

# **Privacy Issues in Workplace Drug Testing**

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## **The Straight Dope, an Introduction**

Laws maintain that employment in the private sector is "at-will" meaning employers may fire employees whenever they choose without reason. In the public sector, workers are afforded somewhat more privacy under the Fourth Amendment prohibiting unreasonable search and seizure, and under the Fifth Amendment that protects against self-incrimination while ensuring due process. Certainly collective bargaining on the private side, and discrimination laws in both arenas mean to protect workers from undue harassment. However, due to the difficulty in determining a universally applicable standard of "what is reasonable," especially on balance with social safety concerns, most any employee may be subjected to analysis for illicit drugs at the employer's whim. Indeed, employers conduct about 45 million drug tests each year,<sup>i</sup> despite conflicting reports of effectiveness and degrees of privacy which vary from state to state, court to court.

While most people feel that workers in immediate control of public safety (bus drivers, airline pilots, nuclear technicians) should be sober and clear whilst working, the wide-spread of use of drug testing in non-safety sensitive vocations presents a conflict. On one hand, the possibility of advances in workplace safety and efficiency, while on the other hand, the acceptable level of intrusion into an employee's most personal details.

To find the fulcrum in this conundrum, I seek to identify the privacy issues surrounding work-related drug testing and resultant ramifications (both positive and negative) to employers, employees and the public at large.

To do so, this report will reference noteworthy Executive Orders, Federal legislation and relevant Court rulings to address workplace drug testing as a privacy issue. Additionally, I'll examine workplace studies to answer questions such as: What are the workplace environment advantages or disadvantages of maintaining a "drug free" workplace? What substances (legal or illegal) actually adversely affect workplace performance?

Additionally, using and relevant anecdotal and personal experiences, I'll address practical situations which employees and employers face when drug testing actually occurs. What are procedures for actually 'performing the test'? Who is required to submit? Who can refuse? What can happen? What can employers and employees do to mitigate the risk? What can past-employers say to inquiries about employee drug test results?

I'll review the processes and procedures for conduct drug tests, methods to cheat tests and find the economic beneficiaries from the drug testing industry. Finally, I'll suggest alternative solutions and strategies for achieving the same stated goals of increased workplace and public safety.

## **Up To Here, The Origins of Workplace Drug Testing**

Since 1986 when the Federal government began testing employees for drugs, thirty-two states have enacted varying drug testing statutes of some kind. While some states' laws seek to protect employees from unwarranted testing, others seek to encourage employers to conduct tests. This, among other problems, causes confusion for employees and employers who operate in multiple jurisdictions.

For example, California courts determine if a test is permitted by balancing the employer's business need against the employee's right to privacy outlined in the state constitution<sup>ii</sup> and rule in favor of the most compelling interest. California courts also ruled that asking applicants to disclose prescription drug use prior to the test was illegal under the American with Disabilities Act. In New York, employers may not refuse to hire or fire based on use of alcohol or prescription drug use off the job.<sup>iii</sup>

Though the Supreme Court has never specifically ruled on the legality of random workplace drug testing, prior to 1986, U.S. Courts maintained a record of striking down mass drug testing programs as unreasonable searches and seizures. Particularly poignant is the 1973 ruling by the U.S. Ninth Circuit Court in *U.S. v. Davis* that addressed the argument that by disclosing the existence of required testing lowers the expectation of privacy. This thinking would leave public sector employees at the mercy of giving up their Constitutional rights to gain employment. The court decided that, "The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines will be tapped, or that all homes will be searched." Additionally, the court put forth that, "If a blanket search program has little or no effectiveness, it is in substance merely a kind of harassment, a show of power, or a 'fishing expedition', and therefore, per se, unreasonable under the Fourth Amendment."<sup>iv</sup>

Specifically, in *Lovvorn v. City of Chattanooga*, the US District Court of Tennessee ruled against the mass testing of fire fighters without individualized "reasonable suspicion" despite arguments from prosecutors that firefighters have less presumption of privacy since they live in the same quarters and use common restroom facilities. A similar conclusion was reached in a 1985 case (*Odehiem v. Rutherford Regional School District*) dealing with a policy requiring students to submit urine samples as a part of a routine physical. The New Jersey Supreme Court pointed out that 28 of 520 who tested positive did not represent a justifiable reason to test all students.<sup>v</sup>

In 1986, former President Ronald Reagan (b. 1911, d. 2004) signed Executive Order 12564 entitled, "Drug-free Federal Workplace." The order which cited "billions of dollars of lost

productivity each year," a concern for "the well-being of its employees," and "profits from illegal drug use provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society." The Order ordered each Executive agency to establish drug-testing programs when there is reasonable suspicion, in the event of an accident or unsafe practice, or as part of follow-up for rehabilitation program. Though the Order also put forth that, "procedures for providing urine specimens must allow individual privacy, unless agency has reason to believe that a particular individual may alter or substitute the specimen to be provided."<sup>vi</sup>

In 1988 during the "crack cocaine epidemic," the 100<sup>th</sup> Congress enacted the Drug-free Workplace Act. P.L 100-690, Title V, Subtitle D of the omnibus anti-drug legislation required federal grantees and contractors to certify that they maintain a drug-free workplace with the exception of law enforcement agencies in undercover operations.<sup>vii</sup>

Requirements vary depending in type of organization administering the contract but are mostly governed internally through notices and policies. For example, individuals receiving federal contracts must sign a certification stating, "as a condition of the grant, I will engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity associated with the grant."

This law created an explosive new industry for certification associations as well as a boon to the lab testing industry and trade associations for the testing labs themselves. The Drug and Alcohol Testing Industry Association's web-site cites numerous reasons for certification from their association including, "builds self-esteem," "offers greater professional recognition from peers," and provides for greater earnings potential."<sup>viii</sup>

In a 1989 case *National Employee's Union v. United States Custom Service* the Supreme Court ruled that urine testing is considered search seizure under the Fourth Amendment but not necessarily a violation of such. They established the rather vague gauge of the reasonable expectation of privacy.

In 1989, the Supreme Court upheld the requirement that U.S. Customs agents who carry a gun, participate in drug interdiction operations, or handle classified materials may be tested. Justice Scalia in dissent said that testing Customs employees was an, "immolation of privacy and human dignity in symbolic opposition to drug use" and "this was a "type of search particularly destructive of privacy and offensive to personal dignity."<sup>ix</sup>

In a 1995 case, the U.S. Supreme Court ruled that student athletes may be tested, regardless of suspicion, despite only twelve positive tests in four and a half years of blanket testing. Yet

in this ruling, Justice Scalia ruled that students lack many fundamental rights to self-determination and student athletes specifically have a lower expectation of privacy since they shower together and act as role models for the student body. Justice Scalia's argument seems to ignore that all students generally shower communally in physical education classes, and role models may come from school band, chess club, drama club, or honor societies which are not obligated to test.

## Privacy Issues and Conundrums

Drug testing relies on a compliant workforce to submit to the testing. Indeed, the economic motivator is sufficient to compel most workers to test despite personal misgivings and widespread chagrin such is outlined in activist writer Abbie Hoffman's book "Steal this Urine Test."

Though employers maintain that "if you don't have anything to hide, then you why do you resist" tests regularly cause casual (or causal) users to attempt to deceive tests to maintain their livelihood. This creates an industry of both drug testers (including test kit makers and laboratories and hospitals specializing in testing) as well as carpet-bagger companies marketing all sorts of snake-oil remedies for beating tests.

Indeed a look through so-called counter-culture magazines reveals an increasing assortment of sophisticated of test beaters from "guaranteed" powdered drinks to fake penises to fill with dehydrated urine (one advertises that all urine is taken from a bible study group). Additionally, anecdotal home remedies abound from loading up on the herb goldenseal and vitamins, to drinking copious amounts of white vinegar, to putting Drano crystals under fingernails to pollute the test.

Regardless of the method used to conduct or defraud the test, the fundamental privacy issues at stake remain the same and can be divided into internal issues (those to do with things inside the body) and external issues (those to do with the surrounding context of the test).

'Internal intrusion' issues start with the questions: What exactly are they testing for? And what else are they finding out? Examples of ethically inappropriate, but not necessarily illegal, findings could include a number of characteristics that employers may wish to avoid for a variety of reasons. This list includes:

- Pregnancy (in Washington DC, the police admitted that they routinely tested all female applicants' urine collected for drug tests for pregnancy without knowledge or consent<sup>x</sup>);
- Use addictive but legal prescription painkillers (e.g.: *oxycontin*), habitually abused tranquilizers (e.g.: *valium*), or anti-depressant drugs (e.g.: *prozac*);
- Details on genetic makeup (i.e.: tendencies towards illnesses that could affect health insurance premiums).

Additionally, within this internal context, legally protected discrimination issues arise as the ADA maintains that alcoholism and drug addictions are diseases and employees cannot be discriminated if they are dealing with such an affliction.<sup>xi</sup> An example is *methadone* a drug commonly prescribed as a treatment drug for heroin addicts. Certainly the presence of such

chemical would indicate a past (or present) narcotic problem, certainly limiting a recovering addicts employment chances.

'External intrusion' issues begin with the embarrassment of authoritative observation of one's 'private' parts which most humans (naturalists not withstanding) feel much more comfortable keeping concealed. Certainly since childhood, the personal act of urination is one performed with the door closed and in some cases can only be done in private. Medically recognized conditions such as 'shy bladder' syndrome, medically called *paruresis*, may cause an employee to be physically or psychologically unable to perform a urine test causing a violation in an employer's policy.<sup>xii</sup>

A recent example of this situation involves an employee who was terminated after being unable to urinate, even after drinking a substantial amount of water. With the threat of termination for non-compliance with the test, the employee paid for and passed a more hair-based test (generally considered more accurate). Yet the company would not accept the result and fired the employee who is now suing for wrongful dismissal under the ADA. The company in question put forth through a spokesperson that, "We believe that our drug testing policy does not violate the Americans with Disabilities Act, and we intend to defend against the allegations."<sup>xiii</sup>

Besides the observation is the handling of test results which may pass through many hands, including hospital and lab staff, compromising integrity and confidentiality especially in a small community. Further, results or rumors may be inappropriately distributed amongst company or industry causing damage to professional and personal reputation. Anecdotally, while in a hospital waiting room, I overheard the loud conversational voice of the receptionist check in no less than eight people coming in for pre-employment urinalysis and chatting about other people who had been in recently to test. While the employee's intent was (likely) not malicious, one does not need to project very far to imagine such irresponsible coffee room chatter about results.

## **Effectiveness of Drug Testing Programs**

Results of scientific studies regarding drug testing and increased workplace safety, absenteeism and performance vary greatly. One research study lists accidents among bus drivers reduced while another shows higher drug use among employed people versus unemployed people. Other studies show increased alcohol abuse resulting from drug testing.

An article by Ellen Nakashima in the Detroit News discussing Federal employees protesting random drug tests cited a 1993-98 study by the Health and Human Services Department. Over this six-year period and 257,576 random drug tests, 1,345 people (0.52%) tested positive at cost of over thirty one million dollars (not including administrative costs), or \$232,637 per positive test.<sup>xiv</sup>

As expected, different sides interpret the data differently. The agency's workplace director purports that the program, "sends a signal to a person who is even thinking of using illegal drugs that they are putting their jobs in jeopardy."<sup>xv</sup>

A statistician for the American Management Association points out the absence of a statistical case that screening acts a deterrent mentioning that, despite increase in random tests, rates of positive tests remain constant. As a result of this and the associated lab expenses, more employers are moving towards suspicion and accident based tests, even using undercover operatives to ferret out offenders.

The U.S. Navy boasted to a Senate subcommittee that with the advent of testing, positive results dropped from 48% to 21% over a two year period (1980-82) however the glowing proud Rear Admiral neglected to mention the corresponding increase in alcohol use<sup>xvi</sup>.

The U.S. Department of Labor puts reinforces this double standard pointing out that "Alcohol is the most widely abused drug among working adults" and is responsible for 86% of costs imposed on businesses by drug abuse. A study by the National Comorbidity Survey points out that about 9% of marijuana smokers meet the American Psychiatric Association criteria for "Substance dependence" while the figure jumps to 15% for alcohol.<sup>xvii</sup>

The argument of whether "users of illegal drugs make less productive workers" is inconclusive since topical studies are subject to faulty science, small test populations, and malleable statistics.

In a 1990 New Republic article writer John Horgan discussed J. Michael Walsh's scientific procedures, (Walsh is the director of National Institute of Drug Abuse's whose findings form

the basis of Federal drug enforcement policy). Horgan suggests that Walsh's zero-tolerance line "doesn't discriminate between use and abuse, between a secretary smoking marijuana on weekends and an AIDS-ridden prostitute smoking \$100 worth of crack a day."<sup>xviii</sup>

Indeed studies which lump illicit substances together as though the societal costs were equal begs the question of: What is the point behind testing at all? Walsh hints at the reasoning when he puts forth that, "I think we have reached the point where the involvement of marijuana in accidents exceeds that of alcohol." Where is the proof in this dramatic statement Horgan asks? Walsh doesn't have any but says, "it's one of the things in my research program we're trying to prove right now."<sup>xix</sup>

## Fill the Cup – Testing Processes and Procedures

While beyond the scope of this paper to extensively detail, it is worthwhile to briefly outline the types of testing and the procedures involved in provided sample to better understand the level of intrusion associated with any kind of test and the associated risks.

The types of samples obtained for testing are:

Urine - the most common and hence the least expensive, detects past use of drugs but not current intoxication;

Blood - can detect current intoxication but not past use, drawing blood is uncomfortable for many people and requires training to handle draw and handle sample;

Hair - newer technology which proponents suggest is most accurate and can be read like timeline, others argue the test is bias against dark-haired people and inaccurate for marijuana use;

Saliva and sweat patch - least sensitive and can only measure for a few hours after use.<sup>xx</sup>

Specifically addressing urinalysis, depending on the stringency of the tests, the routine varies in the degree of invasiveness. In general, the testee is obliged to pee in a controlled area under some degree of observation. In some cases, the tester watches the actual genitalia, in others cases, the tester merely stands next to, or a stall and monitors for unusual behavior.

In some cases, the testee changes into a hospital gown to prevent concealment of a bladder (a technique detailed in Hoffman's aforementioned book) while in other situations, testees are simply patted. In most all cases the subject must vigorously wash hands and arms and remove wristwatch to prevent fouling the tests with a foreign substance. The toilet bowl is usually colored with a dye agent to prevent the testee from watering down the sample. In other cases, an empty pail is used to catch excess sample urine.

When labs use proper care and sophisticated tests, false positives are increasingly rare. This however is not always the case as drug test kits are available for purchase by anyone at prices starting at about ten dollars (incidentally some online brokers sell both the drug kits and drug test cheat kits). In these instances, a variety of substances can trigger false positives.

"Even a 99% accurate test produces one false positive result out of 100 people tested. Given that more than 30 million Americans were tested last year, this means 300,000 false results were delivered!"<sup>xxi</sup>

In addition to substance related false positives, numerous human means of human error can create an unscientific result. Potential human errors include mislabeling, mixing up samples, tampering, mixed up paperwork, unclean sample jars and improper lab work.

The professional (read: expensive) routine is to first use an "immunoassay test" and confirm positive results with a more accurate "gas chromatograph mass spectrometer test" measuring metabolites.<sup>xxii</sup> Advanced labs will also use "split samples" allowing an extra portion to retest if results are inconclusive or contested. An employee may want to request a split sample to be re-tested by another lab depending on result.

In less accurate tests, false positive are obtained with otherwise benign substances like poppy seeds (heroin), hemp oil products and over-the-counter drugs like ibuprofen (marijuana), cold remedies and allergy medication (amphetamines). Plus, numerous prescription drugs (which you may be requested to disclose beforehand) may cause interaction with the tests. Various medicated shampoos (for dandruff) have produced false positives in hair tests.

It is worth noting the confusion over which are 'bad drugs, e.g.: medical marijuana is recognized in thirteen states yet not on a Federal level preventing an established prescription routine. Drug test timeframes vary by drug - i.e.: alcohol (hours), meth-amphetamine & cocaine (days) marijuana (weeks), LSD (years) creating an uneven playing field. Showing ironically, substances with high risk of habitual abuse often stay in system for a shorter period than those with less habit-forming characteristics.

## **Drug Testing Situations and Scenarios**

### To test or not to test, that is the question.

While companies have the legal ability to institute a drug-testing program, before doing so, the company should clearly define what the 'big picture' of testing is. In other words, what is the company trying to prevent or produce by instituting a drug testing policy?

Many companies rely on outside contractors and labs to administrate and enact policies however a policy customized to the needs and culture of the company is a worthy consideration.

Some of the reasons a company may wish to institute a program include:

- Creates a public marketplace impression of being a 'clean' workplace;
- Ability to discover medical data beyond drug use about employees or applicants;
- Deters habitual users who would otherwise apply because other companies are testing;
- Qualify for Federal contracts by being a 'certified clean workplace';
- Appeases shareholders' who think drug testing is the industry norm and protects assets;
- May reduce on job injuries and workplace accidents;
- May reduce absenteeism and/or increase efficiency;
- Way to 'weed out' undesirable workers by singling out for testing;
- May reduce overall group medical insurance costs;
- Limits liability in event of accident of illegal behavior.

Notable reasons for companies not to test include:

- Expensive to test all applicants (the higher the quality the test, the more expensive);
- Lose out on creative and 'libertarian-minded' workers who use soft drugs casually;
- Doesn't eliminate alcohol use/abuse on or off the job (most abused drug in the workplace);
- Doesn't address tobacco use (largest drain on medical insurance costs);
- May create contentious relationship with workers if the policy is non-reciprocal or penalized differently compared with managers;
- False sense of security (workplace efficiency and safety not necessarily reduced);
- Risk of unlawful dismissal lawsuits – even when settled, may be expensive and distracting to fight.

Any company deciding to institute a drug testing policy should establish a specific policy reflecting the goals of the individual company's program and prepare contingencies for positive tests and challenges.

In brief, the policy should address:

- 1) Are the workplace safety reasons compelling enough to warrant testing?
- 2) Are there collective bargaining agreement related issues with union workers?
- 3) Who will be tested and under what circumstances?
- 4) How does the company change the policy or make exceptions or exemptions (if any)?
- 5) What substances will be tested for and what are the reasons for testing for each?
- 6) Who will administrate the program and who will supervise the program administrator?
- 7) What lab will perform the tests and what are their accreditations and exact procedures?
- 8) What processes will be triggered in the event of a "positive" test? (i.e.: second test with split sample to a different lab; suspension with/out pay; counseling/treatment option)
- 9) What are the employee grievance and dispute resolution procedures?
- 10) Who will counsel the company in the event of a challenge or legal proceeding?

In general, situations in which drug tests are administered can be divided into three categories: Pre-employment, Random on-going and Incident (on demand) testing.

#### Pre-Employment Testing

While drug testing is (at least to some degree) intrusive to one's privacy, most job seekers are resigned to offering bodily fluids and agree to the testing for personal chemicals in the hopes of employment but without any guarantee of wage compensation.

Because (as mentioned earlier) hiring an employee is an "at-will" decision by an employer, companies may obligate most any kind of testing by voluntary job applicants. Since a majority of employers require pre-employment drug screening, prudent workers must understand the ramifications and processes of testing.

Besides the physical intrusion of being watched as you pee, the applicant's employment chances are also dependent on somewhat faulty science. Because of the expense of drug tests, pre-employment tests tend to be of a lower quality and more susceptible to false positives. This could result in bad news for someone who unwittingly uses a legal product, which is an indicator of illegal drug use.

A responsible (and ethical) company choosing to test applicants should advertise the policy to prospective employees, including details of the test and results of a 'dirty' test.

The applicant, in most cases, does not receive the results of the test, as the employer owns the results of the employee's chemistry. However, with these results, and the applicant's blanket approval, the employer can find out all manner of information about a potential employee.

Aside from totally abstaining from any illegal drug use and/or abstaining long enough for any trace of illegal drugs to leave the body system, applicants who do not wish to submit to a pre-employment drug screening test have a scant few options, though none well-suited to securing employment.

- 1) Choose not to do the test and take their labor elsewhere;
- 2) Choose to not test and suggest working as a freelance or contractor.

Option two is increasingly common, particularly in the high-tech industry where capable programmers and specialized technicians are increasing valuable and such employees are generally not in a position to affect co-workers' safety. Two recent examples using this approach suggest there are ways to protect one's privacy while successfully gaining work.

In both cases, after successfully completing the application and interview process, the applicants were offered jobs, one as an Internet technician for a telecommunications company,<sup>xxiii</sup> and another with an international microchip manufacturer.<sup>xxiv</sup> The employment offers were contingent on a passing a urine analysis drug test. In both cases, the applicants declined the test at the risk of losing the job offer because they recreationally used cannabis.

As for resolution, the microchip manufacturer offered the applicant the same work but to be performed as a contract worker (incidentally at a higher hourly rate and with more independence).

In the instance of the Telecommunications Company, the applicant spoke honestly with the employer and told that he smoked marijuana and he would not smoke at work. The employer was understanding and arranged for the applicant to work through a third-party temporary-staffing agency in order to circumvent their blanket policy of screening all new hires.

Both employees are still working under these auspices however this scenario is not ultimately desirable in all situations since employee may not enjoy the same insurance coverage and other benefits as drug test compliant employees.

### Random Testing

Employers may conduct random testing with minimal recourse with established policy. Such a policy should outline the terms of randomness including who is included in the 'testing pool'. A random drug testing policy may be a successful deterrent to drug use by employees and is commonly used to such an end. A fair program should include all employees including management to foster a cooperative attitude to the testing program. Indeed random testing forms the basis of many programs including the military, commercial transportation operators covered by the Omnibus Act and professional or amateur athletes.

Anecdotal findings show that a "modified random" program is sometimes chosen to weight the test somewhat. In this scenario, employees may know a ballpark date range in which they are likely to be tested, or in some cases, they are told weeks in advance allowing time to 'clean up' if needed. In a similar vein, an employee's name may be removed from the list after being chosen once or twice over a certain period of time.

In most cases though, the employee is notified at work and instructed to proceed directly to a lab for testing. In an anecdotal situation, a professional scuba diver was radio-ed in to shore from a vessel in the harbor to take a test. He went to the test in wearing his wetsuit, which incidentally kept a concealed condom of clean urine (at an appropriate temperature) which he obtained from his girlfriend.<sup>xxv</sup>

If you choose to submit to testing and wish to pass despite use of illicit drugs, other last resort options include:

- 1) Prepare to 'cheat' the test using one of many and "cross your fingers";
- 2) Declare use of several false positive indicators to make the test inconclusive;
- 3) Use the "second hand smoke" or "unwitting ingestion" defense.

### Incident-based Testing

Employer's drug testing policy may request a test after an accident or based on 'suspicious activity' but tests are the most legally volatile with the greatest risk of repercussions to both sides. To prevent costly civil lawsuits, must balance employee's reasonable expectation of privacy vs. compelling safety reasons. Additionally, such tests are often based subjective observations and/or unknown accusers who may have a personal agenda for implicating someone for testing. With this in mind, tests requested due to specific incidents should be approached with extreme care.

First, the employee should carefully review the company's review policy to see if the incident qualifies under the guidelines. Document all events surrounding the incident for the record and determine if there is a reasonable remedy in the established policy.

Second, if 'dirty' test results may result in significant punitive measures (i.e.: loss of job, negligence lawsuit), the employee should consult an attorney or union representative for advice and advocacy. Competent advice will ensure full knowledge of the possible ramifications from any test outcome allowing for clear decision making.

Third, if the company's chosen lab's procedures are unclear, or the lab offers any reason to doubt their strident professionalism, the employee should request either a split sample to be tested elsewhere or purchase their own test at another lab facility. This will allow the employee to mount a more strident defense in the face of faulty lab work.

An example of an incident based testing occurred when an Internet marketing executive was summoned to a Vice-president's office for a hastily called meeting with a Human Resources director.<sup>xxvi</sup> In the meeting, the employee was informed of "accusations from the community" that the employee was smoking marijuana at a company sponsored golf tournament three months previous. Despite recent commendations for exceptional work, and five-plus years of work, the employee was instructed to take a drug test or face termination as per the company policy.

The employee took the lab paperwork and requested administrative leave to review the situation. After reviewing the company's policy for aberrations and consulting an attorney, the employee refused to take the test. In a letter written to the Vice-president, the employee cited policy-based reasons for refusing the test.

Specifically the reasons cited were:

- 1) The policy included drugs and alcohol yet complimentary beer and liquor was widely available (and encouraged) at the event;
- 2) The policy stated that only employees needing access to secure and sensitive areas needed to be tested yet this employee had no such access;
- 3) There had been no vehicle accident or workplace injury which would have required a test, and;
- 4) The results of the test would not prove or disprove the allegations of marijuana use three months prior.

After reviewing the matter with corporate counsel, the company did not terminate the employee. However, the company but cast assumption guilt in stating, "Your refusal creates a

concern for us that the allegation is in fact true.” The company also offered dependency counseling and reminded the employee of the employer’s right to terminate without reason at any time. The employer also saw fit to include the reprimand in the employee’s permanent record. While irritating, the contents of such a record could in no circumstances be revealed to anyone outside of the company, particularly to another future employer verifying past employment or inquiring about workplace performance.

In a similar example that resulted in a firing and subsequent lawsuit, a manager alleged an employee as appearing to be “acting unlike herself.” He said she was slumping, avoiding eye contact, slurring speech, and possibly suffering from “female problems.” She was asked if she was under the influence of alcohol or prescription drugs. When she denied such use, the manager sent her to go take a UA at a lab over an hour drive away. She refused (stating she had never used drugs in her life) and was fired. In court, she refuted the manager’s account of events and contended an ulterior motive was involved (based on her protesting an overtime policy at a recent staff meeting). She prevailed in her suit for invasion of privacy and wrongful termination in violation of public policy as the drug test was judged to be pre-textual rather than based on objective individual suspicion.<sup>xxvii</sup>

## **Moving Forward – Conclusions and Strategies**

After reviewing the numerous issues and considering alternatives, I offer a few harm reduction points strategies to consider for both employees and employers.

First, drug use in general is not going to go away. Thus, accurate scientific distinctions should be made between drugs less harmful drugs from more harmful substances (i.e. marijuana vs. meth-amphetamine). Further, a scientific distinction needs to be made between “use” and “abuse.”

Second, society should be so lucky to have chronic drug abusers seeking work rather than relying on crime, and draining criminal justice systems and social welfare programs. Effectively barring them from work through testing further marginalizes addicts.

Third, honesty and disclosure is a better policy for fostering a safe and clean workplace. If employees can reveal off-work drug habits without risk of termination so such employees can be placed in non-safety sensitive jobs. Employees should be judged by observation of workplace aptitude and performance and fired if inadequate.

Fourth, if studies can show that drug users are medially more expensive, employees can be offered incentives to test clean rather than punishment for testing dirty (i.e. reduced health insurance premiums).

Fifth, when testing is desirous in a workplace, employers should exercise utmost care and study to introduce a policy which respects employees privacy by outlining terms and objectives of the test including sharing the results and offering alternative solutions besides firing such as counseling, treatment and reassignment.

## Endnotes

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- <sup>xvi</sup> “Drug Testing at Work: A guide for Employers and Employees” Beverly Potter and J. Sebastian Orfali, 1990.
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<sup>xxv</sup> Dave Olson personal experience regarding Eugene M. in Guam, Micronesia USA 1994.

<sup>xxvi</sup> Dave Olson personal experience and letters regarding self in Olympia, WA and Advanced TelCom Group of Santa Rosa CA in 2000. Thanks to Attorney Ken Friedman of Tacoma, WA.

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#### Other Bibliographical notes

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