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ABSTRACT

This document presents discussions of four problems that may be found in the workplace. "AIDS in the Workplace: Employee Safety and Rights" (Robert Durham and Burton White) explores issues of employee/employer relationship and the issue of Acquired immune deficiency syndrome (AIDS) in the workplace. It concludes that the management of the AIDS infection in the workplace should ensure the safety of the employees and the prevention of handicap discrimination as the goals of labor and management. "Legal Challenges to Drug Testing in Public Employment" (Gene Mechanic) examines the relationship of the fourth amendment and drug testing. Other Constitutional challenges to drug testing and challenges under state constitutions are also discussed. The article concludes that it is crucial for employers and employees to work together to achieve a reasonable approach for dealing with drug use problems in the workplace. "Technical Issues and Procedural Safeguards in Workplace Drug Testing" (Steven Hecker) discusses analytical methods for drug testing, capabilities and limitations of drug screening techniques, and labor and management considerations in designing drug screening programs. "Sexual Harassment in the Workplace: Eliminating the Offensive Working Environment" (Paula Barran) discusses the development of legal standards and the employer's responsibilities to take prompt, appropriate, remedial action. "Overview of Legal Issues Relating to Smoking in the Workplace" (Jeffrey Merrick) discusses legislation on smoking, worker's compensation, and constitutional rights of workers. (ABL)

LERC MONOGRAPH SERIES

ISSUE NO. 7

PROBLEMS IN THE WORKPLACE: AIDS, DRUG TESTING, SEXUAL HARASSMENT, AND SMOKING RESTRICTIONS

by

Robert Durham, Burton White, Steven Hecker,
Gene Mechanic, Paula Barran, Jeffrey Merrick

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Foreword

This issue of the *Monograph* admittedly takes some liberty in the use of that literary term. That is, it goes beyond presenting a single article, dealing with a single subject, as the word monograph would dictate. Instead, and as was the case in Issue No. 5, this edition contains a number of articles which address a variety of subjects. In defense, it might be said that these articles do deal with the single theme of *Problems in the Workplace*, and it could be said that they actually constitute a *Series* of monographs published under a single cover. This would be in keeping with the name *Monograph Series* and be, perhaps, enough to appease the *literati*.

The quality of the work which a publication presents is, of course, of far greater importance than the literary tidiness of its moniker. In this regard, no apology is required. The Labor Education Research Center has again been favored by the efforts of members of Oregon's labor, management and neutral communities. The talent and insight which they have brought to the contributions which follow would be a credit to any publication by any name. We are proud and pleased to present their work.

As the reader explores the articles contained in this edition, it will be found that the discussion of the case law, the nature of the AIDS virus and/or the technical aspects of drug testing has not been compromised by some condescending view of the reader's abilities. The discussion is highly technical. It has, however, been rendered in very readable style. This is a testament not only to the technical expertise of the authors, but to the not inconsiderable talent they brought to their work.

These comments would not be complete without acknowledging those who assisted in the various aspects of the *Monograph's* publication. First among these are the members of the Editorial Board who again took time away from their normal assignments at the University to review and critique the manuscripts. Barbara Hill performed her highly-skilled labors again as our indispensable Copy Editor. And LERC's own Barbara Oppliger coordinated the secretarial preparation of the manuscripts through the offices of this edition's contributors, while juggling production details on campus.

James J. Gallagher, Editor
LERC Monograph Series

Dedication

This seventh edition of the LERC *Monograph Series* is dedicated to LERC's Director, Emory F. Via, who will be retiring from the University of Oregon as of September 1, 1988. With an outstanding career behind him, Emory will undoubtedly be lauded in other quarters. It is particularly fitting, however, that his many contributions to this publication be noted here as well.

As Director of LERC, Emory has, in effect, served as the *Monograph*'s publisher. It was he that approved the initial proposal for the publication in 1981. That was a time when the Center was forced to operate under a very heavily strained budget and there was no guarantee that the publication would meet with the success that it has. In a word, it was a gamble which he was willing to take which others might not. Emory has done much more, however, than cope with underfunding.

As an active and original member of the *Monograph*'s Editorial Board, Emory has taken countless hours from an already crushing schedule to review manuscripts and attend editorial meetings. This was true even when he was on a well-earned sabbatical leave. Moreover, the suggestions which he offered during these sessions were, without exception, both cogent and constructive. It is the type of counsel which will be greatly missed.

There is no tangible way in which Emory Via can really be repaid for the many contributions which he has made not only to this publication but to labor education and labor relations generally. Hopefully, however, the knowledge that this is true will in itself be a partial payment on that account. The faculty and staff of LERC would like to think so.

-JJG
April 1988

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AIDS IN THE WORKPLACE;
EMPLOYEE SAFETY AND RIGHTS
by
Robert D.Durham and Burton D.White

I. INTRODUCTION

Acquired Immune Deficiency Syndrome (AIDS) was first defined and reported in the United States in 1981. Not only is it one of the most serious public health problems we now face, it has had profound impact upon the workplace. Employers and unions struggle with competing claims that seem to defy resolution.

When, if ever, does a claim to know the HIV status of another person outweigh that person's right to privacy? What is the best way to insure an employee against HIV infection when that employee's job duties require contact with persons who may be seropositive? What obligations does an employer have to an employee who is infected with the AIDS virus and to that employee's colleagues who may fear infection? What is the responsibility of a labor organization which may represent both seropositive worker and colleagues concerned about their own safety?

A recent decision by the Employment Appeals Board of Oregon[1] now before the Oregon Court of Appeals provides a case in point.

From the finding of facts presented by the Board we learn: The duties of a Union County jail corrections officer included the handling of inmate laundry. It was rumored that an county jail inmate had AIDS, but no action was taken by the employer to deal with the rumor. The inmate's physician informed the employer that the prisoner had AIDS, but this fact was not communicated to the staff.

[1]Appeals Board Decision 87-AB-1515, entered October 6, 1987.

Training in the methods of dealing with persons with AIDS was held weeks after the issue first surfaced. The training was voluntary. The officer's union advised him that he did not have a grievable situation concerning the infected employee.

A. Reversal by the Appeals Board

The employee resigned and filed for unemployment insurance benefits. The administrative decision to disqualify was upheld by the Referee. The Appeals Board reversed, saying:

> Unless the employer gave this claimant and other employees information about inmates infected with AIDS (or some other highly infectious disease) the only alternative to quitting that existed would be to take chance the that infection would not result from the performance of their jobs. This is not a reasonable alternative.

Employees have the right to obtain and employers have an obligation to provide training in the techniques to guard against HIV infection in the workplace,[2] but the Appeals Board decision seems to assert that an employee has the right to know and the employer has an obligation to report that a *specific person* is seropositive.[3]

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[2]See, for example, *Oregon Health Division's Guidelines for AIDS in the Workplace* (1986); "Protection Against Occupational Exposure to Hepatitis B Virus (HBV) and Human Immunodeficiency Virus (HIV)", Joint Advisory Notice: Department of Labor/Department of Health and Human Services, 52 *Federal Register*, 41818 (1987); "Recommendations for Prevention of HIV Transmission in Health Care Settings," 36 *Morbidity and Mortality Weekly Report* (hereinafter, *MMWR*,) (1987).

[3]It is not entirely clear from the decision whether the Appeals Board thought the employer should have provided information about procedures to deal with AIDS, or, more likely, that a specific inmate was infected with AIDS, or, more generally,that one of the inmates within the officer's assignment was infected with AIDS, but even the latter could result in easy identification of the individual. Finding of Fact (12) states: "Had the claimant been advised that a particular inmate had AIDS, he could have taken precautions to protect himself from the transmittal of any body fluids, . . . "

It should also be noted that the Board's statement that AIDS is a "highly infectious disease" is not in accord with prevailing medical and public health

This article discusses what guidance is offered or what problems may be created when the state statute mandates that the results of HIV tests be kept confidential while state and federal statutes prohibit discrimination against persons with disabilities. It will also comment upon some of the understandable concerns about AIDS in the workplace.

It is well to start with an understanding of the disease and how it is transmitted.

II. AIDS: DEFINITIONS, METHODS OF TRANSMISSION[4]

A. AIDS

AIDS is the acronym for ACQUIRED IMMUNE DEFICIENCY SYNDROME, a disease caused by the Human Immunodeficiency Virus (HIV)[5] and characterized by the occurrence of a defect in the body's natural immunity against diseases. The disease manifests itself months to years after the initial infection with the AIDS

judgment which is that "HIV infection is difficult to transmit. . ." Theodore M. Hammett, *AIDS and tho Law Enforcement Officer,* U.S. Department of Justice, National Institute of Justice.p. 4.

[4]Unless otherwise indicated, the sources for the discussion in this section are: "Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy Associated Virus in the Workplace," 34 *MMWR* 682 (1985); Friedland, *et al,* "Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis,"*New England Journal of Medicine* (hereinafter, *NEJM*) 314 (1986); C. E. Koop, *Surgeon General's Report on Acquired Immune Deficiency Syndrome* , U.S. Department of Health and Human Services (1986); Weiss, *et al,* " HTLV-III Infection Among Health Care Workers," 314 *Journal of the American Medical Association* 2089 (1986); as well as those works cited in footnote 2.

[5]HIV has also been called Human T-Lymphotropic Virus Type III (HTLV-III), and Lymphadenopathy Associated Virus (L.V). Human Immunodeficiency Virus (HIV) has come to be the generally accepted term.

AIDS virus. Persons with AIDS become susceptible to illnesses which are rarely found in persons whose immune systems are functioning normally.

Infection occurs when the virus enters the blood stream. Although HIV has been isolated from such body fluids as tears, saliva and urine, the evidence is that transmission is through sexual intercourse and the exchange of blood.[6] Research continues to reinforce the finding that HIV is not transmitted by casual contact:

> The cumulative epidemiologic data indicate that transmission of. . . HIV requires direct, intimate contact with or parenteral[7] inoculation of blood and blood products, semen or tissues. The mere presence of, or casual contact with, an infected person cannot be construed as "exposure" to . . . HIV.[8]

1. Seropositive

The first indication that the disease is present usually is a blood test which shows antibodies to the virus. Even when blood is seropositive, a person may feel no symptoms whatever, and may be able to function normally. Despite this, the person is assumed to be capable of transmitting the disease to others through sexual contact or blood-to-blood contact.

2. AIDS Related Complex (ARC)

The condition of a person infected with the AIDS virus can degenerate to a second stage known as AIDS Related Complex (ARC). This condition exists when a person manifests some of the clinical symptoms which indicate infection with

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[6] 34 *MMWR* 682 (1985)

[7] That is, introduced into the body by a route other than through the intestines.

[8] *Op cit*, Joint Advisory Notice, 52 *Federal Register* 41820.

the virus but without any of the severe or life threatening opportunistic diseases which are used to define AIDS.

3. AIDS--The Final Stage

AIDS is the final, and so far, fatal, stage of the infection. At this stage, a person suffers such opportunistic diseases[9] as Pneumocystis Carinii Pneumonia (PCP) and Kaposi's Sarcoma (KS).

Because the disease is blood borne and can be sexually transmitted, the persons who face a high risk of infection are those who engage in unprotected intimate sexual contact with infected individuals or who inject themselves with instruments contaminated with infected blood. These two means of transmission account for approximately 95% of the known AIDS infections in the United States.[10]

B. HIV is Not Easily Transmitted

A study published in the New England Journal of Medicine advises that AIDS is not transmitted by typical social interaction such as shaking hands, sharing drinking glasses, skin-to-skin contact or any of the other normal physical interactions which occur in the home environment,[11] a much more intimate setting than the workplace.

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[9]That is, diseases which take advantage of the HIV damaged immune system.

[10]The balance of infections present in this county is accounted for by perinatal transmission (infected mother to newborn child) and by hemophiliac persons who have become infected by contaminated blood products.

[11]See 314 *NEJM* 348:
"This study supports the view that transmission of the infection requires injection of blood or blood products or intimate sexual contact, and that longstanding household exposure to patients with AIDS is associated with little or no risk of transmission of HTLV-III/LAV infection."

The Centers for Disease Control (CDC) states that "the highest risk for transmission of HTLV-III/LAV in the workplace would involve parenteral exposure to a needle or other sharp instrument contaminated with blood of an infected patient." The report goes on to note "t..e extremely low risk of transmission of HTLV-III/LAV infections *even when needle stick injuries occur. . .*"[12] (Emphasis added.)

III. CONFIDENTIALITY AND INFORMED CONSENT

A. Statutory Protection of Confidentiality

During the 1987 session of the Oregon Legislature, HB 2067 was enacted into law. The act contains the following provisions:

> No person shall subject the blood of an individual to an HIV test without first obtaining informed consent.[13]

and

> No person shall disclose or be compelled to disclose the identity of any person upon whom an HIV related test is performed, or the results of such a test in a manner which permits identification of the subject of the test, except as required or permitted by the law of this state or any rule, or as authorized by the individual whose blood is tested.[14]

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[12] 34 *MMWR* 684 (1985).

[13] ORS 433.045 (1).

The law also states: "Prior informed consent to HIV antibody testing need not be obtained from an individual if the test is for the purpose of research as authorized by the Health Division and if the testing is performed in a manner by which the identity of the test subject is not known, and may not be retrieved by the researcher." ORS 433.055 (3)

[14] ORS 433.045 (3)

The law states that "'person' includes but is not limited to any . . .government agency, employer, . . .or agent of any of them."[15]

With the passage of HB 2067, the policy of the state of Oregon is strongly on the side of individual privacy. AIDS presents no risk for most employees,[16] but for such persons as health care workers, emergency medical technicians, firefighters, and prison and police personnel, there is real concern over exposure to the AIDS virus as a result of one's work. Frequently, out of this concern comes a demand that conflicts with the statutory requirement for confidentiality: namely, that clients who are seropositive be identified to such workers.

Discussion on this matter must start with the knowledge that to date there is no record of transmission of the virus to such workers as firefighters, EMTs, or prison guards.[17] A recent notice issued jointly by the Departments of Labor and Health and Human Services points out that "it is the legal responsibility of employers to provide appropriate safeguards for healthcare workers who may be

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[15]ORS 433.045 (6)(b).

[16]"For most state employees, if you're worried about getting AIDS in the workplace, you're doing something you're not getting paid for." *AIDS Education in the Workplace An Education Design Proposal for the Oregon State Government Workforce* Draft Edition; Education Committee of the Executive Department's Task Force on AIDS, p. 27.

[17]See, for example, 19 *Criminal Justice Newsletter*, p7 "An additional piece of good news gathered by Hammett's third annual survey of federal, state and local correctional systems: there has been no known case of AIDS or transmission of the AIDS virus, to correctional employees as a result of contact with inmates." The survey was by Theodore Hammett, author of the National Institute of Justice reports cited elsewhere in this article.. see fn 21. A work previously cited (Joint Advisory Notice, 52 *Federal Register* at 41819) contains a summary of studies of health care workers who had percutaneous (through the skin) or mucous membrane exposure to blood or body fluids of HIV infected clients. See also fn 18.

exposed to these dangerous viruses. . . .OSHA will respond to employee complaints and conduct other inspections to assure that appropriate measures are being followed."[18] The notice obligates employers to assess the work responsibilities of employees according to three categories. Category I tasks are those which require that protective equipment be worn; category III tasks require no protective equipment. Category II tasks "also do not require protective equipment, but . . .inherently include the predictable job-related requirement to perform Category I tasks unexpectedly or on short notice, so that these persons should have immediate access to some minimal set of protective devices. For example, law enforcement personnel or firefighters may be called upon to perform or assist in first aid or to be potentially exposed in some other way."[19]

If identification of seropositive individuals could effectively reduce the danger of infection to workers, a balance could be sought between competing rights. However, knowledge of a person's HIV status does not reduce danger of infection and it could result in a dangerous assumption of false security. In contrast, education in and application of the procedures set up to guide workers in general and health and safety workers in particular provides real protection against infection.

B. Workplace Safety

The required level of workplace safety can be achieved, even in lockups and in places where emergency medical care is given, by establishing procedures which protect against HIV infection, by instructing workers in those procedures and by requiring that they be used for all clients.[20] This is the approach

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[18] *Id.* at 41818.

[19] *Id.* at 41829.

suggested by public health authorities as well as by the National Institute of Justice of the U.S. Department of Justice in its publication *AIDS and the Law Enforcement Officer: Concerns and Policy Response*[21]. The Joint Advisory Notice issued by the Department of Labor and the Department of Human Services states:

> Workers occupationally exposed to blood, body fluids, or tissues can be protected from the recognized risks of . . . HIV infection by imposing barriers in the form of engineering controls, work practices, and protective equipment that are readily available, commonly used, and minimally intrusive.[22]

1. Protection

The best protection for health and safety workers is for them to behave as if all clients are infectious.

> The risk of the unknown is always present in health care. It should be assumed that "every patient has everything" and appropriate infection control measures taken.[23]

Workers counter that in emergencies, application of the procedures may not be possible, but if there is not time to apply these precautions, there is not time to research a person's HIV status. Emergency care must be provided without pausing to check whether or not the patient is seropositive.

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[20] The Executive Summary of the Center for Disease Control/Occupational Safety and Health Act "Recommended Practices for Protection against Occupational Exposure to AIDS and HBV" is attached as an appendix to this article.

[21] See also Theodore M. Hammett, *AIDS in Correctional Facilities: Issues and Options*, Second Edition with 1986 Update, May, 1987.

[22] *Op. Cit.*, Joint Advisory Notice, 52 *Federal Register* 41820.

[23] Clever and Omenn, "Hazards for Health Care Workers," *Annual Review Public Health*, (1988), 275.

2. False Security

Reliance upon the absence of positive or the existence of negative HIV test results creates false security. A person may be seropositive without knowing it and without having undergone a test for the presence of HIV antibodies. The tests are not fully reliable; they produce a limited number of false negatives. More important, errors can be made in the laboratory. The period between infection and the time that antibodies are detectable though tests range from two to six weeks or longer. An infected person becomes infectious before antibodies can be detected.[24] A person can become infected *after* receiving a test result that accurately reported the person seronegative at the time of the test.

3. "Knowledge" Creates Danger

If a worker were to relax application of the guidelines because the data leads to the conclusion that a seropositive person is seronegative, that "knowledge" creates heightened danger, not increased safety.

Workers buttress their argument for access to information about a client's HIV status pointing out that such information would alert them to their own exposure and allow them to take steps against passing the infection to their families. However, if exposure were to occur while a worker was providing care, after-the-fact knowledge of a client's HIV status would not negate that exposure. Putting aside the fact that there is little or no risk of infection when giving care under the guidelines advocated by such agencies as the Oregon Health Division and the CDC, after-the-fact review of a client's HIV status may not increase family protection: the information may not exist or it may be erroneous--

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[24]". . . seronegative patients can transmit the virus." *Id.*

unreliable for any of the reasons already stated. It may indicate safety when none exists. If so, it could well lull the worker into false security.

The fact remains that the only *reliable* procedure when exposure is suspected is to monitor the worker for signs of infection and, in the interim, for the worker to apply the known ways by which one can reduce the possibility of transmitting the disease.

IV. STATUTORY RESTRICTIONS ON HANDICAP DISCRIMINATION

A. Oregon Statute

Oregon law generally prohibits discrimination in employment or in membership or participation in a union against persons with a mental or physical impairment.[25] ORS 659.425 provides:

> 1. For the purpose of ORS 659.400 to 659.435, it is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:
>
> (a) An individual has a physical or mental impairment which, with reasonable accommodation by the employer, does not prevent the performance of the work involved;
>
> (b) An individual has a record of a physical or mental impairment; or
>
> (c) An individual is regarded as having a physical or mental impairment. . . .

[25] "An apparent or medically detectable physical or mental condition which substantially limits one or more major life activities. Major life activity includes, but is not limited to self-care, ambulation, communication, transportation, education socialization, employment, and ability to acquire, rent or maintain property." OAR 839-06-205 (7); ORS 659.400 (3)(a).

> 3. It is an unlawful employment practice for a labor organization, because an individual is a handicapped person, to exclude or to expel from its membership such individual or to discriminate in any way against such individual.

ORS 659.400 provides in relevant part:

> (2) "Handicapped person" means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

The phrase "is regarded as having an impairment" is defined by the statute to mean that the individual:

> (a) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;
>
> (b) Has a physical or mental impairment that substantially limits major life activities only as the result of the attitude of others toward such impairment; or
>
> (c) Has no physical or mental impairment but is treated by an employer of supervisor as having an impairment.

1. AIDS As A Handicap

The Oregon Bureau of Labor and Industries regards these statutes as adequate to protect persons who are infected with the AIDS virus from employment discrimination. In its brochure *AIDS and Employment Discrimination Law*, the Bureau states Oregon's position on AIDS as a handicap, "AIDS, ARC and those testing seropositive are protected under ORS 659.425. . . "The document also notes that "an employment decision based on a perception that an applicant or employee is at 'high risk' and therefore treated as having an impairment" would also be a violation of employment discrimination law.

The Bureau is currently processing a handicap discrimination complaint against a Eugene area restaurant employer that discharged a female employee who was found to be infected with the AIDS virus. The Division is relying on the handicap statutes cited above.

B. Federal Statute

Federal law also prohibits handicap discrimination by public and private employers receiving federal financial assistance. Section 504 of the Rehabilitation Act of 1973,[26] provides that public and private employers receiving federal financial assistance are prohibited from discriminating in "any program or activity" receiving such assistance against "otherwise qualified handicapped individuals solely" on the basis of their handicap. Section 504 covers employees and is not limited to those situations where the principal objective of the federal assistance is to provide employment.[27] Employees adversely affected by handicap discrimination under this statute have a private right of action against their employers under the statute.[28] The claimant must demonstrate (1) that he or she is employed in a program or activity receiving federal financial assistance, (2) that she or he is "otherwise qualified," and that "he or she is a handicapped individual." An "otherwise qualified individual" under Section 504 is one who can perform the essential functions of the job in spite of her or his handicap.[29]

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[26] 29 USC Section 794

[27] *Consolidated Rail Corp. v. Darrone*, 465 US 624 (1984).

[28] *Id.*

[29] *Southeastern Community College v. Davis*, 422 US 397, 400 (1979).

1. "Handicapped Individual" Defined

A "handicapped individual" under the federal statute is an individual who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such impairment, or (c) is regarded as having such an impairment.

C. Supreme Court Rulings

Whether this federal law completely prohibits discrimination against individuals carrying the AIDS virus is technically an open question. The United States Supreme Court has not declared its position regarding the extended protection for persons with AIDS under the Rehabilitation Act of 1973. The issue was raised but not decided in *School Board of Nassau County v. Arline.*[30] In *Arline*, the Court held that a person possessing contagious tuberculosis was a "handicapped individual" and was "otherwise qualified" to teach elementary school, within the meaning of Section 504 of the Rehabilitation Act of 1973. With support from the United States Department of Justice, the school district employer in *Arline* contended that the employer should be permitted to exclude the plaintiff from employment based on the employer's concern for the contagious effects of the disease. The Court squarely rejected that claim, holding:

> Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of Sec. 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as

[30] 107 SCt 103, 43 FEP Cases 81 (1987).

> are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: The definition of "handicapped individual" is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief. The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accuse of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology - precisely the type of injury Congress sought to prevent. We conclude that the fact that a persons with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under Sec. 504.[31] (Original emphasis.)

The Court went on to conclude that the question of whether the plaintiff is "otherwise qualified" under the statute must be assessed on a case by case basis. The Court found that an individualized assessment of the plaintiff's qualification to continue in employment is essential to the statutory purpose of "protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[32]

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[31] *Id.* at 85-86.

[32] *Id.* at 88.

1. Guidelines for Trial Courts

In determining whether a handicapped individual is "otherwise qualified" under the federal statute, the Court instructed trial courts to follow guidelines promulgated by the American Medical Association, suggesting that the inquiry should include:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[33]

The Court instructed courts, and by implication, employers, to "defer to the reasonable medical judgments of public health officials" in determining whether an employee is "otherwise qualified" for continued employment despite manifestation of a contagious disease.[34]

Although *Arline* dealt with a case of tuberculosis, the rationale seems directly applicable to the case of an employee manifesting the disease of AIDS. The Court expressly declared that it was *not* deciding the applicability of the federal statute to cases involving AIDS.[35] However, it is impossible to ignore the logical application of the Court's reasoning to the circumstances surrounding AIDS in the workplace.

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[33] *Id.* at 87.

[34] *Id.*

[35] *Id.* at 84-85 n7.

2. Local 1812 AFGE v. U.S. Dept. of State

The response of the federal appellate courts to the reasoning in *Arline* has been mixed. In *Local 1812, AFGE V. U.S. Department of State*,[36] the Court sustained the Department of State's expansion of its employee medical fitness program to require mandatory testing of blood for the presence of HIV in employees seeking to qualify for service abroad. The Department of State conceded the applicability of the Rehabilitation Act of 1973 on the grounds that HIV carriers are physically impaired and are handicapped only for that reason due to measurable deficiencies in their immune systems even where the disease symptoms have not yet developed. The Court declined to enjoin the testing program on the ground that HIV-infected persons were not "otherwise qualified" for worldwide duty in the Foreign Service. The Court found that there was a "sufficient prospect of serious harm to the Department of State's mission and to its employees to warrant continued testing and consequent limitations on assignment or hiring."[37] The Court also found no evidence of an intention to discriminate by the employer.

3. *Chalk v. U.S. District Court*

The Ninth Circuit Court of Appeals reached a very different result in *Chalk v. U.S. District Court*.[38] In *Chalk*, a teacher sought treatment for symptoms related to his infection with the AIDS virus. The treatment restored Mr. Chalk to better health, and he asked to be returned to his classroom teaching duty. His school district employer declined, claiming that his AIDS infection justified his assignment to a non-classroom position. Mr. Chalk sued under Section 504 of the

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[36] 2 IER Cases 47 (DC Cir. 1987).

[37] *Id.*. at 51.

[38] ___F2d___, 1988 West Law 13567 (9th Cir., February 26, 1988).

Rehabilitation Act of 1973 and sought an injunction requiring his return to the classroom. The trial court declined to issue the injunction, claiming that even the slight chance of infection of children in the classroom justified a denial of the requested injunction. On appeal, the Ninth Circuit Court of Appeals held that there was no realistic prospect of infection of students in the normal types of interaction which the teacher would have with his students. The Court found that Mr. Chalk was "otherwise qualified" to continue his teaching duties, and entered an order enjoining the district to return Mr. Chalk to his teaching assignment.

The *Chalk* case is significant in that it underscores the requirement that employers refrain from taking *any* adverse action or enforcing any changes in a teacher's assignment unless a teacher's handicapped condition creates a reasonable and medically supportable risk of infection or injury to students or co-workers. The Court found that the school district's refusal to assign Mr. Chalk to the classroom was an illegal act of handicap discrimination, even though the employer's alternative assignment was arguably an easier job, and produced no modification in the employee's salary, benefits or working hours.

D. Advice to Employers

Oregon employers would be wise to adhere to the policy announced by the Oregon Bureau of Labor and Industries, which prohibits any discrimination against persons with the AIDS infection. Any uncertainty in the status of current federal law in its coverage of employees infected with the AIDS virus is irrelevant for Oregon employers who are subject to Oregon's statutory prohibition on handicap discrimination. The fact that the Oregon Bureau of Labor and Industries is presently prosecuting employers who discriminate against employees with AIDS infections is the clearest indication that employers are well advised to treat the AIDS infection on the same basis as any other serious employee illness.

V. COLLECTIVE BARGAINING CONCERNS

A. Common Labor/Management Interest:

The workplace has not been immune to highly emotional and ill-advised responses engendered by irrational fear of HIV contamination. Accordingly, labor and management share a common interest in minimizing the possibility of such reactions among those whom they employ or represent. This end can best be achieved through cooperative efforts in developing a program and policy for dealing with AIDS in the workplace. In any event, as such discussions would involve matters of safety with potential impact upon other terms and conditions of employment, they would be subject to the bargaining obligations of Oregon's Public Employment Collective Bargaining Act.[39]

B. A Workplace AIDS Policy:

A comprehensive program and policy relating to AIDS in the employment setting will contain a number of elements. Foremost should be a statement which sets forth management's obligations to protect workers from unwarranted exposure to the virus while recognizing the right of HIV infected employees to be free from all forms of employment discrimination. The policy should also include:

1. The reassurance that because of the unique behaviors and/or conditions which permit the transmission of the AIDS virus, the risk of HIV contamination in the workplace should not occur, provided reasonable precautions and protective guidelines are followed.
2. The adoption of industry specific guidelines as to work procedures recommended by the Centers for Disease Control and/or by other responsible state of federal agencies.
3. A commitment by management to provide, without cost to the employee, all necessary education, equipment and/or procedures required by law or recommended under the appropriate guidelines.

[39]See: IAFF Local 314 v. City of Salem, 7 PECBR 5819 (1983).

4. Recognition and/or concurrence by the employer that:

a. No employee may be required to submit to HIV testing without his or her consent.

b. Knowledge of any employee or client's HIV status is privileged and confidential information which shall not be divulged without the consent of the subject individual.

c. Reasonable accommodation shall be afforded any HIV infected employee who cannot perform his or her normal duties by virtue of disabilities incurred as a result of that disease, as provided under state and federal statutes protecting the handicapped.

5. Provision that violation by any employee of the guidelines and provisions set forth in this policy shall render that individual subject to discipline.

VI. CONCLUSION

Facts about AIDS and the virus which causes the infection are the best antidote to the unfounded fears that are a special danger in the workplace. The facts are:

1. The kind of nonsexual person-to-person contact that generally occurs among workers and clients or consumers in the workplace does not pose a risk for transmission of [the AIDS virus.][40]
2. The virus is quite fragile and is quickly killed on environmental surface, when treated with common, inexpensive disinfectants.[41]
3. There is no medical basis for employees refusing to work with such fellow employees or agency clients who are HIV infected.[42]

Labor organizations and employers bear a common responsibility to infected individuals to protect their privacy, both in personnel files and in the confidentiality of their relations with their physicians. Oregon employers are subject to a statutory requirement to refrain from *any* discrimination against individuals who are infected with the AIDS virus. Collective bargaining

[40] 34 *MMWR* 682.

[41] 45 *MMWR 685.*

[42] Office of Personnel Management, Federal Personnel Manual System, *FPM Bulletin* 792-42, dated March 24, 1988.

concerning the management of the AIDS infection in the workplace should proceed from the common assumption that the safety of the employees and the prevention of handicap discrimination should be the unwavering goal of both labor and management.

Center for Disease Control/Occupational Safety and Health Act

RECOMMENDED PRACTICES FOR PROTECTION AGAINST OCCUPATIONAL EXPOSURE TO AIDS AND HBV

This article is the Executive Summary of the Act. For a complete copy of the document, contact the State Accident Prevention Division.

The Centers for Disease Control, with advice from health care professionals, has made recommendations to protect workers from AIDS (acquired immune deficiency syndrome) and HBV (hepatitis B) infection. These precautions are prudent practices that apply to preventing the transmission of these viruses and other similar blook-borne type infections and that should be used routinely.

Personal Protective Equipment

- Use gloves where blood, blood products, or body fluids will be handled.
- Use gown, masks, and eye protectors for procedures which could involve more extensive splashing of blood or body fluids.
- Use pocket masks, resuscitation bags, or other ventilation devices where possible to resuscitate a patient to minimze exposure that may occur during emergency mouth-to-mouth resuscitation. Employers should place these devices where the need for resuscitation is likely.

Workplace Practices

- Wash hands thoroughly after removing gloves and immediately after contact with blood or body fluids.

- Use disposable needles and syringes whenever possible. Do not recap, bend, or cut needles. Place sharp instruments in a specially designed puncture-resistant container located as close as practical to the area where they are used. Handle and dispose of them with extraordinary care to prevent accidental injury.

- Follow general guidelines for sterilization, disinfection, housekeeping and waste disposal. Use appropriate protective equipment. Place potentially infective waste in impervious bags and dispose of them as local regulations require.

- Clean up blood spills immediately with detergent and water. Use a solution of 5.25 percent sodium hypochlorite (household bleach) diluted to one part bleach per 10 to 100 parts water for disinfection.

Education

- Know the modes of transmission and prevention of these infections.

Other recommendations for Prevention

- Treat all body and body fluids as potentially infectious.

- Get an HBV vaccination if you are at substantial risk of acquiring HBV infection.

LEGAL CHALLENGES TO DRUG TESTING IN PUBLIC EMPLOYMENT

by
Gene Mechanic

I. INTRODUCTION

> In the face of widespread use of drugs and its intrusion into the workplace, it is tempting to turn to mass testing as a solution... Government has a vital interest in making certain that its employees, particularly those whose impairment endangers their co-workers or the public, are free of drugs. But the question posed by this litigation challenges the means by which that laudable goal is attained, not the goal itself.[1]

Within the past few years, a massive national movement against drug use has prompted the introduction of a myriad of drug testing programs.[2] President Reagan's Executive Order entitled "Drug-free Federal Workplace," signed on September 15, 1986, gave further incentive to state and local governments throughout the country to develop drug testing programs.[3]

The conflict between the nation's concern over drug use and its recognition of the importance of personal security against government intrusion into our private lives has resulted in considerable litigation over drug testing in both public and private employment.

Litigation in a public sector has primarily involved constitutional issues. Constitutional requirements only apply to conduct which is fostered through government action. Consequently, to avoid legal liability, public employers should be aware of the constitutional dimensions of their drug testing programs.

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[1] Capua v. City of Plainfield, 643 F.Supp. 1507, 1 IER 625 (D.N.J. 1986).

[2] See American Federation of Government Employees v. Weinberger, 651 F.Supp. 726 (S.D. Ga. 1986).

[3] The urinalysis tests used to screen for drugs are usually used to screen for alcohol as well. Generally, references in this article to drug tests should be deemed to include alcohol tests.

Public employees should understand their rights when they are the subject of drug tests.

The United States Constitution Fourth Amendment's proscription against unreasonable search and seizures has been the greatest obstacle facing public employers which seek to implement drug tests. Other constitutional theories have been used to challenge drug tests, including the rights to due process and equal protection, the right to privacy, the right against self-incrimination and, even, the right to free exercise of religion.

This article will discuss these various constitutional theories, as well as some statutory and state law issues related to drug tests. However, a major focus of this article will be on the major legal issue involving the public sector--the extent to which drug tests constitute an unreasonable search and seizure under the Fourth Amendment.[4]

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[4]It is important to recognize that judicial remedies may not provide the most effective avenues for resolving a dispute over drug testing. Rather, proceeding through the grievance and arbitration provisions of a labor agreement is often the quickest and least costly remedy.

Arbitrators have been willing to tackle the "reasonableness" of all aspects of drug testing programs. They have relied on contract provisions such as those providing for discharge or discipline only upon "just cause" to conclude that all terms and conditions of employment must be "reasonable." This has led arbitrators to consider many issues regarding the propriety of drug tests, including the employer's authority to implement the test in the first place. See, e.g., United Paper Workers Int'l Union v. Misco, Inc., 126 L.R.R.M. 3113 (1987); CEG Jem City Chemicals, Inc., 86 LA 1023 (1986); CFS Continental Inc. and Teamsters, 86-1 ARB (1985); Day and Zimmerman, Inc., 88 LA 1001 (1987); Weyerhauser Company, 86 LA 182 (1986).

Moreover, an unfair labor practice may be triggered when an employer unilaterally imposes drug tests on a unit covered by a labor agreement. Drug testing is normally considered a "term or condition of employment" which must be dealt with through collective bargaining. See discussion later in this article. See also, e.g., Medicenter Mid-South Hospital, 221 NLRB 670, 676 (1975); Jacob Becker & Sons, 244 NLRB 875 (1979) enforced 636 F.2d 129 (5th Cir. 1981); Bath Iron Works, Case 1-CA-23, 792-2 (NLRB General Counsel Complaint issued against company unilaterally imposing drug and alcohol tests).

II. THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution states that:

> The right of the people to be secure in their p sons, houses, papers and effects, against unreasonable searches id seizures, shall not be violated, and no warrants shall issue but upon probable cause . . .

The Fourth Amendment relates to criminal, civil, and administrative investigations.

In essence, mass and random drug testing of public employees is being prohibited by the courts, under the Fourth Amendment, except where the employer is involved in (1) a highly regulated industry or (2) an industry with a significant degree of regulation where the employee works in a job in which public safety concerns are paramount. If an employer does not fit within these exceptions, it must have reasonable suspicion that the individual employees to be tested have used drugs. A closer look at both the general Fourth Amendment requirements and cases involving particular areas of employment provides insight into which drug testing programs are being approved and which programs are being rejected.

A. Two-pronged Test

Determination of whether a drug test violates the Fourth Amendment requires application of a two-pronged test. First, a court must decide whether the government's conduct constitutes a search or seizure by infringing a legitimate expectation of privacy. Courts have found that individuals have a reasonable expectation of privacy in the personal "information" bodily fluids contain.[5] And a consensus has developed that mandatory urinalysis testing

[5]Capua v. City of Plainfield, supra at 1513; McDonald v. Hunter, 612 F.Supp. 1122 (D. Ohio 1985); Lovvorn v. City of Chattanooga Tennessee, 647 F.Supp. 875 (E.D. Tenn. 1986); see also O'Conner v. Ortega, 107 S.Ct. 1492 (1987).

constitutes a search within the meaning of the Fourth Amendment.[6] Some employers have unsuccessfully argued that urine, unlike blood, is routinely discharged from the body so that no actual intrusion is required for its collection. But this assertion has been rejected on the ground that persons do not expect their urine to be used for the disclosure of personal "physiological secrets."[7]

The second and more complex part of the Fourth Amendment analysis involves whether a search and seizure is reasonable.[8] Ordinarily, a warrant approved by a judge or magistrate and full probable cause of misconduct are required to satisfy the reasonableness standard of the Fourth Amendment.[9] However, the courts have been carving out an exception to this principle in the case of urine tests of public employees. A warrant requirement for drug testing has been deemed unduly burdensome.

Courts have emphasized that the delay entailed in obtaining a warrant for drug tests could lead to the eventual dissipation of the substance to which a search is sought.[10] The soundness of this reasoning may be questioned. Many drugs such as marijuana can be detected well after their use.

The U.S. Supreme Court has never addressed the Fourth Amendment standard for drug tests, although it has agreed to review the legality of a U.S.

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[6]Local 318, Policemen's Benevolent Ass'n. v. Township of Washington, 2 IER 965, 968-69.

[7]National Treasury Employees Union v. Von Raab, 816 F.2d 170, 2 IER 15 (5th Cir. 1987), cert. granted S.Ct. (1988).

[8]Smith v. Maryland, 442 U.S. 735 (1979).

[9]New Jersey v. TLO, 469 U.S. 325, 351 (Blackman, J. concurring); Katz v. United States, 389 U.S. 347, 357 (1967).

[10]Local 318 v. Township of Washington, supra at 969-70.

Customs Service drug testing program.[11] Significantly, the Supreme Court has already found a warrant and probable cause requirement to be unworkable where a hospital searched the office of a staff psychiatrist accused of sexual harassment.[12] The Court noted that employers are focused primarily on the need to complete government agency's work in a prompt and efficient manner. Accordingly, an employee's legitimate expectation of privacy must be balanced against the government's need for supervision, control and efficient operation of the particular workplace.[13]

B. Random Testing v. Reasonable Suspicion

The lower courts have been using this balancing test on a case-by-case basis to determine whether a particular employer's drug testing program is constitutional. Public employers in some areas are receiving a message that they may institute random and mass testing without reasonable suspicion of drug use by each person tested (i.e., horse racing, corrections, aviation and nuclear power facilities). Other public employers have been given clear direction that reasonable suspicion of drug use by the employees tested is required (i.e., teaching, fire fighting, police). Still others have received a mixed message, for example transit workers. A review of cases involving particular areas of employment highlights the need to consider the specific nature of the public sector work.

C. Public Sector and "Regulated Industries"

1. Fire Fighters

Mandatory random and mass drug testing of law enforcement officers and fire fighters has generally not been permitted. Despite the strong relationship

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[11] Supra note 7.

[12] O'Conner v. Ortega, 107 S.Ct. 1492, 1500 (1987).

[13] O'Conner v. Ortega, supra at 1499.

of these workers to public safety and the need for public confidence in the work performed, police and fire fighters have not been considered to be part of a highly regulated industry.

For example, a city program in New Jersey was deemed to have violated the Fourth Amendment rights of fire fighters because there was no reasonable suspicion that the fire fighters tested were under the influence of drugs.[14] None of the 103 individual fire fighters compelled to submit to urine testing had received prior notice that their job performance was below standard. None of them were under investigation for drug use on the job. Moreover, there was no increase of incidents of fire related accidents or community complaints about inadequate fire protection.

On the other hand, where a drug dealer identified a fire fighter as a drug buyer, a city was allowed to subject that fire fighter to a urinalysis.[15] Reasonable suspicion of drug use was found sufficient to justify the test.

2. Police Officers

Police officers have been treated similarly to fire fighters. Mandatory, random urinalysis drug testing of police officers has been deemed to constitute an unreasonable search and seizure under the Fourth Amendment.[16] But where facts are sufficient to constitute reasonable suspicion of illegal drug use by individual police officers, testing is permissible. For example, a federal court has held that Chicago's mandatory drug testing of police officers does not violate the Fourth Amendment, where testing based on individualized suspicions of drug

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[14]Capua v. City of Plainfield, supra.

[15]Everett v. Napper, 2 IER 1377 (1987).

[16]Local 318 Policemen's Benevolent Ass'n v. Township of Washington, supra; Feliciano v. City of Cleveland, 661 F.Supp 578 (N.D. Ohio 1987); American Federation of Government Employees v. Weinberger, supra; Bostic v. McClendon, 2 IER 873 (N.D. 1986); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. Ct. of App. 1985).

use is for non-criminal purposes, is no more intrusive than ordinary urinalysis, and is adequately reliable.[17]

However, a U.S. Customs Service program requiring the testing of employees seeking transfer to certain sensitive law enforcement jobs was held to be a reasonable search.[18] The court noted that the Customs Service's tester (1) did not watch employees urinate, (2) that screening was scheduled in advance, (3) that employees were not tested until other requirements for transfer were satisfied, (4) that the test results left no room for discretionary interpretation, and (5) that the use of controlled substances by custom services employees would seriously frustrate the agency's efforts to enforce the drug laws. Therefore, the court's finding of reasonableness was heavily based on the fact that the employees dealt with drug law enforcement and the agency made an effort to minimize intrusions into individual privacy. Review of this decision is now pending in the U.S. Supreme Court.

In contrast to the Customs Service case, a New York state court invalidated a city police department order requiring periodic, random drug testing of organized crime control bureau personnel, even though their work involved enforcement of laws prohibiting the use and sale of narcotics, gambling and prostitution. The court held that reasonable suspicion is required before urine testing of members of a police department can be ordered.[19]

3. Army Civilian Employees

The U.S. Army's program of random urinalysis drug testing of civilian employees in "critical jobs" has been rejected by the District of Columbia

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[17]Wrightsell v. Chicago, 2 IER 1619 (N.D. Ill. 1988).

[18]National Treasury Employees Union v. Von Raab, supra.

[19]Caruso v. Ward, 2 IER 1057 (1987).

Federal Court.[20] The civilian employees to be tested included law enforcement personnel (guards, police officers, corrections officers), aviation positions (air traffic controllers, pilots, mechanics), and alcohol and drug abuse prevention staff. In enjoining the program, the court noted that (1) these employees are not in a "high regulated industry" subject to licensing requirements and comprehensive regulatory scheme diminishing their privacy expectations, (2) there is insufficient demonstrable effect of off-duty drug use on workplace safety, since urinalysis fails to show whether employees are impaired on the job and (3) the government had not shown that alternative methods of detecting drug use had been seriously considered or attempted.

On the other hand, another federal court has held that random drug testing of civilian employees in "sensitive" positions at an army base is reasonable under the Fourth Amendment.[21] The positions chosen for urinalysis testing included law enforcement personnel, air traffic controllers, armed guards, handlers of toxic chemical and nuclear materials, and the drug testing personnel themselves. The court highlighted that test subjects are (1) selected on the basis of neutral criteria, (2) urine samples are taken in privacy, (3) accurate chain of custody procedures are in place, (4) tests are performed by a laboratory that has demonstrated accuracy, (5) workers who choose not to submit to urinalysis may request reassignment to non-critical positions, and (6) employees with confirmed positive results are offered counseling or treatment. Taking all of this into account, the court determined that the test was reasonable.

4. Teachers

Compulsory drug testing for teachers has been unsuccessfully attempted. Without objective facts establishing reasonable suspicion that the teachers

[20] National Federation of Federal Employees, et al. v. Carlucci, et al., 2 IER Cases 1709 (D.D.C. 1988).

[21] Mullholland v. Department of Army, 2 IER 868 (E.D. Va. 1987).

tested are using drugs, it has been held that such testing violates the Fourth Amendment and is "an act of pure bureaucratic caprice."[22]

5. Transit Workers

a. Testing upheld: There is a conflict among courts as to the extent to which transit workers may be tested for drugs. The Chicago transit authority instituted a blood and urinalysis test program whereby operating employees directly involved "in any serious accident" or "suspected of being under the influence" of intoxicating liquor or narcotics would be tested. A federal district court held that the public interest in the safety of mass transit riders outweighed any expectation of privacy of those drivers who met one of the criteria for testing.[23]

A Pennsylvania transit authority's drug testing program was upheld on the ground that reliance "on individual suspicion" testing was an inadequate method of dealing with the problem of substance abuse in a highly regulated and safety-critical industry. The court noted that since many of the employees operate without close supervision, even obvious impairment can go undetected.[24] Moreover, the New York City Transit Authority's mandatory and random testing of employees and job applicants was held to be a "reasonable" search because of the governmental interest in passenger safety. The court noted that personal intrusion must be no greater than necessary to accomplish the safety objectives.[25]

b. Testing rejected: On the other hand, a federal district court

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[22]Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford Union Pre-School District, 119 App. Div. 2d 35, 505 N.Y.S.2d 888 (N.Y. App. Div. 1986), affirmed 70 N.Y.2d 57, 2 IER 198 (1987).

[23]Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976) cert. denied 429 U.S. 1029 (1976).

[24]Transportation Workers ... SEPTA, 2 IER 1804 (E.D. Pa. 1988).

[25]Burka v. N.Y.C. Transit Authority, 2 IER 1632 (S.D.N.Y. 1988).

rejected a mass urinalysis program instituted by the District of Columbia Transportation Department. The program was directed at school bus attendants. The court emphasized that the testing program was unreasonable because it was directed at employees who the Department had no particular reason to believe or suspect were using drugs. A significant increase in traffic accidents, an increase in absenteeism, several incidents of erratic and abnormal behavior of some Department employees, and the discovery of syringes and bloody needles in Department restrooms, were not deemed sufficient to allow mass testing.[26] A California federal court also rejected the Palm Springs' public transit agency's imposition of mandatory random alcohol and drug testing on bus drivers and maintenance workers. It said that the Fourth Amendment did not allow for testing which was not based on at least "reasonable suspicion" that the individual employees tested were using drugs or alcohol.[27]

6. Railroad Workers

The U.S. Court of Appeals which covers Oregon has concluded that the searches permitted under Federal Railroad Administration regulations are not justified without "particularized suspicion" of drug use. The Court invalidated regulations issued by the Federal Railroad Administration regarding drug and alcohol testing of employees who are involved in "major" train accidents, "impact accidents" (reportable injury or damage to railroad property of $50,000), or "fatal" incidents.[28] The Court said that "accidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that

[26] Jones v. McKenzie, 628 F.Supp. 1500 (D.D.C. 1986). The Court noted that the search was conducted against the plaintiff without probable cause and without a warrant. Whether the Court was actually promoting this standard for drug testing is unclear.

[27] Amalgamated Transit Union Local 1277 v. Sunline Transit Agency, 663 F.Supp. 1560 (C.D. Cal. 1987).

[28] Railway Labor Executives' Assn. v. Burnley, 127 LRRM 233 (9th Cir. 1938).

tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire trained crew."

Additionally, the court held that the tests are not reasonably related to their stated purpose, since they "cannot measure current drug intoxication or degree of impairment." The Court recognized that railroads are a highly regulated industry, but held that this fact should not diminish the individual railroad employee's expectation of privacy in his person or his body fluids. The government is seeking U.S. Supreme Court review of this decision.

7. Horse Racing

Random testing of jockeys by the New Jersey Racing Commission was found to be reasonable.[29] The Court said that horse racing has been among the state's most highly regulated industries. The State had a significant interest in the revenue generated by wagering and needed to deal with the vulnerability of the industry to "undue influences."

8. Correctional Officers

It has been held that urinalysis may be performed uniformly by systematic random selection of correctional facility employees who have regular contact with prisoners on a day-to-day basis. Correction officers' expectation of privacy was found to be diminished during their work in a prison.[30]

9. Nuclear Power Plants

Employees working at nuclear power plants have also been given little leeway in challenging drug tests. The federal district court in Tennessee upheld urinalysis tests, emphasizing that the agency operating the plant is required by the nuclear regulatory commission to have procedures to provide reasonable

[29]Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986).

[30]McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987).

assurance that those employees with access to vital areas are fit for duty.[31] Similarly, the federal district court in Nebraska found a compulsory drug testing program at a nuclear power plant did not violate the Fourth Amendment since a strong interest exists in maintaining public confidence and safety with respect to the plants and employees have a diminished expectation of privacy given the pervasively regulated nature and place of employment.[32]

10. Aviation

A federal district court in Alaska held that the national interest in air safety and the public's perception of safety justifies the intrusion into the legitimate expectation of privacy of flight service specialists resulting from the FAA drug testing program.[33]

The mandatory, random drug urinalysis of U.S. Department of Transportation employees in "critical positions," mostly involving aviation, has also been upheld.[34] The court found that the Department presented proof that drug use, at the level sought by testing, generally impairs the normal functioning of employees. Most of the employees covered held aviation related positions such as air traffic controllers, electronic technicians, aviation safety inspectors and aircraft mechanics. The court found the Department's duty to protect the public safety outweighed any intrusion on the privacy of the employees affected. Importantly, the court noted that "plan reflects a high degree of concern for employee privacy interests and is carefully tailored to assure a minimum of intrusion." Fire fighters, nurses, railroad safety inspectors, armed law enforcement officers and "top secret" security clearance personnel were also

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[31] Smith v. White, 2 IER 1320 (1987).

[32] Rushton v. Nebraska Public Power District, 2 IER 25 (1987).

[33] National Association of Air Traffic Specialists v. Dole, 2 IER 68, 86.

[34] American Federal of Government Employees v. Dole, 2 IER 841 (D.D.C. 1987).

among those subject to random testing in this case. To that extent, this case conflicts with court rulings involving local government police and fire fighters.

D. Other Issues Raised by Drug Tests

Specific issues are raised by drug testing programs which have not been sufficiently addressed by the courts, thus far, to provide adequate guidance to employers or employees.

1. Periodic Medical Examination

For example, may an employer screen for drugs and alcohol as part of a urinalysis performed under a policy requiring annual physical examinations of employees? At least where an annual physical appears to be a pretext for drug and alcohol screening, it would seem that an unreasonable search would result.[35] However, Chicago's mandatory drug test that was part of a routine employee-related medical examination required of police officers after a return of 30 days or more of leave has been found to be a reasonable search.[36] The Court noted that there were no allegations that the tests were unduly intrusive or unreliable. It is also emphasized that the city's interest in public safety, served by having a fit police department, outweighed the officers' "minimal interest" in already discharged urine.

2. Pre-employment Testing

Should different rules apply when dealing with pre-employment drug testing, rather than testing of current employees? Job applicants may not have the expectation of privacy to which current employees are entitled. As a practical matter, job applicants are less likely to challenge a drug testing program for fear of not getting the job in the first place. A requirement that all police academy cadets be screened for drug tests was successfully challenged,

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[35]Local 318 Policemen's Benevolent Ass'n, etc. v. Township of Washington, 2 IER supra at 977-78.

[36]Wrightsell v. Chicago, supra.

but the cadets were current employees of the police department.[37] However, pre-screening of all transit authority applicants has been upheld.[38]

3. Drug Testing and Collective Bargaining

Neither the National Labor Relations Board nor Oregon's Employment Relations Board has ruled directly on whether drug testing and related issues are mandatory subjects of bargaining (but see cases cited in footnote 4). However, the Ninth Federal Court of Appeals, covering Oregon, has held that a railroad's mandatory urine testing program, designed to curtail on-duty use of alcohol and drugs as forbidden by the railroad's safety rule, is a mandatory subject of bargaining under the Railway Labor Act. Thus, the program cannot be implemented unilaterally.[39] With respect to the National Labor Relations Act, NLRB General Counsel Rosemary Collyer has addressed this question in a far-reaching Advice Memorandum to NLRB Regional Directors.

a. NLRB General Counsel Memorandum: In this Advice Memorandum, Collyer has held that mandatory drug testing constitutes a "condition of employment." She states:

> In our view, any such obligatory tests, which may reasonably lead to discipline, including discharge, are plainly germane to the employees' working conditions and, therefore, are presumptively mandatory subjects of bargaining and within the ambit of the Act. . . . We do not believe that drug testing falls within the realm of managerial or entrepreneurial prerogatives excluded from Section 8(d) of the Act.

On pre-employment drug testing Collyer says:

> A prehire drug test not only establishes a condition precedent to employment for job applicants, it also settles a term and condition of employment of current employees by vitally affecting their working environment.

She cites previous NLRB decisions that the "conditions of becoming employed"

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[37] Feliciano v. City of Cleveland, supra.

[38] Burka v. N.Y.C. Transit Authority, supra.

[39] BLE v. Burlington Northern RR, 127 LRRM 2812 (9th Cir. 1988).

and employer hiring practices can also constitute mandatory subjects of negotiation.

Where an employer adds a drug testing plan to an existing program of required physical examinations for employees or applicants, the General Counsel submits that the addition constitutes a substantial change in the terms and conditions of employment.

In the guidelines issued under this policy, the General Counsel directs that (1) drug testing for current employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the Act; (2) in general, implementation of a drug testing program is a substantial change in working conditions, even where physical examinations previously have been given, and even if established work rules preclude the use or possession of drugs in the plant; (3) the established Board policy that union's waiver of its bargaining rights must be clear and unmistakable is to be applied to drug testing; (4) normal Board deferral policies under Dubo [Dubo Manufacturing Corp., 142 NLRB 431 (1963)] and Collyer [Collyer Insulated Wire; 192 NLRB 837 (1971)] will apply to these cases; however, if Section 10(j) relief is otherwise warranted, deferral will not be appropriate.

b. Oregon Public Sector: This policy of the NLRB General Counsel is subject to reversal by the NLRB itself and the courts. It is undoubtedly also an issue which will be tested before the ERB and the courts in Oregon's public sector.

4. Voluntary Consent

A person may voluntarily consent to a drug test, thereby waiving Fourth Amendment rights. It is clear that mere failure to object to a mandatory urinalysis does not constitute voluntary consent where the employees are told that they would be discharged for not participating in the test.[40] Additionally,

[40] Bostic v. McClendon, supra.

where the employees, even without a direct threat, have a reasonable belief that producing the urine sample was necessary to retain their jobs, the consent has been found involuntary.[41]

III. OTHER CONSTITUTIONAL CHALLENGES

A. Right to Privacy

As noted earlier, intrusions on individual privacy have usually been challenged through the Fourth Amendment. But a separate right of personal privacy has also been deemed implicit in the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.[42] Challenges to drug tests based on a right to privacy, outside of the scope of the Fourth Amendment, have not been successful.

However, the Fourteenth Amendment's Due Process Clause encompasses a "concept of personal liberty" which fosters the interest of an individual in avoiding involuntary disclosure of "personal matters," including personal medical information.[43] Accordingly, should a public employer disclose the results of drug tests to persons other than medical and management personnel essential for implementation of the program, the conduct would impinge upon the Due Process Clause's right to privacy.

B. Privilege Against Self-Incrimination

In 1966, the U.S. Supreme Court held that compulsory withdrawal and chemical analysis of a blood sample did not violate the U.S. Constitution's Fifth

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[41] Feliciano v. City of Cleveland, supra.

[42] See e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. State of Connecticut, 381 U.S. 479 (1965).

[43] Whalen v. Roe, 429 U.S. 589, 598 n. 23 (1977); Shoemaker v. Handel, supra.

Amendment's protection of the right against self-incrimination.[44] The same rationale has been applied to urinalysis testing. In effect, the privilege against self-incrimination protects evidence of a testimonial or communicative nature. The forced taking of urine and subsequent chemical analysis have been considered physical, rather than testimonial or communicative, evidence.[45]

Even a requirement that employees complete questionnaires regarding medical history, listing prescription medications taken and any circumstances involving legitimate contact with illicit drugs has been upheld.[46] These questionnaires have been found not testimonial or communicative in nature, or not to be aimed at obtaining incriminating information.

C. Procedural Due Process

Under the U.S. Constitution's Fourteenth Amendment, states and their political subdivisions may not deprive a person of liberty or property without due process of law. A public sector labor agreement containing a "just cause" termination provision establishes a constitutionally protected property interest, mandating due process procedural safeguards before termination. Some statutory or civil service schemes also provide particular employees with a protected property interest in their job.[47]

Furthermore, public employees have a constitutionally recognized liberty and property interest in their individual reputations, and in the honor and

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[44]Schmerber v. California, 384 U.S. 757 (1966).

[45]Rushton v. Nebraska Public Power District, supra; National Treasury Employees Union v. Von Raab, supra (the Fifth Circuit reversed a federal district court finding to the contrary); Amalgamated Transit Union Local 1277 v. Sunline Transit Agency, 663 F.Supp. 1560 (1987); Bay v. Bauman, 475 So.2d 1322, 1324 (Fla. App. 1985).

[46]National Treasury Employees Union v. Von Raab, supra; National Association of Air Traffic Specialists v. Dole, supra.

[47]See Cleveland Board of Education v. Loudermill, 470 U.S. 532; Tupper v. Fairview, 276 OR 657 (1976).

integrity of their good names. This protected reputational interest derives directly from public employment and cannot be arbitrarily or capriciously infringed by government officials.[48]

1. Potential Violations

Drug testing may violate an employee's liberty and property rights in several ways. For example, where an employee established that the EMIT test[49] was a sole basis for her firing despite the manufacturer's clear label warning that "positive results should be confirmed by an alternate method," the court held that her due process rights were violated.[50] The court noted that several scientific studies highlighted the possible inaccuracy of the EMIT test. The court concluded that, at a minimum, the employee was entitled to some adversary process before termination designed to determine whether (1) she is, in fact, the subject of the particular positive test, and (2) that the positive test has been appropriately confirmed.

Due Process also entitled a public employee to oral or written notice of charges against him or her, explanation of the evidence, and an opportunity to present his or her side of the story.[51] It has been held that procedural due process requirements were ignored where the testing was unilaterally imposed

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[48] See e.g., Paul v. Davis, 424 U.S. 693, 708-09 (1976); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972); Capua v. City of Plainfield, supra at 1520-21.

[49] Enzyme Multiplied immunoassay Test. See Hecker, Steven, "Technical Issues and Procedural Safeguards in Workplace Drug Testing," in this issue.

[50] Jones v. McKenzie, supra.

Through an amendment enacted in 1987, ORS 438.510 now requires that a clinical laboratory performing a urinalysis must, if the initial test is positive, "perform a confirming test which has been designated by the rule of the Health Division as the best available technology for use to determine whether or not the substance of abuse identified by the first test is present in the specimen prior to reporting the test results."

[51] Lovvorn v. City of Chattanooga Tennessee, supra.

as a condition of employment without prior notice to the applicants and without an opportunity for them to voice objection or to seek advice of counsel. Provisions to protect the confidentiality interests of employees were also necessary.[52]

Where the Federal Aviation Administration failed to ensure the preservation of the samples by the testing laboratory, a due process violation was triggered, since the employee did not have an opportunity to evaluate the accuracy of the evidence used against an employee.[53] In contrast, a U.S. Customs Service urinalysis program was approved where a follow-up test to initial screening was "almost always accurate," elaborate chain-of-custody procedures minimized the possibility of false-positive readings for presence of drugs, and the employee could resubmit the specimen to a laboratory of his or her own choosing for retesting.[54]

D. Substantive Due Process

The Due Process Clause prohibits governmental actions which "offend those canons of decency and fairness which express the notions of justice" in our society.[55] The term "substantive due process" has been applied to this concept. In determining whether governmental conduct violates substantive due process, a court must look to whether the requirement imposed is rationally related to the legitimate interest of the employer. Within the parameters of substantive due process, drug testing programs have been held to achieve a reasonably legitimate

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[52]Capua v. City of Plainfield, supra at 1521. But see Burka v. N.Y.C. Transit Authority, supra.

[53]Banks v. Federal Aviation Administration, 687 F.2d 92 (5th Cir. 1982) (Federal employees have due process protections under the Fifth Amendment).

[54]National Treasury Employees Union v. Von Raab, supra.

[55]Rochin v. California, 342 U.S. 165 (1952).

government goal.[56] However, as discussed earlier, some courts have indicated that drug tests may not achieve such legitimate government goals in the context of the Fourth Amendment.

E. Equal Protection

The Fourteenth Amendment also mandates that persons receive equal protection under law. Thus far, equal protection attacks by the particular groups of public employees targeted for drug testing have not succeeded.[57] It is important, however, to scrutinize whether a particular drug testing program unfairly discriminates against certain employees. Certainly if the discriminated group constitutes a protected class (i.e., racial minorities, women, religious groups protected under Title VII of the 1694 Civil Rights Act) the equal protection implications should be evaluated.

F. Freedom of Religion

In one case, employees argued that a drug testing plan at a nuclear plant violated their right to free exercise of religion. The employees' religious beliefs dictated that drug or alcohol abuse was a sin. They contended that the drug testing plan offered treatment to those who tested positive based upon the concept that drug addiction and alcoholism was an illness or disease. And even participating in a program that offers treatment to those sinners "would lash [the plaintiffs] to an heretical idea."[58]

This rather novel claim forced the court to consider whether the drug testing program accomplished a "compelling state interest" which justified this burden on the employee's religion. Given the nature of a nuclear power plant, the

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[56]See e.g., Rushton v. Nebraska Public Power District, supra; Division 241 Amalgamated Transit Union v. Suscy, supra.

[57]CEG Shoemaker v. Handel, supra; Burka v. N.Y.C. Transit Authority, supra.

[58]Rushton v. Nebraska Public Power District, supra.

court held that such compelling interest existed. Perhaps in an area of work which is less regulated and filled with safety concerns, religious objections may be more difficult to disregard.

IV. CHALLENGES UNDER STATE CONSTITUTION

The Oregon Constitution contains clauses analogous to the clauses in the United States Constitution which have been previously discussed. This includes state constitutional rights to due process for injury done to person, property, or reputation (Article I, Section 10), the right to be secure against unreasonable search or seizure, with no warrant issuing but upon probable cause (Article I, Section 9), the right against self-incrimination (Article I, Section 12), the right to equal protection (Article I, Section 20), and the right to freedom of worship and religion (Article I, Sections 2 and 3).

The state courts could conceivably provide broader protection against drug testing programs through state constitutional challenges than are now being provided through court interpretations of the federal Constitution. For the most part, however, state constitutional clauses have been interpreted to coincide with their federal constitutional counterparts.

V. GOVERNMENT ACTION FOR PURPOSES OF CONSTITUTIONAL PROTECTION; UNION LIABILITY

Normally, private employers are not bound to the constitutional requirements which are placed on public employers. However, if a private employer establishes a close enough nexus with the government so that it is acting in a public capacity, constitutional standards apply. In effect, the private

employer's conduct must be performed "under color of state law."[59] As a practical matter, the private employer must have acted through the authority and at the promotion of the government.[60]

For example, where a physician contracts with a state hospital, the physician's work may be subject to constitutional standards.[61] A construction company which is the general contractor on a public work project may be subject to constitutional liability for joining with a public agency to institute a drug testing program.

In highly regulated industries, the government may require private employers to perform drug tests of employees. That test would be performed "under color of state law."[62]

A union which negotiates a drug testing program with a public employer may be subject to a civil rights claim under 42 U.S.C. Section 1983, in addition to a fair representation claim. To act under "color of law" the union need only be "a wilful participant and join in activities with the State or its agents."[63] Unions have already been sued for both the contents of their agreements[64] and for their conduct.[65]

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[59]42 U.S.C. Section 1983.

[60]Davis v. Carson Pirie Scott & Company, 530 F.Supp. 799 (N.D. Ill. 1982).

[61]Dole v. Temple, 409 F.Supp. 899 (N.D. Va. 1976).

[62]See e.g., Railway Labor Executives' Ass'n. v. Burnley, supra, which invalidated drug tests conducted by railroad companies as required by Federal Railroad Administration regulations.

[63]Adickes v. SNH. Kress & Company, 398 U.S. 144, 152 (1970).

[64]Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) (agency fees).

[65]See, e.g., Sellers v. Local 1598 AFSCME, 600 F.Supp. 1205 (E.D. Pa. 1984) (grievance handling violated due process).

VI. COMMON LAW TORT REMEDIES

State court tort laws may provide a means for challenging drug testing programs. Basically, a tort is a wrongful act from which liability for damages arises. Public agencies are liable for torts under Oregon's Tort Claims Act (ORS 30.260 et.seq.). Torts which may arise from drug tests include invasion of privacy, defamation, wrongful discharge, interference with an existing contract, intentional infliction of emotional distress and outrageous conduct.[66]

A. Privacy

The tort of invasion of privacy by intrusion has been recognized by the Oregon courts.[67] For example, public disclosure of drug test results may violate an employee's right to privacy. A right to privacy may also be triggered when a drug testing program intrudes upon the off-duty activities of an employee or permits unnecessary participants observe the act of urination.[68]

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[66]Employees who are covered by a collective bargaining agreement may be restricted in filing state law tort claims under either an explicit waiver in the contract or the preemption doctrine. It is not likely that a state court would agree with the argument that an employee has waived an independent federal or state right because of labor agreement language. See e.g., NLRB v. Magnavox Company, 415 U.S. 332 (1974); Metropolitan Life Insurance Company v. Massachusetts, 471 U.S. 724 (1985). It is possible, however, that a court would find that the Public Employment Relations Act's promotion of collective bargaining grievance mechanisms and the Act's forum for resolving unfair labor practices before the Employment Relations Board preempt state common law remedies for disputes arising out of the employment relationship. In other words, the statutory scheme for resolving public sector labor disputes is supreme. For private sector cases see IBEW v. Heckler, 125 LRRM 2353 (1987); Starchan v. Union Oil Company, 768 F.2d 803 (5th Cir. 1983). Restricting common law remedies may conflict with Article 1, Section 10 of the Oregon Constitution, which provides that all persons "shall have remedy by due course of law for injury done him in his person, property, or reputation."

[67]McLain v. Boise Cascade Corp., 271 Or. 549, 533 P.2d 343 (1975); Leggett v. First Interstate Bank of Oregon, 86 Or. App. 523 (1987).

[68]See Luck v. Southern Pacific Transportation Company No. 84-3230 (Cal. Super. Ct.).

B. Defamation

Defamation may arise when the results of a drug test are publicly disclosed. The tort of a defamation is premised upon an unprivileged communication to a third person of false and defamatory information concerning a person which damages that person's reputation. Damages on a defamation claim were awarded when an employer fired a worker who had first tested positive for methadone, but had a negative retest.[69] Another worker was awarded over $400,000 for defamation, intrusion on privacy and wrongful discharge stemming from a false accusation of drug use.[70]

C. Negligence

In effect, negligence is the failure to exercise reasonable care. Employees whose test results, for example, are false positives may very well be able to demonstrate employer or laboratory negligence in administering the test. Employees have successfully used negligence theories in suits involving inaccurate conclusions drawn from polygraph examinations.[71] Chain of custody errors also may lead to a negligence claim.

D. Wrongful Discharge

The tort of wrongful discharge is quite limited in Oregon. Among other factors, the plaintiff must allege that he/she was meeting a public duty (i.e., jury duty) or pursuing a private, statutory or constitutional right related to work which is of important social interest (i.e., workers' compensation claims or sexual harassment).[72] Conceivably, an employer which fires an employee in retaliation for the worker's valid challenge to use of a drug test could be sued on

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[69] Houston Belt & Terminal Ry Co. v. Wherry, 548 S.W.2d 743 (Tex Ct. App. 1976), cert. denied, 434 U.S. 962 (1977).

[70] O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067 (1st Cir. 1986).

[71] Zambatori v. United Parcel Service, 479 N.Y.S.2d 470 (N.Y. Sup. Ct. 1984).

[72] Kofoid v. Woodard Hotels, Inc., 79 Or. App. 283 716 P.2d 771 (1986).

this theory.

E Interference with Contract

The tort of intentional interference with contractual relations (a person's employment relationship) may come into play when a supervisor or co-worker uses a drug test to harass a worker, rather than to benefit the employer. It is not necessary that an employee actually be terminated to assert this tort. If the interference results in mental suffering, damage to reputation, and economic loss short of termination, the claim may still be asserted. However, when supervisors or co-workers act in the interest of the employer and in good faith, they have a legitimate defense or privilege against a claim for wrongful interference with contract.[73]

VII. STATUTORY CLAIMS

Drug testing programs may implicate federal and state laws protecting handicapped individuals from discrimination in employment. Substance abuse is recognized as a handicap under the Vocational Rehabilitation Act of 1973.[74] Section 504 of the Act provides that "[n]o . . . handicapped individual . . . shall, solely by reason of his handicap . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."

Drug and alcohol addiction are considered physical and mental impairments within the meaning of Section 504.[75] A "handicapped individual" is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activity; (ii) has a record of such

[73] Straube v. Larsen, 287 Or. 357, 369, 600 P.2d 371 (1979).

[74] 29 U.S.C. Sections 701-796.

[75] Simpson v. Reynolds Metals Company, Inc., 629 F.2d 1226 (7th Cir. 1980); Tinch v. Walters, 573 F.Supp. 346 (E.D. Tenn. 1983).

impairment; or (iii) is regarded as having such an impairment."[76] In 1978, Congress amended the definition of "handicapped individual" to exclude

> any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such person 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 safety of others.

Without question, prevailing on a Section 504 discrimination claim involving alcoholism or drug addiction is a formidable task. The plaintiff must show that he or she has a substantial drug or alcohol problem which limits certain major life activities but does not inhibit proper work performance.

A. Drug Dependency Discrimination

Discrimination results when a public employer promotes a blanket policy against hiring current or former addicts, or harasses and discharges an employee upon learning that the employee received treatment of alcoholism or drug addiction.[77] Termination because of recreational drug or alcohol use does not fall within Section 504 protection, where the employee has not been diagnosed as an alcoholic or drug addict.[78]

Oregon has a Fair Employment Practices Act which also provides a remedy to persons who have been discriminated against at work because of a handicap. The aggrieved employee may file a lawsuit or an administrative complaint with the State Commissioner of Labor. Like Section 504, the Oregon law provides that a person who does not actually have a physical or mental impairment, but is regarded by an employer as having one, is protected. He or she may seek an

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[76] 29 U.S.C. Section 706(7)(B).

[77] Davis v. Bucher, 451 F.Supp. 791 (E.D. Penn. 1978); Athanas v. Board of Education, 28 FEP Cases 569 (1980).

[78] Connecticut General v. Wisconsin Department of Industry, 273 N.W.2d 206 (1979).

injunction, requiring reinstatement or hiring, and back pay.[79]

VIII CONCLUSION

The "search and seizure" clause of the U.S. Constitution's Fourth Amendment has been the primary vehicle for challenging the drug testing of public employees. We can expect the United States Supreme Court to define further those circumstances and areas of employment where drug tests are permissible under the Fourth Amendment. It is likely that the Court will, in essence, adopt the emerging principle that mass and random drug tests are generally allowed in (1) highly regulated industries or (2) industries with a significant degree of regulation and employees who work in jobs where public safety concerns are paramount. The more difficult question is which industries are to be considered "highly regulated" or to have "paramount" public safety concerns necessitating drug tests.

Public employers are now being given leeway in testing employees who are working in the areas of corrections, transit, aviation and nuclear power. However, even in most of these areas there have been conflicting decisions. The extent to which employers will be given more authority to test police officers and fire fighters is uncertain. As it stands, there is strong precedent that across-the-board testing of these workers is unconstitutional.

Generally, the courts have been holding that individual employees may be tested if an employer has reasonable suspicion, based on objective evidence, of drug use by those specific employees which affects job performance.

Drug testing programs which have been approved assure that test subjects are selected on the basis of neutral criteria, that urine samples are taken in

[79]ORS 659.425.

privacy, that there is adequate chain of custody procedures, that tests are performed by a laboratory that has demonstrated accuracy, that a separate confirmatory test is given and that employees with confirmed positive results are offered counseling or treatment.

In this highly volatile arena, it is crucial that employers and employees work together to try to achieve a reasonable approach for dealing with drug use problems which may exist in the workplace. Employers can better protect themselves against legal liability by not overreacting to a perceived drug problem. In many cases, there may not be a drug problem. Where there is drug use, public employers should focus on the least intrusive means for testing employees to best ensure that they are not violating employees' constitutional rights.

TECHNICAL ISSUES AND PROCEDURAL SAFEGUARDS IN WORKPLACE DRUG TESTING

by
Steven Hecker

I. INTRODUCTION

There are several compelling reasons for exercising great care in deciding whether to implement workplace drug testing and, if a decision is made to proceed, in designing the program. The potential impact of a positive test result on an employee's livelihood and reputation, and the potential liability of an employer for a falsely positive result should be evident. The volatility of drug testing as a labor relations issue has been clearly demonstrated in Oregon and across the country. Furthermore, in too many cases testing is perceived and used as a technological "quick fix" for the substance abuse problem. Drug testing is not a substitute for a comprehensive workplace substance abuse program. It is, at best, one component of an overall program that emphasizes rehabilitation over punishment for victims of chemical dependency.

To address these concerns it is necessary first to understand the basic science of the drug tests themselves, including their uses and limitations, and then to consider a number of factors in designing workplace drug testing policies and procedures.

II. ANALYTICAL METHODS FOR URINE DRUG TESTING

Drugs can be identified and measured through tests of a number of biological specimens including urine, blood, hair, saliva and breath, while even

brain waves are being examined exporimentally for this purpose.[1] Urine is currently the specimen of choice because 1) it contains higher concentrations of more metabolites of the drug taken than other specimens, and 2) its collection is generally considered less intrusive than blood, (although this opinion is not universally held), offsetting other advantages the latter may have.[2] In the workplace, urine testing is by far the most prevalent technique, with blood testing sometimes used in conjunction.

Drugs that are ingested, inhaled, or injected eventually enter the bloodstream. In the process the drug is converted into other substances called metabolites. Drug testing methods may look for and/or measure the drug itself or some part thereof, or one or more metabolites of the drug. For example delta-9-tetrahydrocannabinol (THC) is the predominant psychoactive ingredient in marijuana. When the marijuana is smoked, free THC is released, enters the bloodstream, and is simultaneously absorbed into most body tissues and converted in the liver to a number of metabolites. The metabolites are much more water soluble than the original THC so they eventually pass through the kidney into the urine where they accumulate until eliminated.[3] These metabolites, like any other drug or metabolite, are eliminated over time, with different substances having different "retention times" in the urine.[4] THC

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[1]Bureau of National Affairs (BNA), Alcohol and Drugs in the Workplace (1986) pp.31-32. John Herzfeld, "Brain Scans on the Job," American Health (July/August 1986) pp.72-78.

[2]BNA, supra note 1, p.32. Abbie Hoffman, Steal This Urine Test, New York, Penguin (1987), p.188.

[3]Robert E. Willette, "Interpreting Cannibinoid Assay Results," Syva Monitor 4(1) (1986) p.1.

[4]"Drug and Alcohol Testing on the Job," AFL-CIO (1987) p.5.

metabolites have a relatively long retention time so that a positive urine test result for marijuana can indicate that "past use" has occurred, but cannot pinpoint that use more specifically than between one hour and one week ago or longer.[5]

For our purposes we shall distinguish among drug urinalysis techniques on the basis of 1)chemical principle and 2)whether the technique is primarily used for initial screening or for confirmation of a positive screening test. Immunoassays, or antibody tests, constitute one major class of screening procedures. Chromatography methods are a second group. One particular chromatographic technique is usually singled out because of its sophistication and normally very high accuracy. This is gas chromatography/mass spectrometry (GC/MS). Immunoassays and most chromatography methods are commonly used for initial screening, while GC/MS is the preferred confirmation technique.

A. Immunoassays

Two immunoassays, the enzyme-multiplied immunoassay technique (EMIT)[6] and the radioimmunoassay (RIA), are the most widely used tests in workplace urine screening programs. Immunoassays are based on the principle of competition between labeled and unlabeled drug for binding sites on a specific antibody.[7]

In the EMIT assay the drug or metabolite being tested for is labeled with an enzyme. An animal is inoculated with the drug or metabolite, provoking the

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[5]Richard Hawks, "The Constituents of Cannabis and the Disposition and Metabolism of Cannabinoids," The Analysis of Cannabinoids in Biological Fluids, NIDA Research Monograph 42 (1982) p.132.

[6]EMIT is a trademark of the Syva Corporation.

[7]Richard Hawks, "Analytical Methodology," Urine Testing for Drugs of Abuse, National Institute on Drug Abuse Research Monograph 73, (1986) (hereinafter NIDA Monograph) p.30.

animal to produce antibodies that will bind with the drug. In the test the urine sample is mixed with the antibodies, the enzyme labeled drug, and another compound called the substrate. If a sufficient quantity of the drug is present in the urine it will bind with the antibody, leaving the enzyme labeled drug free to react with the substrate. This reaction gives the sample solution certain characteristics, one of which is its ability to absorb light. By measuring light absorption and comparing it to that of known "standard" solutions, a positive or negative result is determined.[8]

RIA is similar to EMIT, but the drug is labeled with radioactive iodine rather than an enzyme. The labeled drug is mixed with the urine sample and antibody, and the radioactive drug competes with any drug in the urine for the antibody. The radioactive antibody compounds are then counted. A higher radioactive antibody count indicates a lower concentration of drug in the urine, while a low radiation count indicates that drug from the urine successfully competed for attachment to the antibodies.

Immunoassays are attractive for screening because they can be highly automated and hence are quite inexpensive, costing as little as $10 per sample. They are highly sensitive, meaning they are capable of detecting very low levels of a drug or metabolite. Certain EMIT assays have been promoted by the manufacturer as suitable for "on-site" use by an employer's own personnel.[9] The very principle of these tests, however, raises some problems. Since the tests depend on the binding of an antibody to the drug, other substances which compete with the drug for the antibody, including legal medications, food metabolites, or the body's own enzymes, may cause false results. This cross-reactivity

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[8]John P. Morgan, "Problems of Mass Screening for Misused Drugs," Journal of Psychoactive Drugs 16(4) (1984) p.305.

[9]Id. Hawks, supra note 7.

necessitates that positive immunoassay results be confirmed by an independent procedure.[10] Also the EMIT in particular is sensitive to temperature variations and adulterants like salt.

B. Chromatography

In chromatography the various components of a biological specimen are separated by movement across a plate or through a column, and once separated the components may be identified and/or measured. Thin layer chromatography (TLC) is a common urine screening technique. The urine sample is purified, pH balanced, and concentrated. The sample is then spread on a plate which has been covered with silica gel or another adsorbent. A solvent is then allowed to flow across the plate by capillary action, carrying the different components with it. Each drug metabolite travels a quantifiable distance based on certain chemical and physical characteristics. Treatment with color enhancing chemicals further aids the technician in "reading" the sample. High-performance Liquid Chromatography (HPLC) is a related but somewhat more sensitive and sophisticated technique.

Advantages of TLC include low cost, rapid analysis, and the ability to detect more than one drug or metabolite in a single test.[11] However, its sensitivity and specificity are lower than EMIT or RIA, and considerable subjective judgment is involved which is highly dependent on the skill of the technician. Because it operates on a different chemical principle from the immunoassays it is sometimes used as a confirmation test, following positive screening results. There is disagreement over this practice. Many experts believe that when TLC is performed by a highly trained and experienced

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[10]Hawks, supra note 7, p.30.

[11]Id. p.33.

technician under all the right conditions, it can confirm immunoassay results with excellent reliability for certain drugs. However, as a general rule, most also agree that currently gas chromatography/mass spectrometry remains the most legally defensible confirmation technique.

C. Gas Chromatography/Mass Spectrometry

GC/MS is the most widely used confirmatory test, combining two analytic techniques. In the chromatography phase the sample to be analyzed is vaporized and transported through a glass column with an inert gas. The drugs present are separated by their retention time, the time it takes for the drug to travel from the injection port to the detector at the end of the column. Once the separation has taken place the sample is bombarded with electrons and the resulting ion mass fragments are analyzed by the mass spectrometer. When operated in the "full scan" mode the MS produces a complete mass spectrum for each component of the sample, representing a "fingerprint" unique for each drug.[12] Properly done the GC/MS provides the most conclusive identification of all the urine screening techniques. However, it relies on expensive equipment, highly trained technicians, and is quite expensive compared to the tests discussed earlier.

II. CAPABILITIES AND LIMITATIONS OF DRUG SCREENING TECHNIQUES

A. Measures of Accuracy

Employers and unions contemplating the use of urine drug screening must be aware of the capabilities and limitations of the tests. These limitations include those inherent to the specific testing techniques and those that result from the procedures of sample collection and handling. Furthermore, it is

[12] Id. p.35.

necessary to understand at the outset that a positive result on any of the urinalysis tests currently in use indicates only that the drug is present, and is not a measure of impairment or intoxication.

Screening tests are characterized by sensitivity and specificity.[13] Sensitivity is a measure of how likely a test is to positively identify the drug in a sample when the drug is really there. A test with 95% sensitivity performed on 100 drug users would identify 95 of them as drug users (true positives) and 5 of them as drug free (false negatives). Specificity is a measure of the accuracy of a test in identifying a non-user as free of drugs. Thus a 95% specific test applied to 100 persons free of drugs would find 95 of them free of drugs (true negatives) and 5 of them as drug users (false positives).

Finally, the positive predictive value of a test is the value of a positive test result in predicting the actual presence of the drug. A positive predictive value of 80% means that of 100 persons who test positive 80 are actually drug users. Table 1 illustrates the effect of the prevalence of use of the drug being tested for on the positive predictive value of the test being used.

TABLE 1

Effect of Prevalence on Predictive Value of a Positive Result[14]*

Prevalence %	Predictive Value of a Positive Result
0.1	2
1.0	16
2.0	28
5.0	50
10.0	68
50.0	95

* Test with 95% sensitivity and 95% specificity

[13] Mark Rothstein, Medical Screening of Workers, BNA (1984)p.46.

[14] George Lundberg, "Mandatory Unindicated Urine Drug Screening: Still Chemical McCarthyism," Journal of the American Medical Association 256(21) (1986) p.3003.

In practice, testing laboratories and manufacturers of urine screening systems set "cutoff" limits for their tests. This is the point above which a test result is labeled positive. It is important to realize that, though related to the sensitivity of the assay, this cutoff value is an administrative breakpoint.[15] A union may legitimately argue, and many have, for a higher cutoff to reduce the possibility of false positives or positive reports resulting from off-job drug use.

In designing or choosing testing procedures then, these statistical measures and the objectives of the testing must be considered together. If the purpose of the initial screening is to identify as many drug users as possible, a highly sensitive test is desirable. However, since a sensitivity increases, specificity decreases, this highly sensitive test will produce more false positives.[16] False positives, though never desirable, are not a critical problem in most clinical laboratory testing. In workplace drug screening, however, which is an application of analytical forensic toxicology, the legal implications and personal impact of a false positive are such that much more is at stake.[17] Furthermore, as the prevalence table above indicates, the likelihood of a positive result correctly identifying the subject as a drug user declines precipitously as the proportion of true users in the tested population declines.

These statistical facts have two very practical implications. First an employer should have substantial evidence that a drug use problem does indeed

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[15]Hawks, supra note 7, p.36.

[16]Morris Panner and Nicholas Christakis, "The Limits of Science in On-The-Job Drug Screening," Hastings Center Report (December 1986) p.8.

[17]"Scientific and Technical Guidelines for Federal Drug Testing Programs; Standards for Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies; Notice of Proposed Guidelines," Department of Health and Human Services, FR52(157) (August 14, 1987) (hereinafter HHS) p.30643.

exist before embarking on a screening program. Second, it is essential that a confirmatory test using a highly reliable technique be performed on every sample identified as positive by a less specific screening test.

B. Quality Assurance and Chain of Custody

A number of factors limiting the reliability of screening tests have already been mentioned. Cross-reactivity with other chemicals may cause false positives in some of the immunoassays. For example, an amphetamine assay may read positive if a subject has consumed certain over-the-counter cold medicines including Contac.[18] Certain urinary enzymes may also interfere with the accuracy of EMIT and RIA assays.

Another set of factors which affects accuracy and reliability includes the handling of samples from the time of collection through the entire analytical and reporting procedures. The "chain of custody" of the sample must be accurately maintained and documented at every step to protect the employee and to minimize the employer's liability for false results. The proper training of laboratory personnel and proper lab management are essential to a lab quality assurance program. Not only must proper methodologies be employed, but care must be taken that equipment is cleaned and calibrated as necessary, that accurate standards and controls are utilized, and that reagents and the samples themselves are kept fresh. Finally, the lab should successfully participate in proficiency testing (PT) programs to compare its performance with other labs doing similar work.[19]

Earlier studies have shown extremely poor performance by some labs in

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[18]Jay Roth, "An Introduction to Drug Screening Tests," Drug Testing in the Workplace, AFL-CIO Lawyers Coordinating Committee, (1987) p.47.

[19]Robert Blanke, "Accuracy in Urinalysis," NIDA Monograph supra note 7 p.49.

such PT programs, in one case leading the Centers for Disease Control to proclaim a "crisis in drug testing."[20] Certification programs for drug testing laboratories are only now being developed in many jurisdictions, including Oregon. Senate Bill 478 passed by the 1987 Oregon Legislature, directs the Oregon Health Division to develop standards for laboratories screening for drugs of abuse. Included in the current draft of these regulations is a requirement that all positive screening results be confirmed by a licensed clinical laboratory if such screening results "are to be used to deprive or deny any person of any employment or any benefit."[21] Presently, however, it still rests on the purchaser of such laboratory services to thoroughly evaluate the capabilities of the facility.[22]

C. Impairment

The inability of urine drug screening techniques to measure impairment or intoxication remains their most serious limitation. The measure of intoxication we are all most familiar with is the Breathalyzer, used to measure alcohol in exhaled breath and correlated with blood alcohol concentration. While this correlation is good, it must be recognized that even these blood alcohol levels which are defined as intoxicating (0.08% in Oregon for instance), are legal definitions and not necessarily scientifically valid. Actual impairment varies with individual characteristics such as weight, height, body type and individual

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[20]HJ Hansen, SP Caudill, and J. Boone, "Crisis in Drug Testing: Results of the CDC Blind Study," Journal of the American Medical Association 253 (1985) p.2382.

[21]"Clinical Laboratories," OAR 333-24-350(1), Draft For Review and Comment Only (1988).

[22]John Laseter and Greg Butler, "Proper Drug Testing Procedures Require Lab Analysis Accuracy," Occupational Health and Safety 57(2) (Feb. 1988) p.38.

tolerance.

With urinalysis for drugs, or even blood testing for drugs, such correlations with impairment do not exist. The retention times of different drugs and metabolites in the urine and variations in individual metabolism and tolerance make the accurate measurement of impairment and even the pinpointing of time of ingestion of drugs impossible. Chiang and Hawks summarize the current situation:

> Drug concentrations in biological fluids are affected by the dose, route of administration, pattern of drug use, and the dispositional kinetics (distribution, metabolism, and excretion) of the drug. As most drugs are distributed to the site of action by blood, drug concentration measurement in this body fluid provides the best information as to the potential effect on behavior such as driving impairment or on psychological high. Due to wide individual variations in the pharmokinetics and pharmacodynamics of drugs, however, the use of plasma drug concentrations for the estimation of impairment has not been established for most drugs. As for urinalysis, drug concentrations in the urine are further complicated by other factors such as urine flow and pH. Even if a specific method is used for the quantitation of a specific drug (the active species, not the inactive metabolite), interpretation in forensic samples to predict time of drug use or impairment is not possible, except within broad time periods, because of the variations in urine drug concentration as well as the limited knowledge available about the dose or the route of administration.[23]

Other measures must be used to assess impairment, including behavioral and physical symptoms and tests of motor skills.[24] However, it must be recognized that there are numerous other causes of functional impairment, including legal over-the-counter or prescription medications.[25]

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[23] C. Dora Chiang and Richard Hawks, "Implications of Drug Levels in Body Fluids: Basic Concepts," NIDA Monograph supra note 7, p.80.

[24] TS Denenberg and RV Denenberg, Alcohol and Drugs: Issues in the Workplace, BNA (1983)pp.91-98.

[25] BNA supra note 1, p.29.

IV. LABOR AND MANAGEMENT CONSIDERATIONS IN DESIGNING DRUG SCREENING PROGRAMS

The foregoing discussion should make clear that workplace drug testing is not an activity to be entered into lightly. If a substance abuse program is to be implemented and drug testing is being considered as a component of it, both labor and management have a number of serious issues to contemplate. These considerations include:

1) Does a drug problem exist in the workplace sufficient to warrant a substance abuse program? How can the nature and extent of the problem be assessed and documented?
2) Will drug testing help to address the specific problems identified?

If testing is to be included in the program, a further set of specific issues must be addressed:

1) Which employees will be tested, when, for what reasons, and who will decide?
2) What will be the impact of a positive test result?
3) How will impairment be determined?
4) How will quality and accuracy be assured from sample collection through testing and reporting of results?
5) How will legal drugs including prescription medications and alcohol be incorporated into the program?

6) What will be the relationship between testing and treatment?

7) How will confidentiality be maintained throughout the program?

Let us briefly explore these questions.

A. Establishing the Need

Workplace drug programs range in content from basic drug education aimed at prevention of abuse to comprehensive education, intervention, and treatment programs. The needs of each workplace must be assessed based on its own characteristics. Absent any evidence of significant drug use among employees affecting individual or company performance, it is probably not wise to introduce drug testing just because other employers are doing it. However, in order to make this assessment, an organization must have specific job performance standards to provide an objective basis for measuring and documenting inadequate or deteriorating performance.[26] Implementing drug tests in the absence of any knowledge of the prevalence of drug use among employees introduces the accuracy problems inherent in testing low prevalence populations.[27]

Some advocates of testing argue that testing provides a deterrent effect to drug use so that its use may be justified even where individualized suspicion or large scale drug use among employees is not present.[28] Testing, this argument continues, gives people who might otherwise indulge for social or peer pressure reasons, an excuse to "just say no." While the threat of testing undoubtedly does deter some drug use, some opponents of testing maintain that urine screening

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[26]Thomas Backer, Strategic Planning for Workplace Drug Abuse Programs, National Institute on Drug Abuse, HHS Pub. No. (ADM)87-1538, (1987) p.12.

[27]Lundberg supra note 14.

[28]BNA supra note 1, p.28.

mainly catches social drug users, and that "serious" drug users are more likely to use sophisticated means to avoid detection.[29] Employers need also to consider the impact of testing on employees who may be casual users off the job but are excellent and valuable employees. Such employees may be prompted to leave by resentment of the test or by embarrassment over a positive test result.[30]

Finally, the nature of the employer's business certainly affects the needs assessment. The potential consequences of on the job drug use are certainly more serious in transportation or firefighting services than in a less safety-related administrative operation.

B. When Testing is Permissible

Who can be tested, when, and under what circumstances is probably the most contested issue in designing and implementing urinalysis programs. Arrangements vary from universal unannounced testing of all employees, which is rare, to programs requiring strictly defined "probable cause" before an employee can be screened. Other protocols include post-accident drug screens, testing as part of an annual physical examination, testing of those in specific safety-related job categories, preemployment applicant screening, and random testing.

The standards that are established should be reasonably related to the goals of the program and should be spelled out and clearly communicated to all concerned parties. To protect employees from harassment and discriminatory application of testing, the following program elements should be considered:

1) specific probable cause supported by written documentation before submission to testing is required;

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[29]Richard Dwyer, "The Employer's Need to Provide a Safe Working Environment: Use Abuse of Drug Screening," Labor Studies Journal 12(3) (1987) p.12.

[30]BNA supra note 1, p.33.

2) require a supervisor to obtain concurrence of other supervisors and/or higher level management personnel before ordering an individual to be tested;

3) extensive training for supervisors in recognizing symptoms of drug intoxication and impairment.

4) explicit granting of the right to union representation for employees ordered to submit to urinalysis.

In addition all subject employees should be clearly made aware of the consequences both of refusal to take the test and of a positive test result.

C. Accuracy and Confidentiality of the Testing Procedure

The integrity of a drug screening program is dependent on clearly defined procedures from sample collection through analysis and interpretation of results. Certification programs for laboratories engaged in urine drug screening are only now being established. Guidelines established under these programs should be carefully considered in choosing a testing lab.[31] In addition to scientifically valid testing techniques, provisions for confirmation of positive screening results and maintaining confidentiality must be of paramount concern.

D. Interpretation of Test Results/Impairment

Qualified medical personnel must interpret the results of drug screens. The cutoff that has been set will determine what is reported as a positive result, but such a result may have many meanings. If off-job use of illegal drugs is expressly forbidden by contract or work rule or if a contract specifies discipline or discharge for a confirmed positive test, then such a result can be validly used to enforce the contract or rule. However, in other cases the fact that the test only indicates use at some point in the past requires that policies be in place on the consequences of a positive result.

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[31] HHS, supra note 17.

A common flaw in testing programs is the failure to distinguish between the casual drug user and the serious abuser. Medical and/or psychological evaluation may be necessary to make this distinction. The policy should clearly spell out how this is to be done while protecting the dignity and confidentiality of the employee. If this part of the program is not carefully designed, employees may be referred for inappropriate treatment or otherwise subjected to unwarranted discipline or humiliation. This can result not only in severe injustice to the employee but also in considerable waste of expensive health care services.

E. Testing, Treatment and Rehabilitation

A workplace drug abuse program should emphasize treatment and rehabilitation over punishment, in keeping with the recognition that chemical dependency is a disease. Many employee assistance programs (EAPs) predate drug screening programs, and have provided counseling and referral services for employees with alcohol, drug, or other mental or emotional problems. A variety of EAP models exist. Large employers may run their own programs with or without union cooperation. Many employers contract with outside providers for EAP services, and there are also union-run EAPs.[32] All EAPs rely heavily on the trust of employees to be successful. The advent of drug testing has raised the question of whether that trust can be maintained in the face of what is seen by many as a negative approach to substance abuse. The fear is that the EAP will be seen as playing two incompatible roles, that of "policeman as well as rehabilitator. [33]

It is not clear whether this conflict can be completely avoided. However,

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[32] BNA supra note 1, pp.39-45.

[33] Id. p.44.

it is critical that the testing function be kept separate from the employee assistance function as much as possible. This is easier where the programs are contracted separately to different service providers. Equally important is that the testing component is, in reality and in perception, an aid to the overall goal of rehabilitating, not punishing, employees. Evidence supports this point, indicating that the identification of employees with drug problems through observation by trained supervisors and workers is far more successful than urine screening in generating referrals to rehabilitation.[34]

F. Legal Drugs

Finally, it must be recognized that alcohol and other legal drugs account for far more of the costs of drug abuse than illegal drugs, by any standard of measurement. Any viable substance abuse program must recognize this and address alcohol and prescription drugs as well as illegal substances. This will not only begin to focus on the substances that are responsible for over 80% of the treatment population, but it will help to rectify the hypocrisy inherent in testing for drugs for "safety" reasons, while ignoring the most dangerous substances because they are "legal."[35]

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[34]cited in Dwyer, supra note 30, p.17.

[35]Dwyer, supra note 30, p.13. Lundberg, supra note 14, pp.3004-5.

SEXUAL HARASSMENT IN THE WORK PLACE:
ELIMINATING THE OFFENSIVE WORKING ENVIRONMENT
by
Paula A. Barran

I. INTRODUCTION

A few years ago, Phyllis Schlafly in a well-publicized speech commented:

> Non-criminal sexual harassment on the job is not a problem for the virtuous woman except in the rarest of cases.

Ms. Schlafly's personal opinion is clearly not shared by the majority of working women. The Oregon Bureau of Labor and Industries reports that sexual harassment charges make up approximately 20% of all sex discrimination claims filed with that agency. A 1980 study conducted by the federal government's Merit Systems Protection Board reported that 42 percent of the women surveyed (and 15.3% of the men surveyed) felt that they had personally encountered sexual harassment in the workplace.

In the last 15 years, courts have come full circle. Early decisions under Title VII refused to recognize sexual harassment as sex discrimination, an issue now settled beyond question by the Supreme Court in Meritor Savings Bank v. Vinson.[1] Sexual harassment, however, continues to be a much litigated category of discrimination.

Sexual harassment is a slippery beast and courts must struggle with the difficult task of locating the line between the acceptable and the unacceptable. As Judge Krupansky of the Sixth Circuit commented in Rabidue v. Osceola Refining Co.:[2]

> In the case at bar, the record effectively disclosed that Henry's obscenities, although annoying, were not so startling as to

[1]477 US 57, 91 L Ed 2d 49, 106 S Ct 2399 (1986).

[2]805 F2d 611 (6th Cir 1986), cert den 95 L Ed 2d 823, 107 S Ct 1983 (1987).

> have affected seriously the psyches of the plaintiff or other female employees. The evidence did not demonstrate that this single employee's vulgarity substantially affected the totality of the workplace. The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.[3]

Wherever the line is to be drawn, sexual harassment remains an important workplace issue confronting both labor and management. This article will examine the legal bases under which sexual harassment claims are brought and the guidelines developed by the EEOC and the courts in defining and resolving claims. It will conclude with a practical approach for investigating and handling sexual harassment complaints.

II. THE DEVELOPMENT OF LEGAL STANDARDS

A. Nonstatutory, Statutory and Constitutional Protections

1. Common Law Theories

The common law developed nonstatutory civil causes of action to protect the personal integrity of an individual. Such torts as assault, battery, and intentional infliction of severe emotional distress offered some protection from the conduct which is today considered to constitute sexual harassment in the work place. Narrowly interpreted principles of agency, however, frequently protected the employer, and workers' compensation often offered the only remedy.[4]

2. Title VII

[3]805 F2d 611, 622.

[4]However, for Oregon common law risks see Holien v. Sears, Roebuck and Co. 298 Or 76, 789 P2d 1292.

After the passage of Title VII of the Civil Rights Act of 1964,[5] victims of sexual harassment in the workplace attempted to bring claims under that statute. Title VII provides that it is an unlawful practice for an employer and its agents:

> To discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.[6]

Early attempts to bring sexual harassment within the coverage of Title VII did not meet with success. In Corne v. Bausch and Lomb, Inc.,[7] the court refused to find a Title VII violation notwithstanding the plaintiffs' allegations that they were repeatedly subjected to verbal and physical sexual advances from their supervisor who persistently took unsolicited and unwelcomed sexual liberties with them. District Judge Fray commented on the sparse legislative history recording the inclusion of sex in the protections of Title VII, and drew a distinction between the conduct of an employer (which is to be found in company practices) and the conduct of an individual (albeit a supervisor), which appeared to be "nothing more than a personal proclivity, peculiarity, or mannerism." Judge Fray also warned of the danger inherent in recognizing sexual harassment as a violation of Title VII:

> It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit. Also, an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.[8]

Eventually, sexual harassment became recognized as a violation of Title

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[5] 42 UCS § 2000e, et seq.

[6] 42 USC § 2000e(b) defines employer to include any agent of an employer.

[7] 390 F Supp 161 (D Ariz 1975).

[8] 390 F Supp 161, 163-164.

VII. An early decision was Barnes v. Costle.[9] The district court had taken the position that the allegations of sexual harassment which included retaliatory acts taken because the plaintiff employee had refused her supervisor's request for an "after hours affair," "are not the type of discriminatory conduct contemplated by the 1972 Act."[10] The court had reasoned that the substance of the plaintiff's complaint was not discrimination because of her gender but rather retaliation for refusal to engage in a sexual affair:

> This is a controversy underpinned by the subtlety of an inharmonious personal relationship. Regardless of how inexcusable the conduct of [appellant's] supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on [appellant's] sex.[11]

The District of Columbia Circuit reversed, commenting:

> It is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job.
>
> But for [plaintiff's] womanhood from aught that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel. Put another way, she became the target of her supervisor's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job.[12]

(3) Oregon Statutes

Title VII is not the only statute in which a victim of sexual harassment may find a remedy. ORS Chapter 659 contains provisions similar to those in

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[9]561 F2d 983 (D.C. Cir 1977).

[10]Title VII was amended by the Equal Employment Opportunity Act of 1972, extending the protection of the statute to government employees.

[11]561 F2d 983, 986.

[12]561 F2d 983, 989-990.

holding her job.[12]

(3) Oregon Statutes

Title VII is not the only statute in which a victim of sexual harassment may find a remedy. ORS Chapter 659 contains provisions similar to those in Title VII prohibiting discrimination on the basis of sex. See Holien v. Sears, Roebuck and Co.[13]

4. Constitutional Protections

Public employees may avail themselves of yet another avenue of protection. Sexual harassment is also considered by some courts to constitute sex discrimination in violation of the equal protection clause of the constitution, and is actionable under 42 USC § 1983. See Bohen v. City of East Chicago, Ind.[14] See, however, Otto v. Heckler,[15] holding that while Title VII does not preclude other claims for relief, redress cannot be granted without evidence of a constitutional injury caused by a federal agent acting within the parameters of his authority.[16]

B. Guidelines and Regulations

In 1980, the EEOC issued its guidelines on sexual harassment. The applicability and enforceability of these guidelines was finally approved by the Supreme Court in Meritor Savings Bank v. Vinson, supra.

Second, in 1980 the EEOC issued guidelines specifying that

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[12]561 F2d 983, 989-990.

[13]298 Or 76, 789 P2d 1292 (1984).

[14]799 F2d 1180 (7th Cir 1986).

[15]781 F2d 754 (9th Cir 1986).

[16]See Bush v. Lucas, 462 US 367, 76 L Ed 2d 648, 103 S Ct 2404 (1983), and Bivens v. Six Fed. Narcotics Agents, 403 US 388, 29 L Ed 2d 619, 91 S Ct 1999 (1971).

'sexual harassment,' as there defined, is a form of sex discrimination prohibited by Title VII. As an 'administrative interpretation of the Act by the enforcing agency,' . . . these guidelines, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'[17]

The EEOC guidelines provide that sexual harassment violates Title VII when it falls within the scope of the following definition:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[18]

C. Categories of Unlawful Conduct

While the EEOC guidelines encompass several different types of conduct which constitute sexual harassment, the unlawful conduct can be divided into two broad categories. In the first type of conduct, the employee's response to sexual advances has some tangible impact upon that employee's job situation. In the second group, the employee is not tangibly affected; rather, the work situation becomes hostile or offensive.

There has been little argument that quid pro quo harassment violates Title VII. In a classic quid pro quo case, the employer requires sexual consideration from an employee in exchange for job benefits. The acceptance of the harassment by an employee is an express or implied condition to the receipt of a job benefit, while rejection is the cause of a tangible job detriment. Until

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[17]91 L Ed 2d 49, 56. At least Appellate Court was giving effect to the EEOC's guidelines within three months of their issuance. See Bundy v. Jackson, 641 F2d 934 (DC Cir 1981), in which the court cited to the guidelines as "a useful basis for injunctive relief in this case."

[18]29 CFR § 1604.11(a). See fn. 9 supra.

Recently, however, there has been considerable discussion of whether or not "hostile environment" harassment constitutes a violation of Title VII and, if so, the appropriate standards under which to review such conduct.

D. Hostile Environment Harassment

1. Early Recognition of the Theory

The first case to recognize and remedy hostile environment harassment was Bundy v. Jackson, supra, decided shortly after the EEOC guidelines were issued. There, Judge Wright held:

> Though no court has as yet so held [that hostile environment harassment constituted discrimination], we believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination.[19]

2. Supreme Court Consideration

It took five years for the issue to reach the Supreme Court. In Meritor Savings Bank v. Vinson, supra, the Court finally addressed the issue of whether or not hostile environment harassment is a violation of Title VII and concluded that it is, subject to the caveat that hostile environment harassment must be sufficiently severe or pervasive to alter the conditions of the working environment. Writing for the Court, Justice Rehnquist held that:

> [T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment.[20]

The boundaries of a hostile environment case are evolving. Understanding the type of conduct which can in an appropriate case give rise to a hostile environment

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[19]641 F2d 934, 943-44 (emphasis added).

[20]91 L Ed 2d 49, 58.

claim requires little more than a vivid imagination;[21] analyzing that conduct under the appropriate legal standard is more difficult.

3. Objective Proof in Hostile Environment Cases

Whether or not the complained of conduct is sufficient to constitute a hostile environment is assessed by an objective rather than subjective standard. In Rabidue v. Osceola Refining Co., supra, the court described the appropriate presentation of a hostile environment case as a three-step process. The plaintiff must first demonstrate that the conduct in question would interfere with a reasonable person's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances. Second, the plaintiff must demonstrate that she was actually offended by the conduct of the defendant. Third, the plaintiff must demonstrate that she suffered some degree of injury as a result of the abusive and hostile work

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[21] See the following: Robson v. Eva's Super Market, Inc., 538 F Supp 857 (ND Ohio 1982) ["during January, 1980 plaintiff asserts the unwanted sexual advances continued. Mayfield, she testified, asked her to wear 'tight jeans' to work, and, in the presence of Brown, directed her to perform certain work tasks in his vicinity 'so I can watch her walk by'"]; Zabkowicz v. West Bend Co., 589 F Supp 780 (ED Wis 1984) ["in 1982, when Mrs. Zabkowicz was pregnant and under a 25 pound lifting restriction, Mr. Romans allegedly grabbed his crotch and remarked, 'Carol, I bet you'd have trouble handling this 25 pounder'"]; Bundy v. Jackson, supra ["Swane casually dismissed Bundy's complaints, telling her that 'any man in his right mind would want to rape you'"]; Bohen v. City of East Chicago, Ind., supra, ["she was a continual target for obscene comments by firefighters and other male employees and was forced to listen to their filthy talk and descriptions of their sexual fantasies of which she was the object. On one occasion a captain in the department informed Bohen (in words of another color) that a forcible rape in some nearby flora would improve her disposition. Bohen's fellow employees were also apparently much amused by implying that Bohen's cool reception to their constant invitations to engage in deviate sexual conduct was evidence of lesbian tendencies"]; Priest v. Rotary, 634 F Supp 571 (ND Cal 1986) ["when plaintiff was hired, she asked Rotary what she should wear as a cocktail waitress, and defendant stated he wanted her to wear 'something low cut and slinky'"].

environment.

4. Subjective Elements

The court's comments emphasize an important aspect of the plaintiff's proof. Not only must the hostile environment be one which would be offensive to a reasonable person under the same circumstances, it must also have been subjectively offensive to the plaintiff. This aspect is reflected in the EEOC's guidelines, which define sexual harassment in terms of conduct which is "unwelcome." Thus, an employee who participates in the complained of conduct is unlikely to prevail. See Gan v. Kepro Circuit Systems,[22] finding that the plaintiff had welcomed and encouraged the very conduct she complained of by regularly engaging in crude and vulgar language, initiating sexually oriented conversations with co-workers, and discussing intimate details of her own sex life.

In Meritor Savings Bank v. Vinson, supra, the Supreme Court held that a complainant's sexually provocative speech or dress is "obviously relevant" in making a determination of whether or not the plaintiff found particular advances to be unwelcome, and cited to the EEOC guidelines which provide:

> In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts on a case by case basis.[23]

5. Pervasiveness of the Conduct

There is an additional threshold level of proof which a complaining plaintiff must meet. Assuming the conduct in question was objectively and subjectively offensive and unwelcome, the plaintiff must also prove that it was

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[22] 28 FEP Cases 539 (ED Mo 1982).

[23] 29 CFR § 1604.11(b).

sufficiently pervasive to alter the conditions of employment and create an abusive working environment. As the Supreme Court cautioned in Meritor Savings Bank v. Vinson, not all conduct which may be described as harassment necessarily affects a term, condition, or privilege of employment. Where the complained of conduct can best be characterized as "flirting," and where "propositions" are propositions only by inference, the plaintiff is unlikely to succeed in a hostile environment claim.[24] See Scott v. Sears, Roebuck and Co. As the court held in Volk v. Coler:[25]

> In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be isolated or sporadic, . . . nor merely part of a casual conversation. . . . Instead, a Title VII violation requires the plaintiff to show a 'concerted pattern of harassment' . . . such as a 'steady barrage of opprobrious racial comment,' . . . which is 'so excessive and opprobrious' that it disrupts the normal work environment. . . .
>
> Examination of these and other authorities leads this Court to the conclusion that a Title VII violation for sexual harassment requires more than occasional foul language or gestures directed toward an employee. Unfortunately, human nature being what it is, this kind of conduct will, on occasion, occur. While such conduct is certainly to be discouraged, every instance of bad judgment on the part of the supervisor does not constitute a Title VII violation.
>
> Nevertheless, when the conduct reaches the point to where an employee is continually subjected to demeaning and offensive language before his colleagues by a supervisor, such activity necessarily has the effect of altering the conditions of his employment within the meaning of Title VII. Supra; see also, Jones v. Flagship Intern.[26]

E. Quid Pro Quo Harassment

In contrast to the difficulties inherent in proof and defense of a hostile environment, quid pro quo cases require the plaintiff to demonstrate only that he or she suffered a tangible job detriment as a result of non-acquiescence. See,

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[24] 605 F Supp 1047 (ND Ill 1985), affd 798 F2d 210 (7th Cir 1986).

[25] 638 F Supp 1555 (CD Ill 1986).

[26] 793 F2d 714 (5th Cir 1986), cert den 107 S Ct 952 (1987).

for example, Phillips v. Smalley Maintenance Services, Inc.[27] and Henson v. City of Dundee.[28] Note that men can be victimized by sexual harassment as well as women, as was the case in Joyner v. AAA Cooper Transportation,[29] finding that tangible job detriment occurring as a result of resistance to homosexual advances could constitute a violation of Title VII. Similarly, a male employee can state a claim where tangible job detriment occurs as a result of resistance to the advances of a female supervisor.

F. Preferential Treatment Harassment

A final group of cases defies classification as either hostile environment or quid pro quo harassment. Where one employee is favored for certain benefits as a result of that employee's relationship with a supervisor or manager, other employees may complain that they were disadvantaged. While there is some conflict in the case law, such a complaint states a claim under Title VII. See King v. Palmer;[30] see also, 29 CFR § 1604.11(g), providing:

> Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.[31]

G. Employer Liability for Acts of Supervisors and Co-workers

1. Strict Liability Under EEOC Guidelines

The extent to which an employer is liable for acts of sexual harassment has alternately intrigued and dismayed courts. Under the EEOC guidelines, an

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[27] 711 F2d 1524 (11th Cir 1983).

[28] 682 F2d 897 (11th Cir 1982).

[29] 597 F Supp 537 (MD Ala 1983).

[30] 778 F2d 878 (DC Cir 1985).

[31] See also OAR 839-07-560.

employer is strictly liable for the acts of its supervisors, regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.[32] Where the conduct complained of is that of a co-worker or, at times, a customer, an employer is responsible where it knew or should have known of the conduct and failed to take prompt appropriate remedial action.[33]

2. Strict Liability Only in Quid Pro Quo Cases

The Eleventh Circuit in Henson v. City of Dundee, supra, sought a compromise. There, the court held that an employer is strictly liable for the actions of the supervisory personnel resulting in quid pro quo harassment, but that where the claim is of hostile environment harassment, the plaintiff must prove that the employer knew or should have known of the harassment.

3. Meritor's Limitation of Strict Liability

In Meritor Savings Bank v. Vinson, the Supreme Court had the opportunity to define the scope of employer responsibility but declined to do so. The Court did hold, however, that employers are not always automatically liable for sexual harassment by supervisors and sent a clear signal that employe sponsibility was to be determined by agency principles.

> We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer, 42 USC § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held

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[32]See 29 CFR § 1604.11(c). This was the view initially taken by the Ninth Circuit in Miller v. Bank of America, 600 F2d 211 (9th Cir 1979). This decision has, however, been overruled by necessary implication by the Supreme Court decision in Meritor Savings Bank v. Vinson, supra.

[33]See 29 CFR § 1604.11(d).

responsible.[34]

Analysis of appropriate agency issues is an intricate factual inquiry requiring an assessment of the authority granted to the supervisor and the nature and scope of his employment responsibilities. Also pertinent is the employer's reaction to the conduct, which may or may not evidence condoning or ratification of the acts in question.

III. The Employer's Responsibility to Take Prompt, Appropriate, Remedial Action

In many cases, the answers to the confusing question of employer responsibility are to be found in the employer's conduct rather than the conduct of supervisory personnel.

Under the EEOC guidelines, the employer's responsibility is to take "immediate and appropriate corrective action." Proper corrective action will preclude a finding of liability against the employer for acts of co-workers and customers. Depending upon the legal theory applied, corrective action may or may not preclude a finding of liability for acts of supervisors. At a minimum, however, corrective action taken by an employer can mitigate its damages. See Henson v. City of Dundee, supra, particularly note 19. The introduction of general agency principles into determinations of employer liability by the Supreme Court's decision in Meritor Savings Bank v. Vinson should lead to further case law on of the extent to which corrective action can insulate an employer from liability. Where an employer makes it clear that sexual harassment will not be tolerated and consistently takes appropriate corrective measures to remedy any instances of sexual harassment, it is less likely that a court will consider the acts of its supervisors to be within the course and scope of their employment or

[34] 91 L Ed 2d 49, 63.

ratified or condoned by the employer.

Employers would be wise to consider the following guidelines which will not only assist in the prevention of sexual harassment in the work place, but also help insulate employers from liability.

A. Prepare and Disseminate a Policy Prohibiting Sexual Harassment.

The EEOC guidelines include some helpful advice:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.[35]

No employer should be without a general policy on harassment which makes specific mention of sexual harassment. The form of such a policy need not be complicated. One example used by many employers is the following:

> It is the policy of [employer] that all employees should be able to work in an environment free from discrimination, including sexual harassment. Sexual harassment occurs when an employee is subjected to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to such conduct is made explicitly or implicitly a term or condition of employment or is used as the basis for employment decisions affecting employees or has the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile or offensive working environment. Such conduct is specifically prohibited by [employer]. Any employee or applicant for employment who believes himself or herself to be subjected to sexual harassment or intimidation is encouraged to bring such incidents to the immediate attention of [appropriate personnel]. All such complaints will be promptly investigated.

Indeed, the absence of a policy specifically prohibiting sexual harassment was noted in the Supreme Court's decision in Meritor Savings Bank v. Vinson, supra, in discussing some of the reasons for rejecting the employer's argument that the existence of a grievance procedure and an anti-discrimination policy insulated the employer from liability.

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[35] 29 CFR § 1604.11(f).

B. Ensure That the Policy is Well-Publicized

A policy which is not known is no more effective than no policy at all. At a minimum, employer policies should be posted. If there are employee handbooks, the policy should be included in the handbook. Employers should take advantage of publications such as employee newsletters. Including policies against sexual harassment in payroll stuffers on an annual or semi-annual basis is a helpful practice. In addition, employers who regularly hold employee meetings of any variety should ensure that general discrimination topics and particularly sexual harassment are included in such training sessions. Employers should not overlook union meetings or publications as another mechanism for disseminating the policy.

C. Provide for a Complaint Mechanism

In addition to ensuring that employees are aware that sexual harassment is prohibited, employers should also provide a mechanism to bring complaints about sexual harassment to the attention of the appropriate personnel. The type of complaint mechanism will vary from employer to employer. Where a union is recognized, the contract's grievance procedure may well serve this purpose. Also it is frequently helpful to designate a personnel director or EEO coordinator to receive such complaints.

D. Ensure Complainants Can Bypass Their Supervisors, If Necessary

More than anything else, employers should be careful that they do not limit the effectiveness of the policy by requiring the complaint to be made to the very person responsible for the harassment. In rejecting the employer's argument that the existance of its grievance procedure and policy precluded a finding of discrimination, the Supreme Court in Meritor Savings Bank v. Vinson noted that:

> [T]he bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report

her grievance to him. Petitioner's contention that respondent's failure [to report the harassment] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.[36]

In some cases a union contract requires or employers prefer to have complaints made first to a supervisor. Where this is so, an alternate avenue should be provided to ensure that an employee can make a complaint about a supervisor without having first to go to that same supervisor.

E. Ensure That Complaints are Promptly Investigated

When complaints of sexual harassment are made, the employer's first obligation is to conduct an investigation of the complaint.[37] As a general practice, the investigation should be conducted in three steps.

1. Interview the Complainant

The first step should be to interview the employee making the complaint. The interview should be carefully handled. An employer who demonstrates sensitivity in interviewing the complainant may find that its efforts are rewarded by trust and confidence, enabling it to resolve the problem without intervention by a third party such as the EEOC or Oregon Bureau of Labor and Industries. In many cases, employees are loathe to discuss sensitive or

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[36]91 L Ed 49, 63.

[37]See the comments in Munford v. James T. Barnes & Co., 441 F Supp 459 (ED Mich 1977):

> The Court agrees that an employer may be liable for the discriminatory acts of its agents or supervisory personnel if it fails to investigate complaints of such discrimination. The failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior. While the Court declined to follow the holding in Barnes that an employer is automatically and vicariously liable for all discriminatory acts of its agents or supervisors, the Court does hold that an employer has an affirmative duty to investigate complaints of sexual harassment and deal appropriately with the offending personnel. 441 F Supp 459, 466

embarrassing matters. Some employers have found that asking the employee to write down what happened eliminates some of this embarrassment. In other cases, it may be more appropriate to have an interview handled by a person of the same sex who can collect the information and summarize the events for higher management.

2. Interview Witnesses

The second step of the investigation should involve interviews with other employees who may or may not have witnessed the events complained of. Employers should not lose sight of the fact that sexual harassment complaints are sometimes spurious. It is not unknown for employees to accuse others of sexual harassment for personal reasons, and there are many examples in reported decisions of employees accusing a lover or former lover of sexual harassment as a result of an affair gone sour. Interviews of other employees or potential witnesses will assist an employer in ascertaining whether or not the complaint is valid and will also be extremely helpful in assessing the pervasiveness of the conduct in question.

3. Interview of Alleged Perpetrator

The final step to the employer's investigation should be an interview with the alleged perpetrator. No employer should forget that even accused harassers have rights. No employee should be disciplined for sexual harassment without being given an opportunity to present his or her side of the story. Because such an interview could lead to discipline, a union representative should be present if requested.

4. Confidentiality Concerns

The investigation process is frequently complicated by employees who request that their identities and information be kept confidential. Given that an employer sometimes must be in a position to disclose the type of conduct

complained of, a blanket grant of confidentiality is often impossible. Employees being interviewed should be assured, however, that the interview is being conducted in order to comply with the employer's responsibility under Title VII and related statutes and that the employer will, if at all possible, keep the employee's identity confidential. The employee should, however, not be given absolute promises of secrecy. If an employee is terminated for sexual harassment, the basis for the termination will often become the subject of an unemployment compensation hearing, grievance, or even wrongful discharge lawsuit. Under such conditions disclosure of the information provided to the employer by witnesses and co-workers is necessary.

F. Determine Whether or Not the Complaint is Valid

Once the employer has conducted the investigation, it must make a determination on whether or not the complaint of sexual harassment is valid. Sometimes cases are clear; more often, they are complicated and inconclusive. In such situations, an employer should use the same information it would normally use in resolving discipline issues including credibility determinations based on demeanor, review of the work history, inconsistencies in the stories of the individuals involved, and any other pertinent information the employer may be able to acquire.

If the employer determines the complaint to be a valid one, it must consider the appropriate remedial action discussed below. If the complaint is not a valid complaint or if the information is inconclusive, some remedial action may be called for, recognizing that if nothing else there may be a personnel dispute involved. Where evidence is inconclusive, the complainant and the subject of the complaint should both be advised (preferably separately) that the employer has conducted an investigation and it is unable to determine whether or not the complaint is valid. Both parties should be advised that the employer's

policies prohibit sexual harassment and that any further complaints should be brought to the management's attention. Care should also be taken to advise the accused employees that the incident will not be used against them or affect their careers. To do otherwise would surely invite future grievances which in all probability could not be defended.

In some cases it may be advisable to arrange shifts or work locations so that the employees involved are not required to work together.[38] Employers should be careful not to take such actions if they are in any way inconsistent with a bargaining agreement or other employment contract. Seeking the assistance of the union is valuable, since with the union's concurrence actions may be taken which would ordinarily be impermissible.

G. Take Appropriate Remedial Action

1. Be Consistent With The Bargaining Agreement

If the employer concludes that the complaint is valid, appropriate disciplinary action should be taken against the perpetrator. The types of discipline meted out should be consistent with the conduct complained of, the collective bargaining agreement or agency policies or any employee handbook. For example, if a bargaining agreement or employee handbook obligates the employer to mete out progressive discipline in a particular sequence (such as verbal warning, written warning, suspension, and termination), those policies should be followed. If not, the employer will find its sexual harassment

[38]Employers should be cautioned not to respond to a complaint of sexual harassment by moving only the complainant to another shift or another work location unilaterally. If it is possible to move both employees, employers should consider that option. If only one employee is to be moved, both employees involved should be offered the option of electing a transfer. If both indicate a desire to transfer, or if both refuse to transfer, selection of the employees to be unilaterally transferred should be made on the basis of some objective criterion such as seniority, availability of other skills, or similar factors.

problems complicated by breach of contract lawsuits. Less serious offenses may merit a verbal or written reprimand. More serious conduct may merit demotion or suspension. In serious cases, termination may be warranted even on a first offense.

2. Be Inventive

Employers should not hesitate to be inventive in remedying sexual harassment. Many employers have found that a sexual harassment problem is corrected by requiring the harasser to undergo training which may include training films or EEO seminars. Other employers have required employees to submit to counseling.

3. Reassure the Complainant

Once the appropriate remedy is settled upon, employers should meet briefly with the complainant and explain how the complaint has been handled. This need not be a complete full explanation. However, advising the complainant that his or her concerns have been looked into and remedied is an important step. Many complaints of discrimination are filed by employees because they feel that their complaints have not been given appropriate attention. As part of this final meeting, the employee should be reassured that the employer will not tolerate retaliation; therefore, if the employee ever again experiences harassment or believes that he or she is being retaliated against for making a complaint, that complaint itself should be brought to the attention of appropriate personnel.[39]

H. Treat Unions as Allies Rather Than Adversaries

Because labor organizations can also be liable for sexual harassment in the work place, there is a considerable incentive for both parties to work together.

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[39]Employers should also recognize that even where no actual harassment has taken place, retaliatory acts are unlawful. See Sandy Education Association and Jane Davey v. Sandy Union High School District No. 2 and Kent Heaton, E.R.B. UP-42-87, 10 PECBR 389 (1988).

An effective program should include union participation in the development of both the policies prohibiting sexual harassment as well as the complaint procedure to be followed. Furthermore, employers should not overlook the benefits to be gained by encouraging union participation in educating employees about sexual harassment. Union participation during the resolution phase may assist the employer in fashioning the appropriate remedial action to take, particularly where there is some question about whether or not the action contemplated by the employer is permissible under the terms of the bargaining agreement.

IV. CONCLUSION

Sexual harassment in the work place has existed for years. Before legal remedies were provided for this age-old problem, the cost was measured in terms of lost productivity and dignity. Recent legal developments have added to that not insignificant cost the massive cost of litigation. Nobody wins.

Fortunately, this is not a problem without a solution. Prevention is the best tool. Provide a clear and explicit rule prohibiting sexual harassment in the work place. Provide for a complaint mechanism which can be used without fear or difficulty. Treat all complaints as serious. Investigate fully and take prompt appropriate remedial action. Above all else, recognize sexual harassment for what it is -- a personnel problem with wide ranging ramifications. Do not ignore it.

OVERVIEW OF LEGAL ISSUES RELATING TO SMOKING IN THE WORKPLACE

by
Jeffrey S. Merrick

I. INTRODUCTION

Smoking in the workplace is a controversial issue currently confronting labor and management. Management and non-smokers seek restrictions for reasons of economics and health. Non-smokers oppose limitations on their ability to smoke. Labor unions are caught in between smoking and non-smoking members.

This article discusses the developing law controlling smoking in the workplace. It begins with a discussion of management's and labor's rights and duties. Oregon legislation on smoking is next, followed by the application of general statutes and common law theories to workplace smoking.

II. BARGAINING OR CONSULTING WITH EMPLOYEES BEFORE ADOPTING SMOKING POLICY

A. Mandatory Subject of Bargaining

Oregon's Public Employment Relations Act (PECBA) requires management to bargain with labor with respect to "employment relations."[1] Consequently, management commits an unfair labor practice when it unilaterally imposes changes in any condition of employment that is a mandatory subject of bargaining if it does not bargain with its recognized union. Although there are presently two cases pending adjudication before Oregon's Employment Relations Board (ERB), it is yet to be decided whether rules concerning employee smoking

[1]ORS 243.650(4) and 243.672(1)(e); compare 29 USC 158 sec. (a)(5) and (d) (must bargain over "terms and conditions of employment").

are mandatory subjects of bargaining under the PECBA.[2] However, in the private sector, rules concerning employees smoking are considered conditions of employment over which management must bargain.[3] If, as on many other issues, Oregon's ERB follows National Labor Relations Board precedent, then management may not adopt smoking rules unless it first gives labor notice and an opportunity to bargain.

B. Arbitration Cases

The question sometimes arises whether a collective bargaining agreement authorizes management to impose smoking polices unilaterally. Such authority could be recognized through contractual language, by a union having waived its right to bargain on the issue through practice or bargaining history, or for other reasons. There are cases going both ways, as discussed below.

Occasionally, the motivation for adopting a smoking policy is pivotal in deciding whether management may impose smoking rules unilaterally. In one case, the arbitrator vacated a no smoking rule imposed for the employees' health. The arbitrator found that the company had no legitimate interest in the health of the employees.[4] In another case, the arbitrator upheld a limited no smoking rule

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[2]Tigard School District vs. the Tigard Educators Association and SEIU Local 49 vs. Pacific Community Hospital.

[3]Tally-Ho Properties, Inc., 271 NLRB No. 143, 117 LRRM 1375 (1984) (employer violated sec. (a)(5) and 8(a)(3) when it required employees to wear ties, prohibited smoking and drinking without notifying the union.); St. Louis Health Center, 248 NLRB No. 143, 104 LRRM 1059 (1980) (violated 8(a)(5) when unilaterally promulgated rule prohibiting smoking in all areas except nurses' lounge); Gallencamp Stores Co. v. NLRB, 407 F2d 525, 529 n. 4 69 LRRM 2024 (9th Cir 1968) (company rules concerning smoking are mandatory subjects of bargaining).

[4]Scheen Body & Equipment Co., 69 LA 930 (Roberts, 1977). Considering potential legal challenges from non-smokers, discussed later in this article, one wonders whether this case would be decided the same today.

designed to prevent litter as part of a general plan to clean up a factory.[5] Preventing the abuse of restroom privileges justified a rule prohibiting smoking in the restrooms in another case.[6]

Other cases have discussed the matter in terms of management's right to make reasonable rules covering the conduct of its employees.[7] If the practice of smoking developed over time without being clearly sanctioned by rule or policy, management has been able to change the practice unilaterally. Where the practice is firmly established, however, management may be prevented from implementing such restrictions.[8]

In addition to challenges of management's authority to impose a smoking rule, there are also arbitration decisions involving discipline of workers for violations of smoking rules. Smoking near an airplane fueling area contrary to a company rule constituted just cause for discharge,[9] as did smoking in a restricted area following clear warnings that smoking would be grounds for discipline or discharge.[10] On the other hand, an arbitrator found discharge too severe for smoking near explosive materials where the employee alleged he

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[5]Snap-On Tools Corp., 87 LA 785 (Berman 1986).

[6]National Pen & Pencil Co., 87 LA 1081 (Nicholas 1986).

[7]Morelite Equipment Co., 86 LA 777 (Stoltenberg 1987) (rule upheld); Litton Industries, 75 LA 308 (Grabb 1980) (rule upheld); Union Sanitary District, 79 LA 193 (Koven 1982) (rule was not reasonable); Kast Metals, Inc., 70 LA 278 (1978) (rule upheld); Dental Command, 83 LA 529 (1984) (Allen Jr. 1984) (one supervisor could not ban smoking in his area of responsibility).

[8]See "Past Practice and Administration of Collective Bargaining Agreements" by Richard Mittenthal. Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators, BNA, Washington, D.C. 1961. See also 89 LA 1065 (Gibson 1987) Restrictions permitted due to past practice.

[9]Gladieux Food Services, Inc., 70 LA 544 (Lewis 1978).

[10]Olin Corporation, 81 LA 644 (Nicholas 1983).

"inadvertently" lit the cigarette without realizing where he was.[11]

III. LABOR'S OBLIGATIONS AND POSITION

Unions have a duty to fairly represent all members of the bargaining unit. When the bargaining unit includes smokers and non-smokers, the question arises as to what the union must do when management proposes to restrict smoking.

The union has wide responsibility and authority in collective bargaining.[12] The obligation to represent all members of the bargaining unit requires the union to make "an honest effort to serve the interest of all of those members, without hostility to any."[13] Applying this general principle to the smoking context, a union probably has a duty to (1) evaluate a proposed smoking rule in light of employee preferences and (2) request any modifications necessary to better serve smoking and non-smoking employees.

With respect to contract administration, the union has a duty to fairly represent bargaining unit employees. In this regard, the union's conduct toward an employee may not be arbitrary, discriminatory, or in bad faith.[14] Consequently, the union must give fair consideration to grievances of smokers or non-smokers.

In 1986, the AFL-CIO Executive Council issued a statement on smoking in the workplace. It supports "programs to provide medical surveillance, education

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[11] Converters, Ink, 68 LA 593 (Sembower 1977).

[12] Caddy v. Multnomah County Deputy Sheriff's Ass'n, / PECBR 6545 (1984) ("wide range of reasonableness" is accorded union); Ford Motor Co. v. Huffman, 345 US 330, 339 (1952); Vaca v. Sipes, 386 US 171 (1967).

[13] 345 US at 337.

[14] Vaca v. Sipes, 386 US 171 (1967).

and counseling about the risks of disease to workers at high risk,"[15] such as those exposed to other toxic substances in the workplace. The AFL-CIO opposes employer discrimination against smokers and employer proposals to require participation in smoking cessation programs. It acknowledges its responsibility to represent all members: smokers and non-smokers. The AFL-CIO is against legislative solutions to smoking in the workplace and believes that the issues are best resolved voluntarily between labor and management. Because smoking rules can arouse strong feelings, prudent union leaders will move cautiously on this issue.

IV. LEGISLATION ON SMOKING

Apart from labor restrictions, other legislation bears on the rights of smokers and non-smokers. This section outlines legislation expressly governing smoking. Later sections discuss the application of general legislation in the smoking context.

A. Oregon Indoor Clean Air Act

The Oregon Indoor Clean Air Act[16] provides: "No person shall smoke or carry any lighted smoking instrument in a public place except in areas designated as smoking areas."[17] "Public place" means "any enclosed indoor area open to and frequented by the public" including:

Restaurants	Bowling Centers
Retail Stores	Banks
Commercial Establishments	Nursing Homes
Educational Facilities	Auditoriums
Arenas	Meeting Rooms

[15]A statement by the AFL-CIO Executive Council on Smoking and the Workplace issued February 19, 1986.

[16]ORS 433.835, et seq.

[17]ORS 433.845.

Grocery Stores

A few public places are statutorily exempt from the requirements. These are:

Cocktail lounges and taverns

Enclosed offices or rooms occupied exclusively by smokers

Rooms or halls being used for private social functions

Retail businesses primarily selling tobacco or tobacco products

Restaurants with seating capacity for 30 or fewer and with certain air filtration systems

The penalty for failing to post signs or unlawfully designating the entire establishment as a smoking area is a fine or fines up to $100 in any 30 day period.

B. Smoking in Hospitals

Oregon statutes deal specifically with hospitals. No hospital employee, patient or visitor may smoke in any non-private patient room or any other area where patient care is provided.[18] Furthermore, the person in charge of the hospital must designate reasonable areas in lobbies, waiting rooms, as well as a reasonable number of patient rooms where smoking is not permitted. Although the law does not require it, some hospitals are prohibiting smoking entirely within their walls.

C. State Offices

The Legislative Assembly directed the Personnel Division to adopt regulations prohibiting smoking except where designated in places of employment operated by the State.[19] The regulations require agencies to designate places of employment where smoking is prohibited and permitted, and require agencies to provide physical barriers, ventilation, space separation or

[18]ORS 441.815.

[19]ORS 243.350.

other methods to create at least some smoke-free areas for non-smokers.[20] Or, if agencies prefer, they may prohibit smoking in the entire area of employment.[21] Interested parties should check with individual state agencies to determine what policies have been adopted.[22]

D. Local Ordinances

Local governing bodies are considering and adopting legislation on smoking. Multnomah County, for example, prohibits all smoking in county facilities.[23] A "county facility" means "enclosed space that is owned, leased or rented by the county as a place of employment, including buildings, cars and trucks."

Other communities in and out of Oregon are considering limitations not only upon public employees, but also upon certain industries, especially restaurants. Consequently, a careful employer will check city and county ordinances before proposing any rules on workplace smoking.

V. HANDICAP DISCRIMINATION

Oregon law prohibits discrimination against handicapped individuals by all employers.[24] Federal law also prohibits discrimination against handicapped persons by certain employers, including certain government contractors, and programs receiving federal financial assistance.[25] The question arises whether

[20]OAR 105-10-060 (1) and (2).

[21]OAR 105-10-060 (4).

[22]See, e.g., OAR 571-50-005 (Rule restricting smoking in University of Oregon Facilities).

[23]Ordinance No. 556. The author understands that AFSCME has grieved the implementation of the policy for an alleged failure to bargain.

[24]ORS 659.425.

[25]The Rehabilitation Act of 1973, 29 USC sec. 791, 793-794.

employees who smoke or smoke-sensitive employees are "handicapped."

The definition of "handicapped individual" is very broad. A handicapped individual is any person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such impairment, whether or not the person is actually impaired. Individuals with such impairments are handicapped if they are likely to experience difficulty in finding, retaining, or advancing in employment.

Sensitivity to tobacco smoke is considered a handicap by Oregon's Civil Rights Division[26] and the federal courts.[27] The "handicap" must be more than a mere dislike of smoke. Although the law is not clear, an employee must probably suffer specific symptoms or a particular pulmonary problem or disease.[28] Thus, an employer who fires someone because of their physical sensitivity to smoke commits an unlawful employment practice.

Employers must make reasonable accommodations to handicapped employees, including smoke-sensitive employees. A reasonable accommodation might be the designation of smoking and non-smoking areas, adding or rearranging partitions, or relocating the desks of smokers and non-smokers. An employer need not incur major expense, such as the installation of ventilation systems or the construction of walls.

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[26]The Oregon Bureau of Labor and Industries, Civil Rights Divisions (CRD) has not issued any written rulings that sensitivity to smoke is a handicap. However, officials with CRD state that they have accepted handicap discrimination claims on that basis and that there should be a written ruling in the near future.

[27]Vickers v. Veterans Administration, 549 FSupp. 85, 86-87 (WD Wash. 1982).

[28]See, GASP v. Mecklenburg County, 42 NC App 225, 256 SE2d 477 (1979) (Plaintiff alleged "discomfort and harm" from smoke. Court held "not handicapped," and noted that outcome might have been different if plaintiff alleged a particular pulmonary problem or disease.).

Addiction to smoking raises another question. Generally, alcoholism and addiction to drugs are considered handicaps under certain circumstances. To date, there are no reported cases holding that an addiction to tobacco or nicotine is a handicap. In an analogous case, a person who tested positive for marijuana was not considered handicapped because he could not prove that his drug use substantially affected his ability to perform a major life activity.[29] Thus, smokers probably are not "handicapped," and employers may refuse to hire (or otherwise discriminate against) smokers.[30] One caveat, however: a smoker could possibly claim handicap discrimination on the grounds that the employer regards an addiction to smoking as a handicap.

VI. WORKERS' COMPENSATION/DISABILITY

A. Workers' Compensation

Workers who are injured on the job or develop a disease from their work are entitled to workers' compensation benefits. To recover benefits for an industrial disease, a worker must prove (1) that the disease arises out of and in the scope of employment, and (2) that the worker is not ordinarily exposed to disease-causing agents outside of work. For example, Marlene Ritchie claimed that she developed rhinosinusitis and bronchitis from second-hand smoke.[31] The referee awarded her compensation. The Workers' Compensation Board reversed on the ground that Ms. Ritchie failed to prove she actually suffered from any disease. Clearly, if workers can prove that they, in fact, suffer from a disease caused by a co-worker's smoke, they are entitled to workers' compensation

[29] McCleod v. City of Detroit, 39 FEP Cases 225 (ED Mich 1985).

[30] The CRD does not consider handicapped an individual who is addicted to smoking.

[31] Marlene W. Ritchie, 37 Van Natta's 1088 (1985).

benefits.

Aggravation of a pre-existing condition also entitled employees to workers' compensation. The Workers' Compensation Board has upheld an award for an aggravation of rhinosinusitis caused by a co-worker's smoke.[32]

Conversely, one claimant alleged that a rule forbidding her to smoke at her desk contributed to on-the-job stress, which is a compensable disease.[33] In that case, several other factors allegedly contributed to her stress. As a practical matter, it may be difficult to prove that a smoking ban, by itself, causes disabling stress.

B. Disability Under Federal Law

The question for decision in Parodi v. Merit Systems Protection Bd.,[34] was whether a smoke-sensitive employee was eligible for disability payments under federal law even though she lacked a serious or permanent medical disability. The court focused on whether the worker could perform the job she last occupied. It found that because of a smoky environment, she could not perform her job and was eligible for federal disability payments. However, the court noted that her disability could be removed by an offer of work in a smoke-free environment.

VII. UNEMPLOYMENT COMPENSATION

A. Leaving Work With Good Cause

Employees who quit work with "good cause" are entitled to unemployment compensation benefits. The question arises whether the non-smokers have good cause to quit when they cannot tolerate their co-workers' smoke.

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[32]Mary A. Downey, 37 Van Natta's 455 (1985).

[33]James v. SAIF, 44 Or App 405, 605 P2d 1368 (1980), modified 290 Or 343, 614 P2d 565 (1980).

[34]690 F2d 731 (9th Cir 1982).

In a 1979 Colorado case, an employee quit because of the smoky environment, alleging "unsatisfactory or hazardous working conditions."[35] Benefits were denied because claimant presented no evidence that working conditions were unsatisfactory or hazardous other than the claimant's statement of subjective discomfort. The case might be decided differently today if claimant offered recent studies linking cancer with second-hand smoke.

A California court articulated an easier standard. The court found that claimant reasonably and in good faith feared harm to his health from the smoky environment.[36] He received benefits.

In Oregon, "good cause" is "such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work. The reason must be of such gravity that the individual has no reasonable alternative but to leave work."[37] The Employment Appeals Board found that a worker had good cause to leave based upon a physician's statement that the worker was allergic to tobacco smoke and should be in a non-smoking area.[38]

B. Refusal to Accept Work in Smoking Environments

An individual who is out of work must seek work as a condition of receiving unemployment compensation. If that individual obtains a "suitable" job offer, but refuses the job, then he or she may not receive unemployment benefits.

In a California case, a smoke-sensitive employee sought work only in smoke-free offices. The question was whether she was "available for work" and whether only smoke-free environments were "suitable." The court found in favor

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[35]Rotenberg v. Industrial Commission, 590 P2d 521 (Colo App 1979).

[36]McCrocklin v. Employment Development Dept., 156 Cal App 3d 1067, 205 Cal Rptr 156 (1984).

[37]OAR 471-30-038(4).

[38]Dawn E. Lowe, Case no. 87-AB-854.

of the employee, thereby permitting her to turn down work in smoke-filled offices and still receive unemployment compensation.[39]

In Oregon, there have been at least two cases in which the referee awarded benefits to individuals who refused work in smoke-filled workplaces. according to a claims manager with the Employment Division.

VIII. WRONGFUL DISCHARGE

There are two types of wrongful discharge cases in Oregon which potentially give rise to punitive and general damages, including damages for emotional distress.[40]

The first type is a discharge for fulfilling a societal obligation. One example is firing someone for serving on jury duty.[41] Another example is a termination for refusing to sign a false and potentially defamatory statement against another employee.[42]

The second type of wrongful discharge case is a discharge for pursuing private statutory rights involving an important societal interest related to plaintiff's role as an employee.[43] An example is a termination for asserting

[39]Alexander v. Cal. Unemployment Ins. App. Bd., 104 Cal App 3d 97, 163 Cal Rptr 411 (1980).

[40]This differs from unlawful termination based upon discrimination. For discriminatory discharges, an individual may obtain reinstatement, back pay, and attorney fees but only $200 in general damages and $2,500 in punitive damages. ORS 659.121.

[41]Nees v. Hocks, 272 Or 210, 536 P2d 512 (1975).

[42]Delaney v. Taco Time Int'l., 297 Or 10, 681 P2d 114 (1984) (refused to sign false and potentially defamatory statement).

[43]Patton v. J.C. Penney Co., 301 Or 117, 121, 719 P2d 854 (1986).

rights to workers' compensation by filing a claim.[44] Another example is a termination for asserting one's right to be free from discrimination.[45] Any wrongful discharge claims arising from smoking in the workplace would be of the second type--a discharge for asserting statutory rights.

Present statutes directly regulate smoking only in public places, state offices, and hospitals.[46] As a result, employees fired for asserting their rights under these statutes could sue their employer for wrongful discharge. For example, if a smoker were fired for asserting a right to smoke in a designated smoking area, that might constitute a wrongful discharge. Similarly, termination for asserting statutory rights to smoke-free areas would be a wrongful discharge. It is also possible that employees protected by local ordinances, such as Multnomah County employees, could sue for wrongful discharge if fired for asserting their rights under local legislation.[47]

Other statues indirectly regulating smoking[48] could also form the basis for a wrongful discharge lawsuit if an employee is discharged for asserting these statutory rights. For example, if a smoke-sensitive employee (1) complains about smoke, (2) seeks a reasonable accommodation under handicap discrimination laws, and (3) is fired, then that employee could sue for wrongful discharge. The same applies to a smoke-sensitive employee fired for filing a workers' compensation claim.

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[44]Brown v. Transcon Lines, 284 Or 597, 588 P2d 1087 (1978).

[45]Holien v. Sears Roebuck and Co., 298 Or 76, 689 P2d 1291 (1984) (fired for resisting on-the-job sexual advances).

[46]See Section IV above.

[47]In such a case, the county might argue that any right to smoke-free facilities is not a right relating to employment. Instead, it is a right shared by non-employees too. It is not clear whether termination for asserting a right shared by non-employees would amount to a wrongful discharge.

[48]See Sections V-VII above.

IX. CONSTITUTIONAL RIGHTS

Some employees have claimed a right under the Constitution to a smoke-free work environment. They have claimed it as among their rights to privacy, free expression, equal protection under the law, and as a right reserved to the people in the Constitution. To date, these claims have been unsuccessful.[49] However, firing public employees (smokers or non-smokers) in retaliation for attempts to enforce their rights could violate the right to free speech and to due process of the law.[50]

X. RIGHT TO A SAFE WORKPLACE

A. Common Law Duty to Maintain a Safe Workplace

Generally speaking, an employer has a duty to maintain a reasonably safe workplace. In the landmark case of Shimp v. New Jersey Bell Telephone Company,[51] a smoke-sensitive employee alleged that the employer violated this duty by allowing smoking at work. The court ordered the employer to restrict smoking to non-work areas.

Other jurisdictions have also held for the non-smoker. In a Missouri case, the court held that an employee could sue to stop his employer form exposing him to tobacco smoke and from affecting his pay or employment conditions because

[49] E.g., Kinsell v. State of Okl., 716 F2d 1350 (10th Cir 1983); Olsen v. Township of Spooner, 133 Wis 2d 371, 395 NW2d 808 (1986) (smoking regulation did not violate equal protection clause).

[50] Anderson v. Anoka County Bd., (USDC MN CV 4-79-269, 1981).

[51] 145 NJ Super 516, 368 A2d 408 (1976).

of his medical reaction to smoke.[52] In yet an other case, an employee was allowed to sue an employer for personal injuries arising out of exposure to tobacco smoke.[53]

Not all courts have sided with plaintiffs. In one case, the employee was fired for refusing to work in an area that contained tobacco smoke.[54] The court held that the general duty to maintain the safe workplace does not impose upon the employer a duty "to adapt his workplace to the particular sensitivities of an individual employee."[55]

There are no reported cases in Oregon where an employee has sued the employer under the general duty to keep a safe workplace. However, Oregon employers must take due care to protect the safety of its employees,[56] and a non-smoker might possibly sue an employer on that basis.[57]

B. Statutory Duty to Maintain a Safe Workplace

In addition to the general duty of due care, Oregon employers have a specific statutory duty under the Employer Liability Law.[58] The statute provides:

> Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible [sic] for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for protection and safety of life and limb, limited only by the necessity

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[52]Smith v. Western Elec. Co., 643 SW2d 10 (Mo App 1982).

[53]McCarthy v. State D. of Social & Health Ser., 46 Wn App 125, 730 P2d 681 (1986).

[54]Gordon v. Raven Systems & Research, Inc., 462 A2d 10 (DC App 1983).

[55]462 A2d at 14.

[56]Howard v. Foster & Kleiser Co., 217 Or 516, 532-535, 332 P2d 621 (1958), reh. denied 342 P2d 780 (1959).

[57]Needless to say, employees who assert their rights to the point of refusing to work jeopardize their livelihood. As in most cases, the prudent course of action is "work now grieve later."

[58]ORS 654.305 et seq.

for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."[59]

That statute requires more of employers than the general duty of due care.[60] How much more is not clear.[61] However, because studies show that smoking is a hazard to the life of employees, the statute might require employers to "use every device, care, and precaution" to protect employees.

C. Workers' Compensation as a Defense to Lawsuits Alleging an Unsafe Workplace

Generally, an employee is limited to workers' compensation benefits for any injuries suffered on the job.[62] As a result, if an employee develops a compensable disease from exposure to smoke, he or she may not bring a separate legal action for those personal injuries.[63]

XI. TITLE VII DISCRIMINATION

Facially neutral employment policies that disproportionately affect protected groups may constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964. [64] It may be possible to show that a smoking ban has a disproportionate impact upon a protected group. A 1985 Surgeon General's

[59]ORS 654.305.

[60]Groves v. Max J. Kuney Company, 303 Or 468, 472, 737 P2d 1240 (1987).

[61]There are no reported cases detailing how this statute applies, if at all, to smoke in the workplace.

[62]ORS 656.018.

[63]See, McCarthy v. State D. of Social & Health Ser., 46 WA App 125, 730 P2d 681 (1986) (because the workers' compensation claim was denied, the worker was able to bring a lawsuit for personal injuries).

[64]See, New York City Transit Authority v. Beazer, 440 US 568 (1979) (refusal to employ methadone users could possibly state disparate impact claim).

report on smoking in the workplace notes that 40 percent of white men smoke while 47.7 percent of black men smoke. Therefore, a no smoking rule would exclude a higher percentage of black men. If the matter went to court, one question would be whether this, or some other statistical disparity, would be great enough to support a claim for unlawful discrimination.

Even if statistics showed that a smoking ban disproportionately excluded blacks or another protected group, there is another question. Does the law prohibit discrimination based on a voluntary trait? People are not born smokers and can quit smoking. Smoking is not an immutable trait necessarily connected with blacks or women. Consequently, smokers challenging a smoking ban based on Title VII would face an uphill battle.

XII. SUMMARY AND CONCLUSION

Increasingly, employers are restricting smoking in the workplace. Whether PECBA requires management to bargain before implementing smoking rules is not yet established. Regardless of how the Employment Relations Board rules, however, employers are well-advised to consult employees before adopting a policy and to involve a cross-section of the workforce: smokers, non-smokers, and former smokers. Such consultation will lead to greater acceptance among those who must work under the policy.