Implied-in-Fact Modifications

The Minnesota Supreme Court has recognized implied-in-fact modifications of the at will relationship through the distribution of employee handbooks. In *Pine River State Bank v. Mettille*, the court construed the distribution of employee handbooks as the offer of a unilateral contract that employees accepted by continuing in their jobs. The court held that since the handbook provisions met unilateral contract standards they were binding on the employer. An employer does, however, have the right to modify handbook provisions at any time by distributing modifications to employees.

An employer contemplating urinalysis substance screening of employees should look at the language of any handbook distributed to employees. When handbook provisions that meet unilateral contract standards delineate work conditions or disciplinary procedures that would hamper the institution of the screening program, both the handbook and the program design should be re-evaluated. If af-

132. See D’Aquila, supra note 44, at 6.
133. See, e.g., *Wherry*, 548 S.W.2d 743.
134. See infra notes 137-61 and accompanying text.
135. See infra notes 162-215 and accompanying text.
136. See infra notes 216-83 and accompanying text.
137. See, e.g., *Lewis v. Equitable Life Assurance Soc’y of the United States*, 389 N.W.2d 876, 883 (Minn. 1986) (language in employee handbook held sufficient to constitute an offer that ripened into a binding unilateral contract upon acceptance).
138. 333 N.W.2d 622 (Minn. 1983).
139. *Id.* at 630.
140. *Id.*
141. *Id.* at 627.
142. This re-evaluation should ask at least three questions:
After re-evaluation it is determined that handbook language still may hamper program implementation, the handbook may be modified by distributing the modification to employees.

In *Eklund v. Vincent Brass and Aluminum Co.*, the Minnesota Court of Appeals recognized that circumstances and acts of parties may give rise to an implied-in-fact covenant of good faith and fair dealing in an employment contract. The covenant is largely a requirement of fairness. If the screening of an employee was fair under the circumstances, then the covenant was not breached. Conversely, if screening of the employee was unfair, then the covenant was breached.

In *Bussard v. College of St. Thomas, Inc.*, the Minnesota Supreme Court recognized another contractually based modification of the at will relationship. In *Bussard*, the court held that when an employee contributes consideration in addition to continued labor, the at will relationship can be contractually modified so as to require good cause for discharge. The at will employer may confront this situation when one business takes over another. In that situation, implementation of a screening program must heed the limits of the purchase agreement and any contemporaneous oral promises.

1. Is there something fundamentally wrong with the screening program?
2. Is there something fundamentally wrong with the handbook?
3. Do the handbook and the screening program conform with the statutory guidelines?

See supra notes 137-41 and accompanying text. A problem with the program design or a conflict with a statute is a clear warning that the entire motivation for screening should be reconsidered. See supra notes 24-61 and accompanying text.

145. See *Alcohol & Drugs*, supra note 8, at 76.
146. 294 Minn. 215, 200 N.W.2d 155 (1972).
147. Id. at 223, 200 N.W.2d at 161.
148. See *Alcohol & Drugs*, supra note 8, at 75. In this situation there are two groups of employees who will need to be considered. The first is a former owner who agrees to become an employee. Often in such cases, one of the considerations of the former owner is a desire to have employment for an indefinite period. A change in the con-
2. Implied-In-Law Modifications

In *Grouse v. Group Health Plan, Inc.*, the Minnesota Supreme Court recognized an exception to the employment at will doctrine based on principles of promissory estoppel. Promissory estoppel is largely a doctrine of reliance. When an employee takes action in reasonable reliance on an employer's representations, the employer is bound by those statements. Principles of promissory estoppel will apply in situations where the employer has made representations about future plans to implement a screening program or the intended use of results.

If an employer makes assurances to employees that no screening program will be implemented, the employer may be bound by those representations. Particularly when an employee has refused other work opportunities, an employer who institutes screening after promising not to do so will face liability based on promissory estoppel. Similarly, an employer who begins disciplining employees based on screen results after promising not to do so, will also face liability.

Employers often require job applicants to submit to pre-employment screens. Employers need to be cautious about making promises of hiring to job applicants before requesting a screen. Employers utilizing pre-employment screening must take particular care when hiring workers, before screen results are known, to communicate to the prospective employee that any continued employment is contingent on the screen result. An employee who is not

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149. 306 N.W.2d 114 (Minn. 1981).
150. Id. at 116.
151. Id. When a promise induces action or forbearance, courts will enforce the promise to avoid injustice. Id. at 116 (quoting Restatement of Contracts § 90 (1932)). When a party does not act in reliance there will be no action for promissory estoppel because the elements of the action will be missing. Id.
152. Alcohol & Drugs, supra note 8, at 75-76. For example, if an employer promised that no screening program would be instituted and later began a screening program, the employees who remained working based on the promise would likely have a cause of action if terminated for refusing to participate. Similarly, if an employee was informed that no discipline would be imposed for failing a screen but then was discharged, a cause of action would probably exist.
153. See Spitzer, supra note 66, at 21.
154. See supra note 152 and accompanying text.
155. Alcohol & Drugs, supra note 8, at 75-76. An employer may require screening of prospective employees if an offer of employment has been made and screening is required of all applicants who have similarly received job offers. See Act approved June 3, 1987, ch. 388, § 2, subd. 2, 1987 Minn. Laws 2931, 2932 (codified at Minn. Stat. § 181.951, subd. 2).
so informed and relies on statements about being hired may have grounds for suit if not hired on the basis of a screen result.156

Another implied-in-law cause of action is the covenant of good faith and fair dealing. The Minnesota Supreme Court has been steadfast in refusing to read an implied-in-law covenant of good faith and fair dealing into the at will employment relationship.157 Similarly, the court has been unwilling to recognize an implied-in-law covenant to discharge in good faith or only for good cause.158 These implied-in-law covenants have, however, been recognized in other jurisdictions.159 The Minnesota Supreme Court's past refusal to recognize an implied covenant of good faith and fair dealing in the at will relationship suggests, but does not assure, that it will continue to do so.160 Accordingly, employers instituting a screening program should insure that the program is administered fairly.161

B. Tort Liability

1. Public Policy Exception

In most jurisdictions, the major exception to the at will doctrine is the public policy exception.162 The public policy exception, recognized by the Minnesota Supreme Court in Phipps v. Clark Oil & Refining Corp.,163 is an action based in tort.164 The cause of action is for

156. See Bensinger, supra note 26, at 10 (speaking of employees). See also Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 601, 292 N.W.2d 880, 893 (1980) (where employee manual promised fair, reasonable corrective discipline and to release employees for just cause only, employees could justifiably rely on those expressions).

157. See Hunt, 384 N.W.2d at 858-59.

158. See id.

159. See, e.g., Tameny, 27 Cal. 3d at 171-72, 610 P.2d at 1332-33, 164 Cal. Rptr. at 841-42 (1980) (employer does not enjoy an absolute right to discharge even an at will employee); Cleary v. American Airlines Inc., 111 Cal. App. 3d. 434, 451-55, 168 Cal. Rptr. 722, 726-28 (1980) (fact that employment contract is terminable at will does not give employer absolute right to terminate in all cases).

160. See supra notes 143-45 and accompanying text. The court of appeals has recognized the implied-in-fact covenant. See Eklund, 351 N.W.2d at 378. It may be but a small step to an implied-in-law covenant.

161. See Alcohol & Drugs, supra note 8, at 76-77.

162. Phipps v. Clark Oil & Refining Corp., 396 N.W.2d 588, 591 (Minn. Ct. App. 1986), aff'd as modified, 408 N.W.2d 569 (Minn. 1987). A majority of the states recognize some form of wrongful discharge. Id. at n.2. The public policy exception to the at will rule is probably the most recognized exception. Public policy cases usually arise because an employee is fired for taking an action that falls in one of three categories: refusing to commit an illegal act, performing a public obligation, or exercising a legal right. Lopatka, The Emerging Law of Wrongful Discharge —A Quadrennial Assessment of the Labor Law Issue of the 80’s, 40 Bus. Law. 1, 6-7 (1984).

163. 408 N.W.2d 569 (Minn. 1987).

wrongful termination. The public policy exception has been adopted to balance the interests of employees, employers, and society. Courts have recognized society's interest in not allowing employers to require employees' participation in unlawful acts. In Phipps, the Minnesota Court of Appeals said that "[a] public policy exception can be reasonably defined by reference to clear mandates of legislative or judicially recognized public policy." The court held that the initial burden of proving a dismissal for a reason in violation of public policy is on the employee. The burden then shifts to the employer to prove that the discharge was based on reasons other than those alleged by the employee.

Phipps opens a door to potential employer liability in substance screening cases. Although the issues in Phipps are focused on an employee's refusal to act contrary to a statute, the decision leaves open the possibility of a wider application of the public policy exception. For example, if a screening program that does not conform to the statutory guidelines is instituted and an employee refuses to participate because of a belief that the program is contrary to the law, the employee could bring an action for wrongful discharge if terminated based on that belief. Less obvious is the possibility of a suit

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165. Id. at 593. See also Recent Developments in Minnesota Law, 14 WM. MITCHELL L. REV. 193, 213 (1988) [hereinafter Recent Developments] (discussing burden of proof in public policy cases).

166. Phipps, 396 N.W.2d at 592.

167. Id. Because the Minnesota Supreme Court based its decision on a statute granting an action for wrongful termination, the court did not specifically deal with the policy reasons allowing such a cause of action. See MINN. STAT. § 181.932 (Supp. 1987) (allowing action for wrongful termination in violation of public policy); Recent Developments, supra note 165, at 212-13. The court, in addressing the punitive damages issue, said, "[i]n a nation of laws the mere encouragement that one violate the law is unsavory; the threat of retaliation for refusing to do so is intolerable and impermissible." Phipps, 408 N.W.2d at 572 (citation omitted).

168. Phipps, 396 N.W.2d at 593. The supreme court's deferral to the statute, see supra note 167, leaves open the question of where public policy is to be found. The major difficulty in public policy theory is determining what expression of public policy will be strong enough to support a wrongful discharge cause of action. Lopatka, supra note 162, at 13. One court found strong public policy in the first amendment's protection of speech. See Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3rd Cir. 1983). In view of the statute, it is unlikely that the Minnesota courts would go so far as to constitutionalize the private sector workplace, but this has been suggested by some commentators. See, e.g., Aurthur Selwyn Miller, "Constitutionalizing" the Supercorporations (1986) (on file at William Mitchell Law Review office). See also infra note 172.

169. Phipps, 408 N.W.2d at 572.

170. Phipps, 396 N.W.2d at 592; Phipps, 408 N.W.2d at 572.

171. Phipps, 396 N.W.2d at 593-94.

172. The employee may be able to elect what statute to proceed under. The drug testing statute provides remedies for breach of the statute. See D'Aquila, Drug and Alcohol Testing In the Workplace, 14 WM. MITCHELL L. REV. 255 (1988).
filed by an employee because of a mistaken belief that the program is either illegal or unconstitutional.173

2. Invasion of Privacy

The Restatement (Second) of Torts,174 section 652B establishes a cause of action for invasion of privacy. Section 652B reads: "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."175 Minnesota has not yet recognized an invasion of privacy cause of action.176

In Satterfield v. Lockheed Missiles and Space Co.,177 the court construed the plaintiffs' complaint to allege an invasion of privacy based on publication of private facts arising out of a termination prompted by a positive random urinalysis screen result.178 The court said that in such an action, the plaintiff has the burden of proof "to show a blatant and shocking disregard of his rights, and serious mental or phys-

173. The Phipps court of appeals decision used language that indicated a constitution could express public policy. Id. at 592. The statute provides that an employee cannot be fired for refusing to "participate in any activity that the employee, in good faith, believes violates any state or federal law or rule." Minn. Stat. § 181.932 (Supp. 1987) (emphasis added). The statute invokes the standard of a good faith belief by the employee that the act is prohibited. Many people believe that the Constitution protects individuals from the actions of employers. See supra notes 133-35 and accompanying text. If the belief of the employee is an honest one, it is difficult to believe that the act (or refusal to act) would not be one of good faith, despite the inaccuracy of the belief. The statute does not require that the employee be correct in the belief. See also Recent Developments, supra note 165, at 214-15. The issue may arise at some point unless employers are careful to explain not only the procedures of a testing program, but also the legal authority to test. See Minn. Stat. § 181.952 subd. 2 (Supp. 1987) (requiring employers to distribute screening guidelines to employees prior to institution of screening program).


175. Id. Public sector decisions have held that the administration of a urinalysis test is an offensive invasion of privacy. "Urine testing involves one of the most private of functions, a function traditionally performed in private, and indeed, usually prohibited in public." Capua, 643 F. Supp. at 1507. See supra notes 111-17 and accompanying text.

176. Hendry v. Conner, 303 Minn. 317, 319, 226 N.W.2d 921, 923 (1975); House v. Sports Films & Talents, Inc., 351 N.W.2d 684, 685 (Minn. Ct. App. 1984). It may be that the appropriate case to recognize the tort has not yet been brought before a Minnesota appellate court. Both decisions remarked that the facts were not such as to recognize the cause of action. Hendry, 303 Minn. at 319, 226 N.W.2d at 923; House, 351 N.W.2d at 685. Hendry involved publication of facts already public and publicity which was not undue or oppressive. Hendry, 303 Minn. at 319, 226 N.W.2d at 923. House involved a claim for appropriation of likeness in which consent was given. House, 351 N.W.2d at 685.


178. Id. at 1369.
tical injury or humiliation." The court did not, however, find an invasion of privacy cause of action based on an intrusion in the administration of the screen.

Commentators have frequently compared the administration of a polygraph examination to the administration of a urinalysis test. It is clear that a polygraph examination is an invasion of an individual's rights. Similarly, administering a urinalysis test may amount to a deliberate invasion of the individual's zone of privacy.

179. Id. at 1370 (citing Shorter v. Retail Credit Co., 251 F. Supp. 329 (D.S.C. 1966)).
180. Id. The court construed the complaint as an action based on the public disclosure of private facts. In refusing to recognize this as a cause of action, the court noted that Satterfield conceded that the positive result was not communicated to the general public. Id.

Minnesota Statute section 181.75 prohibits an employer from asking an employee to take a polygraph. MINN. STAT. § 181.75 (1986). The statute makes it a misdemeanor to convey the results of such a test to anyone other than persons authorized by the testee. Id. § 181.76 (1986) ("no person shall disclose that another person has taken a polygraph or any test purporting to test honesty or the results of that test except to the individual tested"). Section 181.76 has been interpreted as conferring no private cause of action. See Jeffers v. Conroy Co., 636 F. Supp. 1337, 1341-42 (D. Minn. 1986) (no claim recognized based on invasion of privacy). The Minnesota Supreme Court has interpreted section 181.75 to be inapplicable to tests that do not purport to measure physiological changes. See Spannaus v. Century Camera, Inc., 309 N.W.2d 735 (Minn. 1981).

Urinalysis screens detect the metabolites of chemicals introduced into the body. See Note, supra at 902. The production and elimination of metabolites is a physiological process. See id. at 902-03. Thus, urine screens would seem to measure physiological changes.

Despite the differences between drug screens and polygraphs, both can be said to measure a person's honesty. An example of this is an employer testing for drug use after an employee denies using drugs.

More important than the specific language of the polygraph statute is the policy message it conveys. See Note, supra note 13, at 276-80 (discussing the public policy rationale behind statutes restricting the use of polygraphs). The policy message is that employees have a right to be free from unreasonable invasions of privacy by their employers. Further, the statute is consistent with the policy that tests with inherent defects in accuracy are prima facie unreasonable invasions of privacy.

182. See Note, supra note 13, at 277-78. Nineteen states and the District of Columbia restrict the use of polygraphs in the employment context. Twenty-seven states require polygraph examiners to be licensed. Id. at 278 n.63. See also supra note 181 and accompanying text.
183. See supra notes 111-17 and accompanying text. In State Farm Mutual Auto. Ins. Co. v. Village of Isle, 265 Minn. 360, 122 N.W.2d 36 (1963), the Minnesota
3. Intentional Infliction of Emotional Distress

The Minnesota Supreme Court recognized the tort of intentional infliction of emotional distress in *Hubbard v. United Press International*. The court, drawing from the *Restatement of Torts*, stated the elements necessary for a claim as: 1) extreme and outrageous conduct; 2) that is intentional or reckless; and, 3) causes severe emotional distress. The court limited the operation of this tort to cases involving particularly egregious facts.

Consent is coerced when an employee’s only other options are to quit or be discharged. Consent, however, may not be valid when it is coerced. Employers who coerce consent to urinalysis may be intentionally inflicting emotional distress on employees and exposing themselves to sizeable damage awards. If the employer is liable, then any lasting negative psychological consequences of the urinalysis experience will be compensable. In a case involving a particularly sensitive employee the damages could be substantial.

Employers acknowledge that one of the major reasons for instituting a substance screening program is to coerce employees who are currently abusing substances to cease that abuse. Coercion of employee actions that are not related to job performance could be considered outrageous. Innocent employees may suffer severe

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Supreme Court recognized that damages were recoverable for actions "constituting a direct invasion of the plaintiff's rights." *Id.* at 368, 122 N.W.2d at 41. The plaintiff was attempting to recover damages for mental anguish attributable to the physical condition of her husband as a result of an auto accident. The court declined to award her damages because her rights were not invaded. As examples of direct invasions of an individual's rights, the court listed "slander, libel, malicious prosecution, seduction, or other like willful, wanton, or malicious misconduct." *Id.*

*State Farm* was cited by the court in *Kamrath v. Suburban Nat'l Bank*, 363 N.W.2d 108 (Minn. Ct. App. 1985), in affirming a judgment against an employer who had given an employee a polygraph exam in violation of a statute. *Id.* at 111-12. The plaintiff in *Kamrath* based her claim on the violation of the statute prohibiting employers from asking employees to take a polygraph exam. See **MINN. STAT.** § 181.75, subd. 1 (1986) ("No employer or agent thereof shall directly or indirectly solicit or require a polygraph, voice stress analysis, or any test purporting to test the honesty of any employee or prospective employee."). See also **Spannaus**, 309 N.W.2d 735 (Minn. 1981) (upholding the constitutionality of this statute).

184. 330 N.W.2d 428 (Minn. 1983). Hubbard was an alcoholic, and he alleged that U.P.I. discriminated against him on the basis of his alcoholism. *Id.* at 431. See also infra notes 229-52 and accompanying text (discussion of discrimination against handicapped persons).


186. See *id.* at 439.

187. See Weinberger, 651 F. Supp. at 736.

188. See *id.*

189. See *Kamrath*, 363 N.W.2d at 111-12.

190. See *id.*

191. See Hoffer, supra note 45, at 58.
emotional distress when confronted with employer mandated screening programs. Therefore, employers who institute random substance screening programs may be vulnerable to intentional infliction of emotional distress claims.\textsuperscript{192}

4. Defamation

The Minnesota Supreme Court has recognized defamation claims in the employment context in a series of recent decisions.\textsuperscript{193} For a statement to be defamatory, "it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him or her in the estimation of the community."\textsuperscript{194} Communication between two company employees, even when both employees need to know the information, can constitute publication.\textsuperscript{195} One defense to a defamation action is an employer's qualified privilege to communicate relevant information.\textsuperscript{196} This defense will be lost if the employee proves actual malice.\textsuperscript{197}

\emph{Houston Belt \& Terminal Railway v. Wherry}\textsuperscript{198} and \emph{O'Brien v. Papa Gino's of America, Inc.}\textsuperscript{199} are two cases in which employers were held liable for defamation following tests that the employees allegedly failed. In both cases, the tests were given to determine whether the employees were using drugs. In \emph{O'Brien}, the test was a polygraph exam\textsuperscript{200} and in \emph{Wherry} the test was a urinalysis screen.\textsuperscript{201} In each case, the court allowed substantial damages.\textsuperscript{202} \emph{Wherry}, in particular,
points out the problems inherent in conveying information gathered from a urinalysis substance screen. 203 Employers could face substantial damage awards when an employee is mistakenly dismissed on the basis of an inaccurate screen.

5. Negligence

Any suit that arises out of the administration of a urinalysis substance screen will likely include a claim alleging negligence. To establish a negligence claim, the plaintiff must show that the defendant owed the plaintiff a duty, that the defendant breached that duty, that the plaintiff was, in fact, injured, and that the breach was the proximate cause of plaintiff's injury. 204

Employer liability can arise from negligent testing or negligent evaluation of a screen. 205 A claim for negligent testing will arise when: 1) the entity doing the screening knows the test is for a serious purpose; 2) the employer relies on the screen in taking action; and, 3) the employee's termination results from reliance on the screen results. 206 Negligent evaluation occurs when a negligent act yields erroneous data, 207 or when correct data is negligently interpreted. 208

When a screen has been given or interpreted negligently there is a possibility that a cause of action for medical malpractice may arise. 209 The concept of medical malpractice applies to derelictions by someone engaged in health care services. 210 The absence of privy of contract does not bar the physician-patient relationship. 211

203. The tests themselves are inherently inaccurate and the results subject to different interpretations, at least in part dependent on the skill of technicians. See Wherry, 548 S.W.2d at 746. Even assuming the tests are 95% accurate, the potential impact on innocent workers is drastically minimized. Assuming that 5% of a population of 1,000 use substances, 50 people should be detected through screening. In actuality, 47 innocent people will be accused of substance use and may lose their jobs, while 3 people using substances will go undetected and will retain their jobs. See INDIVIDUAL EMPLOYMENT RIGHTS (BNA) 8 (1986).


206. See id.

207. Id. at 3 (citing Zampatori v. United Parcel Service, 125 Misc. 2d 405, 479 N.Y.S.2d 470 (N.Y. Sup. Ct. 1984)) (suit filed against a detective agency that gave polygraph test for the employer).

208. See Herman & Bernholz, supra note 206, at 4.


guably, by instituting a screening program an employer is undertaking to evaluate an employee’s substance use. If that evaluation is not done with proper care\textsuperscript{212} the employer may be faced with satisfying a medical malpractice judgment.\textsuperscript{213} The damages from such a claim could be significant.\textsuperscript{214} This cause of action has been precluded in terms of employer liability by Minnesota’s screening statute.\textsuperscript{215}

\section*{C. Statutory Liability}

Most of the erosion of the employment at will doctrine has been accomplished by statute.\textsuperscript{216} Recently, Minnesota passed legislation that limits the use of screening and prescribes permissible methods of screening employees.\textsuperscript{217} Other statutes may also have an impact on an employer’s decisions to hire, fire, or test employees and job applicants.\textsuperscript{218}


\textsuperscript{212} \textit{See Chiasera v. Employers Mut. Liab. Ins. Co. of Wisconsin, 101 Misc. 2d 877, 878, 422 N.Y.S.2d 341, 342 (N.Y. Sup. Ct. 1979)} (liability will arise out of the negligence principle that one who undertakes to act is subject to take reasonable care in the undertaking).

\textsuperscript{213} \textit{See, e.g., Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11 (Minn. 1979)} (employer liable for employee who negligently started fire); \textit{Lange v. National Biscuit Co., 297 Minn. 399, 211 N.W.2d 783 (1973)} (employer liable when source of assault related to employee’s duties); \textit{Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd., 329 N.W.2d 306 (1982)} (employer liable when psychologists engaged in sex acts with patients).

\textsuperscript{214} \textit{See, e.g., Molien v. Kaiser Foundation Hospitals, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980)} (erroneous diagnosis of venereal disease lead to allowance of damages for negligent infliction of emotional distress, mental suffering, medical expenses associated with marriage counseling, and loss of consortium).

\textsuperscript{215} \textit{See Minn. Stat. § 181.953 subd. 1 (Supp. 1987)} (the statutory requirement that employers not test their own employees inserts an independent contractor into the testing scheme and thereby vitiates any respondeat superior liability. It probably would not vitiate a suit based on a theory of negligent selection of a testing company).

\textsuperscript{216} \textit{See, e.g., Minn. Stat. § 363.03 (1986)} (the Minnesota Human Rights Act spells out a wide range of factors, including race and sex, which cannot be considered in hiring or firing). Under a strict at will doctrine, any factor could be considered.

\textsuperscript{217} \textit{See Minn. Stat. §§ 181.950–957 (Supp. 1987)}.

\textsuperscript{218} \textit{See supra note 129} (citing federal statutes). \textit{See also Minn. Stat. §§ 181.931–.935 (Supp. 1987)} (“whistle blower” statute protects employees who report suspected violations of law); \textit{Minn. Stat. § 363.03 (1986)} (prohibiting discrimination based on sex).
1. Discrimination

a. Race

Both state and federal legislation prohibit employers from discriminating on the basis of race. In the screening context, employers may run afoul of discrimination statutes because of the disparate effects of screening on minority candidates. Disparate effects may arise in two ways. First, substance use appears to be more prevalent in minority communities. Second, minorities are more likely victims of false positive results.

In New York City Transit Authority v. Beazer, the United States Supreme Court upheld the discharge of employees for methadone use. The Court held that disparate impact on a racial group will not support a claim of racial discrimination when a work rule is safety-related rather than motivated by discriminatory intent. The court found that the rule had a rational basis and had been applied without discriminatory intent. Following this analysis, a screening program that is motivated by safety considerations is unlikely to be found discriminatory. In programs that do not run follow-up tests, however, there is a possibility of disparate impact claims arising from flaws in screen procedures.

b. Handicap

The Rehabilitation Act of 1973 protects handicapped individuals from employment discrimination by government agencies or employers who receive federal funds. In 1978, Congress amended...
the definition of ‘handicapped’ in the Rehabilitation Act to exclude individuals “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.”

In Johnson v. Smith, a United States District Court applied the Rehabilitation Act in Minnesota. In July 1983, the plaintiff applied for a job as a correctional officer at the federal prison camp in Duluth. The Bureau of Prisons gave the plaintiff a rating of 95 on a scale of 100, based on a personal qualifications statement he had filled out. Prior to an interview, the plaintiff filled out an interview questionnaire. In the questionnaire, the plaintiff admitted a history of alcohol and drug abuse that ended with his treatment for chemical dependency in 1977.

The plaintiff alleged that his prior alcohol and drug use was the focus of his interview. The plaintiff was notified that he had been removed from consideration for the job because of his history of substance dependency. The plaintiff filed suit alleging deprivation of a property interest contrary to the fifth amendment and discrimination under the Rehabilitation Act. The Federal Bureau of Prisons moved for summary judgment. The court granted summary judgment as to the fifth amendment claim, but denied summary judgment on the Rehabilitation Act claim. The court held that the plaintiff had made out a prima facie case under the Act, and the burden of proof then shifted to the defendant to rebut the inference that employment was denied because of the handicap. The court said that because questions still remained as to whether the plaintiff was as well quali-
fied as other applicants for the job and whether his handicap would prevent him from doing the job, summary judgment must be denied.238

Johnson is important in the screening context. The simple showing of substance use will not permit an employer to discharge an employee. The employer must also show that the employee poses a direct threat to property or the safety of others, or that the substance use impacts on job performance.239

If an employee’s job performance has been satisfactory and the job does not impact on safety, the employee can be discharged only at a large risk of employer liability.240 Johnson is also important because the Minnesota Supreme Court applies principles developed in federal courts in deciding discrimination claims.241

While the Rehabilitation Act applies only to employers receiving federal funds, the Minnesota Human Rights Act242 applies to all employers in Minnesota.243 The language in the pertinent section of the Minnesota Human Rights Act is virtually identical to that in the Rehabilitation Act.244 In defining a disability, the Minnesota Human Rights Act excludes “any condition resulting from alcohol or drug abuse that prevents a person from performing the essential functions of the job in question or constitutes a direct threat to property or the safety of others.”245

The Human Rights Act goes further than the Rehabilitation Act because it prohibits an employer from requiring, before employment, that a person “furnish information that pertains to . . . [a] disability.”246 Minnesota Statute section 363.02 allows employers to require a physical examination under certain conditions.247 These

238. Johnson, 39 Fair Empl. Prac. Cas. at 1107. See also Minn. Stat. § 363.09, subd. 5 (Supp. 1987). This is not a significant distinction. Any employee who is a danger to property or to the safety of others is unable to do the job.
239. Id. The public policy is to encourage the disabled to enter the workplace.
241. Id.
243. Minn. Stat. § 363.01, subd. 15 defines “employer” as “a person who has one or more employees.”
244. 29 U.S.C. § 706, subd. 8(B) (Supp. 1987) states that the definition of a handicapped individual:
[D]oes not include 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 reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Id.
245. Minn. Stat. § 363.01, subd. 25a(2) (1986).
246. Id., § 363.03, subd. 1(4)(a) (1986).
247. It is not an unfair employment practice for an employer, employment agency or labor organization:
exams are limited to the establishment of job-related ability. They cannot be used to determine the existence of a disability except to the extent that the disability prevents the applicant's actual job performance.248

Both the Rehabilitation Act and the Minnesota Human Rights Act require an employer to "make reasonable accommodation" for the alcoholic and drug abusing employee.249 Although "reasonable accommodation" of an alcoholic or drug abuser has not been defined with specificity under either Act, there are some general guidelines employers must follow.250 Job restructuring, part-time or modified work schedules and other similar actions are required by both Acts.251 The Minnesota Human Rights Act accommodation requirements apply only to employers with 50 or more full-time employees.252 Under both the Rehabilitation Act and the Minnesota Human Rights Act, the duty of accommodation may affect whether and how a substance abusing employee may be disciplined.253

(i) to require or request a person to undergo physical examination, which may include a medical history, for the purpose of determining the person's capability to perform available employment, provided (a) that an offer of employment has been made on condition that the person meets the physical or mental requirements of the job; (b) that the examination tests only for essential job-related abilities; and (c) that the examination, except for examinations authorized under Chapter 176 is required of all persons conditionally offered employment for the same position regardless of disability, or

(ii) with the consent of the employee, to obtain additional medical information for the purposes of establishing an employee health record;

(iii) to administer preemployment tests, provided that the tests (a) measure only essential job-related abilities, (b) are required of all applicants for the same position regardless of disability except for tests authorized under Chapter 176, and (c) accurately measure the applicant's aptitude, achievement level, or whatever factors they purport to measure rather than reflecting the applicant's impaired sensory, manual, or speaking skills, except when those skills are the factors that the tests purport to measure...

MINN. STAT. § 363.02, subd. 1(7)(i)-(iii) (Supp. 1987).

248. Id. at (iii).


250. See infra notes 252-53 and accompanying text. The first general rule is, simply, never to discharge an employee solely on the basis of a disability. In other words, an employer should not discharge on the basis of a positive urinalysis substance screen. Second, the employer should attempt to accommodate the employee.

251. 45 C.F.R. § 84.12(b); MINN. STAT. § 363.03, subd. 1(6).

252. MINN. STAT § 363.03, subd. 1(6).

253. See D'Aquila, supra note 44, at 20.
Given the similarity of the Federal Rehabilitation Act and the Minnesota Human Rights Act, and the Minnesota Supreme Court's deference to federal court interpretation of the Rehabilitation Act, Minnesota courts are apt to apply the same analysis to drug and alcohol abuse cases as was used in Johnson. This means that Minnesota employers cannot discharge an employee solely because the employee tests positive on a substance abuse screen.

3. Unemployment Compensation

In instituting screening programs many employers have opted to terminate employees who fail screens.254 Employers who terminate employees for testing positive on a screen may face liability for unemployment compensation.255 In these cases, it will be necessary for employers to become aware of standards relating to payment and denial of benefits and the liability of paying benefits to former employees.

There are as yet no Minnesota appellate decisions on the grant or denial of benefits in a case involving substance screening. Two Minnesota cases involving use of alcohol and unemployment compensation are Tilseth v. Midwest Lumber Co.256 and King v. Little Italy.257 A look at these two cases and decisions from other states specifically dealing with substance screening is useful in exploring employer liability for unemployment compensation.

Both Tilseth and King involve the interpretation of the Minnesota Economic Security Law,258 which disqualifies claimants from unemployment benefits for "misconduct."259 Disqualifications from benefits for misconduct will be the major issue facing employers when an employee is discharged in a screening program.260 When an employee is not guilty of misconduct, a discharge will increase an employer's contribution to the unemployment insurance fund.261 Thus


255. See Note, supra note 254, at 590.

256. 295 Minn. 372, 204 N.W.2d 644 (1973).


258. MINN. STAT. §§ 268.03-268.24.

259. MINN. STAT. § 268.09, subd. (2). See King, 341 N.W.2d at 898; Tilseth, 295 Minn. at 373, 204 N.W.2d at 645.


261. See MINN. STAT. § 268.09.
the employer's liability for a discharged employee may be indirect, rather than direct.

In *Tilseth* the issue was whether consumption of intoxicants by a truck driver during working hours constituted statutory misconduct. The employee's only symptom of actual intoxication was talking loudly and the employer had never curtailed the employee's driving duties. The employee repeatedly had alcohol on his breath. In *Tilseth*, the Minnesota Supreme Court for the first time defined "misconduct" in the unemployment statute by adopting a three-part test for determining when employee actions constitute misconduct. Applying the test to the facts, the court held that "repeated consumption of intoxicants during working hours by a truckdriver . . . does constitute 'misconduct.'"

In *King*, the court of appeals adopted the *Tilseth* standard, noting that the test had been expanded to include "any actions that demonstrate a lack of concern for one's job." Finding that King voluntarily reported to work intoxicated, the court affirmed the decision of the Commissioner of Economic Security to deny unemployment benefits.

The inability of screens to detect impairment has led to employer liability for unemployment benefits. In *Blake v. Hercules, Inc.*, the court pointed out that "mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct.'"

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262. *Tilseth*, 295 Minn. at 373, 204 N.W.2d at 645.
263. *Id.*
264. *Id.* Conduct is "misconduct" only when it is:
   1) wilful or wanton disregard of an employer's interests, or
   2) carelessness or negligence constituting wrongful intent or evil design, or
   3) intentional and substantial disregard of the employee's duties to the employer.
265. *Id.* at 374-75, 204 N.W.2d at 646 (citing Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259, 296 N.W. 636, 640 (1941)). The court pointed out that "mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct.'" *Id.* at 375, 204 N.W.2d at 646.
266. *King*, 341 N.W.2d at 898.
267. *Id.* at 899. King was scheduled to have the day off. After receiving a call at home requesting him to come in to work to repair a malfunctioning mixer, King went in to work intoxicated. King brought his dog with him and permitted the dog to roam the dining room of the restaurant where King worked. He had been warned about reporting to work intoxicated. *Id.* at 897.
268. *Id.* at 899. There is one exception to disqualification for unemployment compensation. If an employee makes "consistent efforts" to maintain necessary treatment, compensation is still available. See Minn. Stat. § 268.09, subd. 1(c)(2) (Supp. 1987). Total abstinence from substances or complete success of treatment is not required. See Moeller v. Minnesota Dept. of Transportation, 281 N.W.2d 879, 882 (Minn. 1979); Leslin v. County of Hennepin, 347 N.W.2d 277, 279 (Minn. 1984).
269. See supra notes 61-62. See also Glide Lumber Products v. Employment Div., 86
the Virginia Court of Appeals held that testing positive on a screen did not prove that an employee reported to work under the influence of marijuana.\textsuperscript{271} The Virginia and Minnesota courts have similarly defined misconduct.\textsuperscript{272} Likewise, Oregon courts, interpreting misconduct similarly to Minnesota courts, have allowed unemployment claims for employees discharged for failing screens.\textsuperscript{273}

As Tilseth might indicate, when a screen reveals intoxicant use that also violates laws and regulations relating to the employee's job, employee misconduct will be found. In \textit{Grinnell v. Board of Review of Industrial Commission of Utah},\textsuperscript{274} the Utah Supreme Court upheld a board of review decision denying a truck driver unemployment benefits.\textsuperscript{275} After discovering that a speed governor on the truck had been removed, and that in a twenty-four hour period the truck had been driven for twenty-one hours and twenty-eight minutes, the employer required the employee to take a urinalysis screen.\textsuperscript{276} The screen revealed marijuana use.\textsuperscript{277} The court held that the discharge was for misconduct and upheld the Board's decision to deny unemployment benefits.\textsuperscript{278}

Not yet resolved is the question of whether an employee is entitled to benefits when the employee quits a job rather than submit to a screen.\textsuperscript{279} The Oregon Court of Appeals confronted, but did not conclusively answer, that question in \textit{Glide Lumber Products Co. v. Employment Division}.\textsuperscript{280} The hearing officer found that the required screening program was an unreasonable condition of employment.


\textsuperscript{271} \textit{Id. at 272, 356 S.E.2d at 455-56.}

\textsuperscript{272} \textit{Compare supra note 264 with Blake, 4 Va. App. 270, 356 S.E.2d 453. The Blake court found that:}

\text{[An employee is guilty of 'misconduct connected with his work' when he deliberately violates a company rule reasonably designed to protect the legitimate business interests of his employer, or when his acts or omissions are of such a nature or so recurrent as to manifest a willful disregard of those interests and the duties and obligations he owes his employer.]


\textsuperscript{274} \textit{732 P.2d 113} (Utah 1987).

\textsuperscript{275} \textit{Id. at 115.}

\textsuperscript{276} \textit{Id. at 114.}

\textsuperscript{277} \textit{Id.}

\textsuperscript{278} \textit{Id. at 115.}

\textsuperscript{279} \textit{See infra} notes 281-81 and accompanying text.

\textsuperscript{280} \textit{87 Or. App. 152, 741 P.2d 904} (1987).
and the employee was justified in quitting rather than submitting to the screen. 281 The court refused to hold that the screen was unreasonable on its face and remanded for a factual inquiry into the reasons why the employee quit rather than submit to the screen. 282

In view of screen imprecision, it seems unlikely Minnesota courts will deny unemployment benefits to employees discharged for failing a screen unless other questionable conduct is also involved. 283

V. MINNESOTA STATUTE § 181.950: DRUG & ALCOHOL TESTING IN THE WORKPLACE

Concerns about screening accuracy and employee privacy have prompted commentators to propose legislation regulating employer screening. 284 Two such bills were introduced in the 1987 session of the Minnesota Legislature. 285 One was introduced by Representative Pappas and one by Senator Chmielewski. 286 After the Pappas bill passed the House, 287 Representative Pappas and Senator Chmielewski met and compromised on a version of the bill. 288 The final version of the bill was signed on June 3, 1987 by Governor Perpich. 289

281. Id. at 154, 741 P.2d at 905.
282. Id. at 156, 741 P.2d at 907.
283. See supra notes 254-68 and accompanying text. See also Glide, 87 Or. App. 152, 741 P.2d 904.
284. See generally Note, supra note 13, at 288-91.

The legislature finds that there exists a serious problem relating to testing for substance abuse in the workplace. In reaction to a real concern about drug and alcohol abuse, employers are increasingly using drug tests to screen job applicants and employees. There are, however, serious concerns about the accuracy of testing procedures and the privacy interest of individuals. Therefore, the legislature is enacting sections 1 to 8 to balance the rights of employers and employees and to ensure that, if the employers use drug testing, the tests are as accurate as possible and limited to circumstances that threaten individual or public safety.

H.F. 42 § 1, 75th Legis., 1st Sess., Mar. 5, 1987 (authored by Rep. Pappas). The bills attempted to solve two employee concerns, privacy and test accuracy, while allowing employers to test individuals actually impaired on-the-job. See id. This section was deleted from the final version of the bill.

A. Process of Testing

The Drug and Alcohol Testing in the Workplace Act imposes two pre-conditions on instituting a workplace screening program. First, no program may be instituted unless it is done pursuant to a written policy. Second, no program may test employees in an arbitrary and capricious manner. The written testing policy must set out: 1) which employees are subject to screening; 2) the circumstances under which screening will be instituted; 3) the right and consequences of refusal of a screen; 4) the actions taken if a screen is positive; 5) the employee’s right to explain or contest a confirmatory test; and, 6) any other appeal procedures available. Additionally, employers must provide an individual employee with written notice whenever that employee first becomes subject to the screening program as well as posting general notice of the program in the workplace.

Although policy statements are not binding contracts under Pine River State Bank v. Metille, the specificity required by the statute virtually guarantees that employers will find their substance screening policies to be enforceable contracts. Because the remedies under the act are non-exclusive, an employer whose screening program violates both the statute and the policy may be liable for punitive damages, contract damages, and also be ordered to reinstate the employee with back pay.

290. Id.
291. Id. at § 181.951, subd. 1.
292. Id. at subd. 1(b).
293. Id. at subd. 1(c).
294. Id. at § 181.952, subd. 1(1)-(6) (listing minimum information to be included in employer’s testing policy). The statutory requirements apply to job applicants as well as employees. Id.
295. Id. at § 181.951, subd. 2.
297. Id. at 626. See Hunt, 384 N.W.2d at 856-57. See also supra notes 137-41 and accompanying text. The requirement that disciplinary processes and procedures be included in the policy means that they will also be enforceable in contract actions. See Hunt, 384 N.W.2d at 856-57. There are sound policy reasons behind this requirement. Part of the motivation for the legislation was to protect the rights of employees. See supra note 286. Requiring screening policies to be enforceable in contract actions permits employees to know with certainty what their rights and responsibilities are.
298. See § 181.956, subd. 2. “In addition to any other remedies provided by law...” Id.
299. See id.
300. See supra notes 137-61 and accompanying text.
301. See § 181.956, subd. 4. “A court may, in its discretion, grant any other equitable relief it considers appropriate, including... reinstate[ment] with back pay.” Id. This approach is sound policy. Providing employees multiple remedies insures employers will not abuse their narrowly prescribed right to screen. It forces the em-
An employer may screen employees only in certain situations. Job applicants may be screened only when a job has been offered and the employer requires a substance test of all applicants for that position.\textsuperscript{302} Current employees may be screened once a year as part of a physical examination, if the employee has two weeks notice that a screen will be part of the physical.\textsuperscript{303} Employers may also screen an employee if they have reasonable suspicion that an employee: 1) is under the influence of a substance; 2) has violated a work rule that prohibits the use, possession, sale, or transfer of drugs on the employer’s premises while operating the employer’s machinery; 3) has sustained or caused an injury; or, 4) has caused or been involved in a work-related accident, or an accident involving machinery in the workplace.\textsuperscript{304}

Employers may screen on a random basis only those employees whose position is “safety-sensitive.”\textsuperscript{305} The definition of “safety-sensitive” in the statute is almost sure to be a source of litigation. It is so vague that virtually any employee could be said to be in a job which is safety-sensitive.\textsuperscript{306} To qualify as a safety-sensitive position an employer will have to be able to show a close nexus between the duties of a job and a threat to health and safety.\textsuperscript{307}

The employer may screen an employee who either has been in a chemical dependency program covered by an employee benefit plan, or has been referred to treatment by the employer within the preceding two years.\textsuperscript{308} This provision is particularly onerous in that, while conceding that the employee may have a problem with chemical abuse, it provides that any failure in the rehabilitation program can mean the loss of the employee’s job.\textsuperscript{309} This seems to con-

\textsuperscript{302} Id. at § 181.951, subd. 2. Additionally, if an applicant receives a job offer conditional on passing a substance screen, the offer cannot be withdrawn based on a positive unconfirmed test result. Id. at § 181.953, subd. 11.

\textsuperscript{303} Id. at § 181.951, subd. 3.

\textsuperscript{304} MINN. STAT. § 181.951, subd. 5.

\textsuperscript{305} Id. at § 181.951, subd. 4. “Safety-sensitive position means a job, including any supervisory or management position, in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person.” Id. at § 181.950, subd. 13.

\textsuperscript{306} See id. See also George, Minnesota Opens Door to Employee Drug Testing, St. Paul Pioneer Press Dispatch, Aug. 30, 1987, at 14, col. 2 (discussing criticism of the legislation by Jack Mogelson, president of the political action arm of the Teamsters Union).

\textsuperscript{307} See MINN. STAT. § 181.950, subd. 13.

\textsuperscript{308} Id. at § 181.951, subd. 6. In such a situation, the employer may request or require testing without notice to the employee. Id.

\textsuperscript{309} See D’Aquila, supra note 172, at 258. See also infra notes 333-37 and accompanying text.
lict with the Human Rights Act's requirement of "reasonable accommodations" for people with handicaps.\textsuperscript{310}

Although an employer is under no duty to screen,\textsuperscript{311} once an employer decides to implement a screening program the statute provides a number of procedural requirements that must be followed in executing the program. The major requirement is that the test results must be confirmed by a second test before any actions may be taken against an employee.\textsuperscript{312} A second requirement is that an employer may not discharge an employee for a positive screen, even if the screen is confirmed, unless the employee has been given an opportunity to participate in counseling or rehabilitation.\textsuperscript{313}

\section*{B. Regulation of Laboratories}

A notable requirement of the statute is the licensing and regulation of laboratories.\textsuperscript{314} Additionally, employers are proscribed from screening their own employees.\textsuperscript{315} The Department of Health is directed to promulgate regulations governing standards for licensing, samples appropriate for screening, methods of analysis, chain-of-custody procedures, threshold detection levels, and licensing fees.\textsuperscript{316} In the interim, an employer may use a nonlicensed testing laboratory, but the statute prescribes education for the laboratory director, proficiency standards, acceptable samples for screening, methods of analysis, chain-of-custody procedures, and certification of confirmatory tests.\textsuperscript{317}

\begin{footnotesize}
\footnotesize{310. See D'Aquila, supra note 173, at 267.}
\footnotesize{311. Minn. Stat. § 181.951, subd. 7. This relieves the employer of Ponticas-type liability as it relates to screening. See supra notes 36-38 and accompanying text.}
\footnotesize{312. Minn. Stat. § 181.953, subd. 10(a) (prohibited employer actions include discharge, discipline, discrimination and request or requirement of rehabilitation).}
\footnotesize{313. Id. at § 181.953, subd. 10(b)(1)-(2). The opportunity for counseling or rehabilitation is statutorily required only when the positive confirmatory test result which precipitates employer action is the first such result for the employee. Id. at subd. 10(b). If the counseling or rehabilitation is not covered by the employee's benefit plan, the employee who chooses treatment is financially responsible for the cost. Id. at subd. 10(b)(1). Employer action may then be taken upon the refusal to participate in treatment, the withdrawal or failure to complete the program, or the occurrence of a positive confirmatory test result after completion of the treatment program. Id. at subd. 10(b)(2).}
\footnotesize{An employer may temporarily suspend the employee or transfer the employee to a different position without change in salary, however, pending the outcome of the confirmatory test if it is reasonably necessary to protect the safety of others. Id. at subd. 10(c). Reinstatement with back pay is mandatory if the confirmatory test, or a requested retest, is negative. Id.}
\footnotesize{314. Id. at § 181.953, subd. 1.}
\footnotesize{315. Id. at subd. 4.}
\footnotesize{316. Id.}
\footnotesize{317. Id. at subd. 2. Permanent regulations must be adopted by Jan. 1, 1988. Id. at subd. 1(b).}
\end{footnotesize}
C. Protection of Privacy

Employee privacy is protected in a number of ways. Laboratories cannot release any information obtained in a screen to an employer other than "the presence or absence of drugs, alcohol, or their metabolites."318 Unless needed in an arbitration, an administrative hearing, or in litigation, screen results may not be released without the permission of the employee.319 The statute also provides a cause of action for employees harmed by the violation of the statutory requirements by either an employer or a laboratory.320

D. Remaining Problems

The legislation goes a long way toward resolving some of the problems in workplace substance screening. The statute sets out a framework that employers and employees can rely on to determine their rights and responsibilities. The statute is not a panacea for the problem of substance abuse. Neither is it a cure for the problems in substance screening programs.

Unfortunately, the statute perpetuates the assumption that an employee is guilty of substance use until proven innocent.321 After an employee's sample has tested positive in a confirmatory test, if the employee wishes to challenge the screen the employee must pay the cost of a re-test.322 Implicit in this section is a belief that the chain-of-custody procedures will eliminate handling errors.323 Requiring employees to pay the costs of re-testing places the burden of proof on the employee. When an employer has taken the deliberate action to invade an employee's privacy, the employer should bear both the burden of proof and the costs of the employee's exonera-

318. Id. at § 181.954, subd. 1.
319. Id. at subd. 2-3(1). Other exceptions to confidentiality include when results are needed by treatment facilities for evaluation or treatment of the employee, and when disclosure is pursuant to federal laws, regulations or orders. Id. at subd. 3(2)-(3).
320. Id. at § 181.956. Under the statutory cause of action, the violation must have occurred knowingly or recklessly. Id. at subd. 2. Injunctive relief is available as are appropriate equitable remedies beyond money damages. Id. at subd. 3-4. Finally, the statute provides a cause of action in addition to any other remedies available by law. Id. at subd. 2.
321. See id. § 181.952, subd. 1(5). To many critics, screening is offensive because it forces employees to prove they are not guilty of substance use. See Note, supra note 13, at 276.
322. Minn. Stat. § 181.953, subd. 6. The employee is also permitted to explain the test result.
323. Id. at subd. 5.
324. Compare id. at subs. 5-6 with supra note 71 (enumerating handling error problems). A shortcoming of the statute is its failure to provide a mechanism for protests of handling procedures that do not conform to the statute's requirements, short of litigation. See supra notes 314-17 and accompanying text.
tion attempt.\textsuperscript{325} Similarly, the employer attempting to terminate an employee should not only have to offer rehabilitation, but also pay for its costs. Employers are not required to pay for an employee's rehabilitation unless there is coverage under an employee benefit plan.\textsuperscript{326} Given that substance abuse is treated and treatable as a disease,\textsuperscript{327} employers should have to bear that burden. Otherwise the problem is only shifted to the next employer.\textsuperscript{328}

Another remaining problem relates to a screen's inability to detect on-the-job substance use.\textsuperscript{329} Except in "reasonable suspicion testing"\textsuperscript{330} an employer does not need to show a connection between an employee's work behavior and a desire to screen the employee.\textsuperscript{331} This problem could be dealt with by a legislative revision narrowing the definition of a safety sensitive position.\textsuperscript{332}

Probably the largest defect in the statute is its method of dealing with an employee whose test is confirmed positive.\textsuperscript{333} There is no room for an employee to relapse.\textsuperscript{334} In light of an employer's right under the statute to move an employee to a position which is not safety sensitive, this provision is, at best, harsh.\textsuperscript{335} There is no requirement that the second test be motivated by on-the-job behavior.\textsuperscript{336} The statute should be modified to provide the employee who completes a rehabilitation program, and whose screens are subsequently substance free for two years, a clean slate. Ideally, there should be some sort of sunset provision under which a positive screen result would be removed from an employee's record after a period of time. As the statute is now written, positive results thirty years apart could result in employee termination.\textsuperscript{337}
VI. GUIDELINES FOR SCREENING

Employers are legitimately concerned about the use of intoxicants in the workplace.338 Employee concerns about privacy also have a legitimate basis.339 Both employers and employees have an interest in the accuracy of screening programs. An employer who contemplates substance screening of employees must be aware that employee substance abuse is a complex and difficult problem and that substance screening is no panacea.340

Employers, prior to instituting a screening program, must carefully weigh the reasons for screening, balancing anticipated gains against potential liabilities. To do so, employers must first educate themselves about the substance abuse problem. As a part of this education process, the employer must ascertain the applicable law. Only after completion of this education process should a screening program be formulated. Each business will have characteristics that require tailoring of the program to fit its needs.341

Prior to the actual institution of a program, an employer should determine what action will be taken as a result of a “positive” screen result.342 Clearly, an employee cannot be discharged with impunity solely for a positive screen.343 A decision will have to be made whether to institute an employee assistance program. An in-house employee assistance program may not be practical for small employers.344

Rules relating to on-the-job use of intoxicants and the consequences of on-the-job impairment should be widely disseminated to employees.345 Training of managers and supervisors should be done to appraise them of the rules and teach them how to recognize employees with potential abuse problems.346

There are a number of “nevers:”

1) Never screen without good reason to believe there is a company-wide substance abuse problem;

338. See supra notes 25-61 and accompanying text.
340. Rothstein, supra note 76, at 435.
341. Id.; Lehr & Middlebrooks, supra note 24, at 419; Geidt, supra note 14, at 200-03.
342. See Rothstein, supra note 76, at 435.
343. See supra notes 312-13 and accompanying text.
344. See Rothstein, supra note 76, at 434-35 (discussing the costs to employers of employee assistance programs).
345. Bensinger, supra note 26, at 22.
346. Rothstein, supra note 70, at 434.
2) Never screen without reasonable suspicion;
3) Never design a screening program to force employees to give samples in front of another individual;
4) Never allow careless sample handling to occur;
5) Never take action against an employee on the basis of unconfirmed screen results;
6) Never assume an employee is an alcoholic or an addict on the basis of a screen result;
7) Never communicate the results of a screen to anyone without the employee’s permission, except on a need to know basis;
8) Never, under the guise of a substance screen, perform medical tests designed to reveal information about an employee other than that which directly relates to substance use; and
9) Never hire a screening service or laboratory without checking the laboratory’s credentials and at least considering liability insurance or indemnification in any employment dispute arising out of a screen result.

Employers should be aware that screening has liability costs as well as administrative costs, and may be an expensive risk, especially for small businesses. The rewards are unproven and the screens can be unreliable.

**CONCLUSION**

Employers are justifiably concerned about the problem of substance abuse in the workplace. The rush to use urinalysis substance screening as a cure ignores the fact that substance abuse is a deeply rooted and complex problem. Urinalysis substance screens, used properly, can be an effective tool in the elimination of substance use in the workplace. Used improperly, screens can subject employers to liability.

Employees have an interest in protecting their privacy, jobs, and reputations from unwarranted accusations of chemical dependency. Urinalysis substance screens are subject to inaccuracies and may be an invasion of privacy.

The growing urinalysis screen industry has been completely unregulated. There has been no conformity in standards of sample handling, test procedures, or training requirements for technicians. These factors, together with the rapid growth of test utilization, could lead to an increased likelihood of inaccurate results.

The new Minnesota statute will go a long way towards clarifying the relative rights of employers and employees. The statute will increase confidence in the accuracy of screen results by regulating the screening industry. The legislation does not, however, make urinalysis substance screening a panacea for the complex problem of sub-
stance abuse in society. Therefore, any employer’s course of action in dealing with substance abuse in the workplace should be deliberate and well considered.

Victor H. Smith