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Honorable Frank A. Gulotta Lecture Nassau County Bar Association January 28, 1987

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HONORABLE FRANK A. GULOTTA LECTURE
NASSAU COUNTY BAR ASSOCIATION
JANUARY 28, 1987

Eric J. Schmertz*

Justice Gulotta, Distinguished members of the Judiciary, President-Elect Hoffman, Dean Simon, Chairperson Zalayet, members and friends of the Nassau County Bar Association and its Academy of Law, ladies and gentlemen.

For at least four reasons, I am immensely honored by the invitation to make this talk. I am honored by my resultant identification with such an eminent, respected, and beloved jurist—the Honorable

* A.B., Union College; J.D., New York University; LL.D., Union College; Dean of the Hofstra University School of Law and Edward F. Carlough Distinguished Professor of Labor Law.
Frank A. Gulotta. I am honored to talk before a Bar Association that I consider to be one of the most active, most imaginative and most collegial in this country. The history of our democratic society is one of delicate balance between absolute freedom and societal regulation. I suggest that the present debate over the propriety and methods of mandatory drug testing is the most recent dilemma requiring that delicate balance. Involuntary blood tests to determine use and quantity of alcohol are common in the employment setting—both private and public—and is a legitimate ground for discipline.¹ What is different about the testing of urine to discover the use of controlled substances²—is in part just that. The search is not just for discovery of drugs, but discovery of what in many jurisdictions constitutes a criminal offense. Even in those states where the drug of marijuana has been “decriminalized,”³ its possession and use—even its personal use—is still an “offense” and in that sense anti-social.⁴ Consequently, the stigma of a crime, or even an offense, heightens the controversy and the debate. But of greater difference, in my view, is the privacy of the body function involved, the act of urination, and the taking of a urine specimen. It is that private body function that becomes exposed and disclosed when urine testing is required. It triggers emotional responses and intensifies attention to “privacy rights,” the constitutional protection against “search and seizure,” the issues of confidentiality, test accuracy and fundamental due process. At the risk of over-simplification, I suggest that, absent that emotional component, urine testing for drug use and abuse may not be that different from many other restraints on absolute freedom that society has properly and understandably imposed on us.

As lawyers, I think we would agree that the government, as an

² The Drug Enforcement Agency (DEA), through the Controlled Substances Act 21 U.S.C. § 201(G) et seq has listed drugs as being controlled on different schedules. Schedule I substances are drugs that have a high potential for abuse, have no currently medically accepted use in the U.S., and lack safety for use under medical supervision. Examples of Schedule I drugs are various opiates, opium derivatives (e.g., heroin and morphine), LSD, mariijuana, mescaline and peyote. Schedule II substances are drugs that have a high potential for abuse, have currently accepted medical use, with severe restrictions, in the U.S., and whose abuse could lead to severe psychological or physical dependance. 2 Food Drug Cosm. L. Rep. (CCH) ¶ 80,017-80,019 (August 3, 1987).
⁴ Id. at 146-147.
employer, and private employers have the right to discover and to bar or remove from their employment drug users and abusers. And if urine testing is the most accurate method presently available, that procedure should not be prohibited. Safety, product quality, commercial reputation, and employee morale are and have been the defensible grounds. 5

However, as lawyers, I think we would also agree that affected employees are entitled to essential due process. 6 Their jobs and reputations should not be jeopardized or stigmatized by urine testing that is inaccurate, that lacks confidentiality, that is undertaken without justifiable reason or is utilized discriminatorily.

And therein lies the critical—indeed essential—role of the lawyer. It is the lawyer who understands due process, probative evidence, fair play, the inestimable value of reputation. I would not leave a mandatory drug testing program to the doctors, bureaucrats, government officials or to the business community. The drafting, or at least review, of substance abuse programs, their implementation, their results, and actions taken call for a lawyer's role. And as the cases begin to develop, it will be clear that what is at issue is not whether there should be mandatory testing of urine to discover drug use and abuse, but how it is to be done within the frame of the delicate balance between its legitimate need and the freedom and privacy rights of affected employees.

The use and abuse of drugs—marijuana, cocaine, heroin, crack, amphetamines, etc.—is probably the most serious domestic affliction that has faced our nation in its entire history, with the gravest of consequences to the health, welfare and productivity of our society.

Judge Irving R. Kaufman stated in his article in the *New York Times Magazine* that “drug testing is shaping up as the premier issue in labor relations for the next decade.” 7 It has been reported that twenty million Americans use marijuana at least once a month. 8 Six


6. See Jones v. McKenzie, 628 F. Supp. 1500, 1 IER Case 1076 (D.D.C. 1986) (Employee bus driver was denied due process when discharged without a hearing after one urine test indicated use of marijuana); see also, Caputa v. City of Plainfield, 643 F. Supp. 1507, 1 IER Case 625 (D.C. N.J. 1986) (Denying fire fighter opportunity to have urine retested by technician of his own choice was denial of due process.


8. Id. at 54.

Recent figures state that three million Americans smoke marijuana once a day and anywhere from 50,000 to 750,000 use cocaine every day. Another study revealed that fifteen to twenty million Americans smoke marijuana regularly and five to six million regularly use cocaine. 43 Record of the Association of the Bar of the City of New York, Drug Testing In the Workplace
million use cocaine at least once a month. Sixty-five percent of today's entering work force has used some illegal or controlled drug. Close to one half of youths recruited for military service are disqualified because of drug use. It drains 60 billion dollars each year from the economy. It is the life blood of organized crime and is the proximate cause of a high percentage of crimes. The depth of the problem cannot be exaggerated.

The response has been to test, or to attempt to test, urine (subject to legal and arbitral challenges). The roll call of those testing or trying to test include: federal employees; municipal police; fire, and transportation employees; Major League baseball players; and}

9. N.Y. Times, October 19, 1986 § 6 (magazine) at 54.
10. Id.
11. Id.
12. Id.
13. The signing of Executive Order 12564 by President Reagan was an important step in the President's goal of a drug-free federal workplace. To assist in carrying out this order, Congress enacted the 1987 Supplemental Appropriations Act, which made it incumbent upon various agencies to develop guidelines for such testing. The plan will cover approximately 1.1 million federal employees, and recently included U.S. Postal Service employees, who were originally exempt from coverage. The judicial branch, legislative branch, and uniformed military service personnel are, at present, exempt. IERM 595:
14. The Third Circuit held that a police department could require its officers to undergo urinalysis whether or not there was suspicion of individual drug use. The court reasoned that the "highly regulated" nature of the profession invoked the administrative-search exception to the warrant requirement of the Fourth Amendment. Policemen's Benevolent Assn. Local 318 v. Washington, 3 IER Cases 699 (3rd Cir. 1988). A District Court in Illinois citing public safety as a primary interest, ruled that urinalysis tests that were part of a routine medical examination for officers who were returning to the force after 30 days of leave was a reasonable search under the Fourth Amendment. Wrightsell v. Chicago, 678 F. Supp. 727, 2 IER Cases 1614 (N.D. Ill. 1988). See also Copeland v. Philadelphia Police Dept., 2 IER Cases 1825 (3rd Cir. 1988) (Policeman, after traces of marijuana were found in his urine, had no claim that his Fourth Amendment rights were violated). But see Lovvorn v. Chattanooga, 3 IER Cases 691 (6th Cir. 1988) (Urinalysis of police and firefighters deemed violative of the Fourth Amendment).
15. In City of East Point v. Smith, 3 IER Cases 157 (Ga. 1988), the testing if a firefighter's urine solely to test for marijuana was reasonable under the Georgia constitution. But see Lovvorn v. Chattanooga, Penny v. Kennedy, supra.
16. A federal district court in New York recently held that urinalysis testing of city transit authority employees or applicants in safety-related positions was not an unreasonable search or seizure under the Fourth Amendment. Burka v. NYC Transit Authority, 2 IER Cases 1625 (S.D. N.Y. 1988).
17. Major League baseball has no express agreement as to testing its players for drugs. Brock, McKenna, Drug Testing in Sports, 92 Dick. L. Rev. 505, 518 (Spring 1988) (Citing The Application of San Francisco's Testing Ordinance to the San Francisco Giant Baseball Club and San Francisco 49'ers Football Club, San Francisco Attorney Opinion No. 86-04 (March 28, 1987) (unpublished op. at 8)). In the 1986 preseason, Commissioner Peter Ueberoth attempted to institute a drug testing program and later a mandatory drug testing program for all league players, but this was rejected by the Major League Baseball Players Association.
National Football League players, National Basketball Association players, IBM.

One of the reasons this topic was selected is because, by chance, I was the arbitrator in what turned out to be a leading arbitration case on drug testing between Bath Iron Works (in Maine) and Locals 6 and 7 of the Marine and Ship Builders Union AFL-CIO which I decided in June of last year. As that case was widely reported in the reporting services, in newspaper articles and editorials in New England, and widely discussed and cited in government circles in Washington, D.C., it is proper for me to discuss it with you. The issues raised in that case are all the issues generally considered by the courts in both public and private employment. I think, respectfully, that my decision in response to those issues was consistent with the present majority view of the courts. The Bath Iron Works is the country's leading builder of fighting ships for the U.S. Navy. Its employees are represented by two unions—the clerical force by one local and the production employees by the other. The latter employees are skilled metal workers, welders, electricians, carpenters,

Brock & McKenna at 521 (citing Wong and Eisnor, Major League Baseball and Drugs: Fight the Problem or the Player? 11 Nova L. Rev. 779, 795 (1987)). Eventually, drug testing clauses were inserted by various clubs in the contracts of over 550 players. However, later arbitration held that these contracts violated Major League Baseball's collective bargaining agreement. Thus, all these clauses were void. Brock and McKenna at 521.

18. The National Football League permits testing in some situations. For example, a club physician may test a player as part of the standard preseason physical. An athlete may also be tested upon reasonable cause by the club physician. “Spot” testing by the league is prohibited. There is nothing in the player collective bargaining agreement that provides for postseason testing. Brock & McKenna at 522-523.

19. The National Basketball Association policy is as follows:

The Anti-Drug Agreement provides that any player who is convicted of, or pleads guilty to a crime involving the use of cocaine, or is found, through the procedures outlined in the Agreement, to have illegally used these drugs, shall immediately be permanently dismissed from the League. Said player may, however, appeal for reinstatement after two years, requiring the approval of both the Commissioner and the Players' Association.

Brock & McKenna at 528 (citing Release, The Anti-Drug Program of the National Basketball Association & the National Basketball Association Players' Association—Overview of the NBA's Anti-Drug Program (undated).

20. Managers who suspect that an IBM employee has a drug problem can refer that employee to the company physician. It is then up to the physician to determine whether or not a drug test is necessary. Individual Employment Rights, (BNA) p. 2 (March 29, 1988).

The Minnesota Mining and Manufacturing Co. (3M) recently announced that it would begin implementing a drug and alcohol testing program to its 44,000 employees. The policy behind the test is not punitive; rather, it is to offer help to those employees who have drug problems. Individual Employment Rights, (BNA) p. 4 (April 12, 1988).

draftsmen, marine designers, and heavy equipment operators.

In the spring of 1986 the Secretary of the Navy and several admirals inspected the Bath Shipyard. They reported that they saw some shipyard employees smoking marijuana, and that some employees told them that marijuana was being used on the job. The Secretary of the Navy and the Chief of Naval Operations wrote the President of Bath informing him of their findings, reminding him that the law prohibited the placing of Navy contracts with a contractor employing personnel using drugs, and expressing confidence that Bath would take remedial steps. Subsequently, Bath unilaterally promulgated, without Union participation, a comprehensive Substance Abuse Policy. Its principal provisions were:

1. Random urine testing of all employees. Tests were to be conducted by the Company's medical department, by technicians—not necessarily by a physician.

2. Testing of employees thought by any member of management to be using drugs or "under the influence of drugs"—in other words, testing on basis of "reasonable or probable cause."

3. Testing of urine by a process call [EMIT]. If the result was positive the employee was suspended, pending confirmation of the EMIT test by the process of gas chromatography/mass spectrometry. If positive is confirmed the employee remains suspended for 30 days. If still positive at the end of 30

22. An easy to understand explanation of the "EMIT" test can be found in The Record of the Association of the Bar of the City of New York (1988). The description is as follows: [The "EMIT"] detects drug use by attaching an enzyme to either a sample or a metabolite of the drug use by attaching an enzyme to either a sample or a metabolite of the drug to be detected (the "labeled drug"). The urine specimen is then mixed with a reagent containing antibodies to the drug and the labeled drug is mixed with the specimen. The enzyme in the labeled drug will react with any remaining antibodies to the drug, thereby reducing the enzyme activity. The level of enzyme activity is directly related to the concentration of free drug present in the urine sample.


23. Gas chromatography/mass spectrometry ("GC/MS") identifies drug use by analyzing the molecular structure of the chemicals in a urine sample. Although it is highly accurate, it is less widely used due to costs (fifty to eighty dollars per test as compared to five to ten dollars per test for EMIT) and the substantial technical expertise required to conduct the test. However, the method is more sensitive in that it can detect drugs at a lower rate than the immunoassay tests.

Id. at 454. A recent study indicated that the gas chromatography/mass spectrometry test yields accuracy of "99 percent plus." Individual Employment Rights, (BNA) p. 4 (March 17, 1987).
days—he is discharged. If no longer positive, he is returned to work without back pay and subject to spot testing thereafter. If the EMIT test is not confirmed, the employee is reinstated.

(4) A positive test is not the presence of any drug quantity, but a quantity deemed to be at an “impairment level” or “under the influence.” For marijuana it is 100 nanagrams of marijuana acid.

The Company defended its action on the following grounds:

(1) It had the right to protect the safety of its employees and the safety of its production methods.
(2) It had the right to protect the quality of its product and insure against defects.
(3) It had the right to take steps to protect its contracts with the Navy.
(4) It had the right, as a managerial prerogative, to promulgate reasonable work rules—including discipline for offenses.
(5) It had the right to protect its reputation as a supplier of naval vessels, and generally.
(6) As a matter of public policy—it had the right and responsibility to strike a blow against drug use and abuse—for societal reasons.

The Union objected and grieved on the following grounds:

(1) Random testing violated basic Fourth Amendment rights—and as codified in the privacy laws of Maine.\(^\text{24}\)
(2) The Company’s policy breached basic safeguards of confidentiality—medical technicians were not qualified to take and test urine—the process was an indignity and reputations were damaged regardless of the outcome.
(3) The EMIT test is notoriously inaccurate—and there are significant inaccuracies in the GC/MS confirmation test.
(4) The definition of “impairment” or “under the influence” is inaccurate and not supported by medical authority.
(5) ”Probable cause” or “reasonable basis” for testing not adequately defined and subject to discriminatory application by supervisors.
(6) The unilateral Substance Abuse Policy was an unfair labor practice—because as a “condition of employment” it had to be bilaterally bargained with the Unions—under the NLRA.

At the outset of the arbitration hearings, the Company announced that it would not engage in random testing. This decision

24. The union urged the application of the concepts of the Fourth Amendment—even though it technically applies to government employees—and the Bath employees were private.
was consistent with the application of Fourth Amendment concepts—or laws of privacy covering private employees of the type employed at Bath, namely employees who do not have a clear, immediate and direct responsibility for the safety and welfare of the public. Technically the Fourth Amendment prohibiting illegal search and seizure applies only to employees of the government. However, its concept—and its codification into State privacy laws—seem to prohibit random, indiscriminate urine testing in the absence of some reasonable suspicion that the affected employee is using drugs. This is consistent with the ruling of the federal district court of New Jersey, enjoining “mass, round-up urinalysis” testing of firemen and policemen in Plainfield, New Jersey as an intrusion on “reasonable expectations” of privacy and a violation of the Fourth and Fourteenth Amendments of the constitution.

Of course, it can be sensibly argued that police and firemen fall within a class that has a special duty for the safety and welfare of the public—warranting random testing as well as testing when “probable cause” exists. However, the matter is by no means well settled. For example, in National Treasury Employees Union v. Von Raab, a federal district court in 1986 enjoined the U.S. Customs Service from random testing. The court held that it would not allow the defendants to condition receipt of Federal employment upon waiver of Fourth Amendment and other constitutional rights. Moreover, the court indicated that the public interest would best be served by putting an immediate and permanent end to the Customs’ plan.

25. [T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 342 (1970).


27. Caputa v. City of Plainfield at 1517.

28. See supra notes 14 and 15.


30. However, on appeal the Fifth Circuit reversed 815 F.2d 170 (5th Cir. 1987). Even though they considered the testing a search, it was a reasonable search and thus not violative of the Fourth Amendment. Testing urine for the presence of drugs was not violative of the privilege against self-incrimination and the test used (EMIT in conjunction with gas chromatography/mass spectrometry) was highly reliable. As such, due process was not violated.
In *Penny v. City of Chattanooga*, the district court in Tennessee enjoined the administration of urine tests to all members of the police and fire departments of the City of Chattanooga as an "unbridled violation of the Fourth Amendment."  

In *Jones v. McKenzie*, the Federal District Court for the District of Columbia found that subjecting a discharged school bus attendant to a urinalysis violated her Fourth Amendment rights. It stated that she was not subject to a standard more stringent than those required of local police and bus drivers—and they were subject to "urinalysis only upon reasonable suspicion of use of drugs."  

In *McDonell v. Hunter*, a district court in Iowa in 1985 held that in a correctional facility "prisoners, visitors and employees do not lose all their Fourth Amendment rights at the prison gates" and that strip searches and production of urine and blood specimens was beyond constitutional reasonableness.  

In *IBEW Local 1900 v. Potomac Electrical Power Company*, the D.C. District Court temporarily enjoined random urine testing in the absence of an industry practice—because the Union was likely to prevail in arbitration and a lawsuit—while employees subject to testing would be harmed without possibility of repair.

(i.e.—there was a much lower chance for false-positive results). The Supreme Court recently granted certiorary. 56 U.S.L.W. 3590 (Feb. 29, 1988).

32. Id. at 817.
34. Id. at 1508. However, on appeal, the Court of Appeals for the District of Columbia held that it was not unreasonable for the school system to require drug testing of its employees where:
(a) the employees’ duties have a direct impact on the physical safety of young school children; (b) the testing is conducted as part of a routine, reasonably required, employment-related medical examination; and (c) the test employed is one that has a nexus to the employer’s legitimate safety concern.

36. Id. at 1128.
37. "[S]earches and seizures can yield a wealth of information useful to the searcher... That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one." Id. at 1130. On appeal, the Eight Circuit upheld the District Court's opinion, with the modification that urinalysis testing could take place where there was a "reasonable suspicion... that controlled substances [had] been used within the twenty-four hour period prior to the required test." 809 F.2d 1302, 1309 (8th Cir. 1987).

39. "[A]bsent arbitration the employees whose privacy will be invaded by these proposed actions could not be made whole... In my opinion, the plaintiff is likely to prevail on the merits of this lawsuit." Id. at 3072. However, plaintiff's application for a preliminary injunction was denied. The court reasoned that the change in the company's rules (which plain-
In *Patchoque Medford Congress of Teachers v. Board of Education*, the court found that compelling a urine specimen was a search under the Fourth Amendment. The court stated that, absent any basis for suspicion that a probationary teacher eligible for tenure was illegally using a controlled substance, it would be unconstitutional to demand urine.

However, where the employee has a direct responsibility for the safety of the public, or where the industry is "regulated in the public interest," courts are less likely to find Fourth Amendment or privacy restrictions on random testing. Apparently, Bath Iron Works did not think it or its employees fell into that category. Hence, in *Northwest Airlines Inc. v. Air Line Pilots Association*, the district court found that an arbitration board exceeded its authority in reinstating a pilot who had violated the 24 hour rule against drinking alcohol. The court stated that public policy favored the safest air transportation possible over arbitration of labor disputes. No doubt in my judgment, it would apply the same rule to random urine testing of airline pilots.

In *Shoemaker v. Handel*, a district court upheld the New Jersey Racing Commission rules requiring random testing of jockeys. The Court balanced the privacy expectations of the jockeys with "their participation in a special class of relatively unique industries which have been subject to pervasive and continuous regulation by the State . . . and which temper the protection jockeys may anticipate from the Fourth Amendment."
In *Allen v. City of Marietta* and in *Murray v. Brooklyn Union Gas Company*, the courts upheld random urine testing of those employees engaged in dangerous work close to high voltage wires. The Seventh Circuit, in *Amalgamated Transit Union v. Suscy*, upheld random testing of bus drivers because of a profound duty to provide safe transportation to the citizenry.

In sum, I think we can conclude that in public and private employment random urine testing may run afoul of the Fourth and Fourteenth Amendments and state privacy laws, unless the nature of the employment has, as a direct responsibility or consequence, the public safety or obvious work-related dangers or is a regulated industry.

Hence, the probability of the validity of random testing of airline pilots, air controllers, bus drivers, train motormen, atomic energy plant workers, military personnel explains the present ban

49. In *Allen*, the court reasoned that “[t]he City [had] a right to make warrantless searches of its employees for the purpose of determining whether they are using or abusing their work with hazardous materials [high voltage wires].” *Id.* at 491. However, in *Murray*, the court issued a temporary restraining order against the gas company regarding implementation of its random drug testing program pending arbitration.
50. 538 F.2d 1264 (7th Cir. 1976) cert. denied, 429 U.S. 1029 (1976).
51. “Certainly the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxication or drug abuse.” *Id.* at 1267.
52. The Department of Transportation recently required all commercial airlines to conduct drug tests, even random screening for all employees in sensitive safety-and-security related jobs. Commercial airline pilots were included in the list of employees to be tested. *Individual Employment Rights*, (BNA) p. 1 (March 15, 1988).
53. *Id.*
54. The Federal Highway Commission has proposed mandatory and random drug testing of truck and bus drivers transporting dangerous cargo or operating in interstate commerce. Approximately five million commercial drivers would be covered by these proposed regulations. *Individual Employment Rights*, (BNA) p. 2 (July 5, 1988).
55. The Department of Transportation has proposed regulation which would provide for the random and mandatory drug testing of 120,000 private-sector railroad employers. Employees would be allowed to design their own programs. The 21 major rail carriers and 300 smaller lines would be required to test at least 15 percent of train and railroad yard crews, signal installers, dispatchers, and maintenance employees. *Individual Employment Rights*, (BNA) pp. 1-2 (May 24, 1988). *But see RLEA v. Burnley*, 839 F.2d 575, 2 IER cases (BNA) 1601 (9th Cir. 1988) (testing of railroad employees after certain types of accidents deemed unreasonable search).
56. On July 1, 1988, the Philadelphia Electric Company adopted a “zero tolerance” drug policy. This policy covers 4,000 workers and executives and allows for random testing. In addition, any employee caught stealing, using, or selling drugs on company premises will be fired. The mandatory firing can be avoided by employees who voluntarily seek drug counseling and treatment through the company. *Individual Employment Rights*, (BNA) p. 2 (July 2, 1988).
57. The Court of Appeals for the D.C. Circuit recently set aside an injunction against
random testing of baseball players, NFL players and all federal employees. The foregoing cases make clear, if only by dicta, that urine testing is permitted when there is a "probable or reasonable suspicion" of drug use. I so ruled in the Bath Case, leaving to litigation or arbitration on a case by case basis whether there was in fact probable cause or a reasonable basis to require the test. I also expressly provided for arbitral or judicial review of any employee or union allegation that supervision arbitrarily decided probable cause for discriminatory reasons.

Of course, probable cause or a reasonable basis [which I held were synonymous terms], means an employee exhibiting strange, abhorrent behavior, suspicious physical and demeanor symptoms, personality changes, marked attendance or work deficiencies, as well as direct evidence of drug use.

Hence, in Texas Utilities Generating Co., an arbitrator reinstated an employee who resigned rather than undergo urinalysis. The employee was not on duty at the time and was only briefly on the Company's grounds while driving fellow workers to "clay pits" where they sighted their rifles in preparation for the imminent squirrel hunting season. He said the supervisor lacked any "substantial reason" to suppose a rule violation. There was no objective evidence of drug use, and supervision lacked authority over the employee at the time of the confrontation. The arbitrator said "in matters carrying the stigma of criminal conduct or even general social disapproval, a high degree of fairness supported by proof. . .must be applied." In Everett v. Napper, the District Court in Georgia held that a fire fighter, who had reportedly purchased marijuana, was required to take a urine test. The court said that the urine testing was random drug testing of Army civilians. The decision allowed the Army to test employees seeking new jobs and those that had been involved in accidents. NFEE v. Carlucci, 3 IER Cases (BNA) 128 (D.C. Cir. 1988).

68. See note 19, supra.

69. See note 18, supra.

60. Random testing of government employees is unconstitutional, except in special situations. See Policemen's Benevolent Assn. Local 318 v. Washington, 3 IER Cases (BNA) 699 (3d Cir. 1988); National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987).

61. 82 Lab. Arb. (BNA) 6 (1985) (Edes, Arb.)

62. Id. at 12 (Exact quote: "It has long been recognized that rules which pertain to matters carrying the stigma of criminal conduct or even general social disapproval must be applied with an especially high degree of fairness supported by proof beyond a reasonable doubt.").

a rational protection of the public welfare and property and there was "sufficient rational justification for the test".\textsuperscript{64}

This is not to say that an employer cannot control drug use off his premises and outside of working hours. He can—if that use carries over to and affects the employee's job performance such as "being impaired or under the influence" on the job from off the job use of drugs.\textsuperscript{65} I so upheld that part of the Bath Substance Abuse Policy.\textsuperscript{66}

Extremely controversial, is the question of the accuracy of the EMIT test even with confirmation. More particularly, the controversy centers on the amount of drugs, especially the most prevalent, marijuana, that creates "impairment" or "under the influence." The EMIT test has been discussed in many scholarly articles.\textsuperscript{67} The conclusions are that the EMIT Test is not fully accurate in measuring how much of a certain drug is present. The EMIT test cannot tell how long ago the drug was used. A variety of factors, physical and psychological bear on the effect of the drug from individual to individual, and there are "a legion of reasons for false positive results."\textsuperscript{68}

\begin{footnotes}
\footnotetext[64]{\textit{Id.} at 1485.}
\footnotetext[65]{I consider it proper and appropriate for the Company to take steps to protect its work contracts; to protect the quality of its products; to protect the safety of its employees; and to protect its productive integrity and general reputation by having a policy and program designed to eliminate or reduce the possession and use of illegal drugs in the work place, and the off-property use when such use adversely affects the employee's job performance. That only a relative handful of employees may be using drugs, including marijuana, does not mean that there is not legitimate reason for a substance abuse policy and program. One purpose of the instance Policy is prophylactic, designed to stop and discourage what use presently obtains, and to prevent its proliferation. That is a legitimate objective. I am not persuaded that a condition must become extensive or chronic before management may make a response and seek a remedy. An employer may have policies and regulations which for example, prohibit excessive absenteeism, theft, insubordination, falsification of records and fighting, without first showing a prevalence of those activities. So too with regard to substance abuse. See Note 21, supra at 3-4.}
\footnotetext[66]{\textit{Id.} at 8-9.}
\footnotetext[68]{[M]any over-the-counter and lawful prescription medications, as well as ordinary food products, contain some amount of otherwise illegal drugs. Certain herbal teas and some prescription antibiotics can produce a positive result for cocaine, while Contact and Sudafed can indicate amphetamine use. . . . A certain incidence of error is endemic to the EMIT test. . . . Another cause of false positives is labo-}
\end{footnotes}
However in, *National Federal of Federal Employees v. Weinberger*,\(^6^9\) the Federal District Court of the District of Columbia stated that the EMIT test followed by the gas chromatography mass spectrometry confirmation (GC/MS) test “has been accepted by the scientific community as being the most reliable and acceptable method for drug and drug metabolic identification.”\(^7^0\)

In the District of Columbia school bus attendant case,\(^7^1\) a single, unconfirmed EMIT test was relied on by the school system. District Judge Oberdorfer found the termination “arbitrary and capricious” and imposed the condition that “before defendants can terminate plaintiff again on the grounds of drug abuse, they must confirm a positive EMIT test result by an alternative process such as the two suggested by the manufacturer.”\(^7^2\)

In *Miciotta v. McMickens*,\(^7^3\) a correction officer was dismissed after urinalysis was positive for cocaine. The court found that a factual issue was raised by the officer who stated that the urine testing was some other person’s and not his. The question of whether or not the urine test was properly administered had to be tried.

However, the petitioner in *Curry v. New York City Transit Authority*,\(^7^4\) was not so fortunate. The railroad clerk was dismissed after quinine and morphine were discovered in her urine. She argued that the substances were the result of ingesting prescription medication and tonic water. The dismissal was upheld, but Justice Weinstein in his dissent stated that there was no substantial evidence to show that the chemicals were in the petitioner’s urine for other than valid reasons.\(^7^5\)


\(^7^0\) Id. at 648. On appeal, the case was remanded so that the district court could determine the merits of the preliminary injunction motion and underlying claims. 818 F.2d 935 (D.C. Cir. 1987).

\(^7^1\) See supra, note 32.

\(^7^2\) Id. at 1507.


\(^7^5\) Judge Weinstein wrote:

Although respondent showed that there was no “free” codeine in the urine, respondent failed to establish the absence of codeine in its “conjugated” form. The uncontroverted testimony of petitioner’s expert was that codeine would be found “as a conjugated compound” in the urine. Accordingly, there was no substantial evidence to support a finding that the morphine and quinine were in petitioner’s urine for other than a valid medical reason, and the petition must be granted.
In the Bath decision, I wrote:

The Unions have offered considerable testimony, evidence and argument designed to show that the EMIT test, even with GC/MS confirmation can, in a certain percentage of cases, produce results that are inaccurate, misleading or wrong. I accept the proposition that these types of tests are not fully accurate and that errors can and will be made. But my authority in this case is to decide whether the Policy and Procedures, which include these tests is reasonable enough for Company-wide implementation. I do not conclude that the probability of some errors is enough to void these tests as part of the Policy and Procedures. Indeed, a percentage of error is probable for any type of test utilized. I am satisfied that the EMIT test, with confirmation by GC/MS are sufficiently accurate and reliable to warrant sustaining their reasonableness as a general part of the Policy and Procedures. Whether or not the EMIT Test and the GC/MS confirmation is accurate for a particular affected employee and whether there are other acceptable explanations for any positive findings in any particular case are matters which may be contested and adjudicated on a case-by-case basis as individual cases arise from the implementation of the Policy and Procedure.76

But I went on to say, the definition of “under the influence” in the Policy did not meet the test of reasonableness. I said:

Under this provision, an employee whose urine discloses the presence of 100 ng of Delta 9-THC acid metabolites following an EMIT test is presumptively “under the influence” of marijuana, and is deemed conclusively “under the influence” if the presence of Delta 9-THC is confirmed by the laboratory GC/MS test. The Company uses the 100 ng threshold level for the EMIT test to “eliminate questionable test results based on minute or trace amounts of illegal drugs . . .” and “to eliminate the possibility that a positive test might result only from indirect drug use (i.e., passive inhalation; e.g. smoke filled room, car pools, etc.).” I have no quarrel with the use of a threshold quantity for referral of the EMIT test for laboratory confirmation and I have no quarrel with the 100 ng threshold level. My quarrel is with the Company’s conclusion that a level of 100 ng in the urine in the EMIT test, if confirmed by the laboratory GC/MS test, means that the employee is “under the influence.” The expert testimony and evidence in this record is extensive and scholarly. But it is sharply conflicting and off setting. From the evidence, I cannot conclude that a level of 100 ng of

Id. at 400.
76. See note 21, supra at 13.
Delta 9-THC acid in the urine, if confirmed, produces impairment, mental or physical changes or other symptoms associated with being under the influence. In short, in this case as in others I have heard involving the same question, the experts are in wide disagreement over what quantity of marijuana produces impairment, how quickly, and for what period of time. The evidence in this case does not conclusively show that a recording of 100 ng in the urine, if confirmed, is synonymous with any mental or physical impairment. Unfortunately, medical and pharmacological experts have not been able to establish the quantity of marijuana in the urine, the blood, or the system generally, that produces impairment of constitutes "under the influence" as they have been able to do with alcohol.

So, if the Policy is left to stand unmodified in this regard, employees with confirmed positive tests at or above the 100 ng level will be absolutely determined to be "impaired" or "under the influence" regardless of their objective mental and physical conditions, and stigmatized with the "under the influence" diagnosis, when the medical evidence remains equivocal and disputed. I think this is arbitrary and unfair in a most sensitive and critical area. This is not to say that use of marijuana does not impair the faculties. I am convinced it does. Rather it is to say that the experts disagree on the quantity required for impairment or for being "under the influence" and for how long impairment lasts from any given quantity.

On the other hand, for the company to have an effective policy, as it is entitled to have, some unacceptable or prohibited level of marijuana or other drugs must and may be fixed. While I consider it unreasonable for the Company to deem 100 ng synonymous with impairment or being under the influence of marijuana, with the social stigma that attaches to any such finding, I do not consider it unreasonable for the Company to deem an EMIT test of 100 ng of Delta 9-THC acid, if confirmed, to be a prohibited or an unacceptable level of the drug, and to conclude that such a level may cause impairment or may result in being under the influence.77

In addition, regarding the testing procedures, I wrote in the Bath decision:

When an employee's urine is taken for the purpose of initially testing for drugs, a physician shall be present and shall supervise the process. If a Company physician is not on duty at the time, the local hospital facilities shall be used, and a physician at the hospital shall supervise the process. The supervising physician shall also examine the affected employee physically for the presence or lack of presence of other symptoms of drug use. By example, that exam-

77. Id. at 15-17.
Honorable Frank A. Gulotta Lecture

In the initial examination should include a test of reflexes, examination of eyes, gait, general demeanor, breath and condition of speech. The results of the physical examination shall be included by the physician in a report to the Company and shall be made part of the official record of any disciplinary action imposed, and shall be available if the matter is grieved, arbitrated or litigated.78

And on confidentiality I said:

The Policy's statement in Section E of Article VII is critical to the administration of the entire Substance Abuse Policy and Procedures. The statement is worth repeating and emphasizing in this Decision. It says:

"BIW is committed to implementing this policy in a fair and equitable manner which respects the dignity and privacy of the individual."

The Company's failure to do so would not only subvert the purpose and objective of the Policy, but would constitute a grievable and arbitrable breach of the Policy.79

A major issue in the Bath case, and one that I am surprised has not yet reached the National Labor Relations Board or the Circuit Courts on appeal from a Board ruling—probably because of "deferral"—is the question of whether a substance abuse policy is a "condition of employment" within the meaning of the National Labor Relations Act, requiring bilateral bargaining under Sec. 8(a)(5), 8(d) or 9(a).80 However,

My answer in the Bath case was made simple by the existence of two Company rules which were dispositive of the question and which made unnecessary an answer to the basic issue of whether the Policy, standing alone was a mandatory subject of collective bargaining.81 Similarly, the Eighth Circuit82 held that the railroad

78. Id. at 18-19.
79. Id. at 19-20.
80. 29 U.S.C.A. § 151 et seq.
81. Sec. 8(a)(5). To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).
82. Sec. 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising hereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. Absent random testing for drugs, and against the backdrop of the pre-existing and continuing Company Rules and Regulations Nos. 18 and 19, I do not find that the
was permitted to administer drug tests to employees involved in accidents and those returning to work after furlough or a long absence without negotiating the matter with the unions. However, in Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co., the district court prohibited a unilateral plan of the carrier to use specially trained dogs to detect illicit substances on employees. This “surveillance-search” program was held to be a change in working conditions within the Railway Labor

Revised Policy and Procedures require bilateral bargaining under Sections 8(a)(5), 8(d) or 9(a) of the Act.

I so conclude because, contrary to the Union's assertion, I do not find the policy to be a substantial or significant departure from Rules 18 and 19. Rules 18 and 19 read:

18. Use, possession, distribution, sale or offering for sale, of narcotics, dangerous drugs including marijuana or alcoholic beverages on Company premises at any time.

First Offense: DISCHARGE

19. Being on Company premises under the influence of alcohol, narcotics, or dangerous drugs including marijuana, or refusing to submit to a test administered by the Medical Department to determine if under such influence.

First Offense: 5 days off
Second Offense: DISCHARGE

Those rules were not bilaterally bargained but rather unilaterally legislated by the Company, and actively enforced, over a period of time. The Unions have not and do not in this proceeding challenge the propriety, effectiveness or validity of those Rules. Indeed, there is no question that those two Rules have been accepted by the Unions.

As I see it, the Revised Policy makes explicit, provides particularization and methodological implementation of managerial authority, that was and is implicit in Rules 18 and 19 standing alone.

Under Rules 18 and 19 the Company had the implicit right, under proper, relevant and reasonable circumstances to utilize methods to determine if and when an employee did the proscribed acts of either or both Rules. To do so, I have little doubt that the Company may conduct investigations and use medical tests. The Policy, delineates the means, methods, procedures and standards that the Company will (and must) follow, and in some specific respects may be more protective of the due process rights and privacy considerations of the employees than rules 18 and 19 standing alone.

As Rules 18 and 19 were validly promulgated by the Company on a unilateral basis, those more precise, delineated methods and procedures for the administration and enforcement of the Rules are not significant variations from those Rules nor are they new conditions of employment requiring bilateral bargaining under the Act.

See note 21, supra at 5-6, 11.


83. The court agreed with Burlington Northern's policy of ensuring the safety of its operation. Due to the fact that several accidents were related to drugs, it was understandable that the railroad had to "[expand] the scope of its post-incident testing as well as its periodic and return-to-work medical examinations." Id. at 1024.

Act—requiring bilateral bargaining. 85

Frankly, had there not been Rules 18 and 19 in the Bath case, I am reasonably certain that I would have found the Company’s Substance Abuse Policy, with its many controversial and disputable provisions to be a new “condition of employment” within the meaning of the NLRA—and, I would have enjoined its unilateral implementation. I should note that the parties gave me the express power to decide the unfair labor practice question as if I was the NLRB.

An interesting remaining issue is whether an employer may test for drugs as part of a pre-employment assessment of qualifications and eligibility. There is a general view that an employer—private or public, has wide ranging authority to test in a whole variety of fields as a condition of hiring. 86 It is well settled that he may test for physical ability and condition, 87 for aptitude, 88 and for promotability. 89 But a closer look at those situations will reveal that each pre-employment test had a reasonable relation and is relevant to the job in question. 90 Hence an intelligence or apti-

85. Even though the court prohibited the unilateral implementation of the plan, they were not opposed to the plan per se. However, the court reasoned that “[t]he infringement upon the rights secured by the members of the Brotherhood by their collective agreement with the BN which the surveillance-search program at issue would entail constitutes, in the colloquial, the ‘stuff’ of which strikes are made.” Id. at 173.

86. See notes 87-88, infra.

87. Waters v. Olinkraft, Inc., 475 F. Supp. 743, 21 FEP Cases 420 (D.C. Ark. 1979) (welding skills test lawful); Wheeler v. City of Columbus, 686 F.2d 1144, 29 FEP Cases 1699 (5th Cir. 1982) (physical test for city job valid, even though results fell more harshly on female than male applicants); but see Berkman v. City of New York, 536 F. Supp. 177, 28 FEP Cases 856 (D.C. N.Y. 1982) (firefighters physical exam in which 46 percent of males and 0 percent of females passed was not criterion valid); Cohen v. West Haven Bd. of Police Comrs., 24 FEP Cases 1121 (D.C. Conn. 1978) (physical agility test for police officers which had almost complete adverse impact on female was deemed invalid).

88. Cormier v. P.P.G. Industries, Inc., 519, F. Supp. 211, 26 FEP Cases 652 (D.C. La. 1981) (employers’ use of Wonderlich Personnel Test & Bennett Mechanical Aptitude Test to screen potential utility crew deemed did not discriminate against black applicants); Thomas v. Basic Magnesia, Inc., 22 FEP Cases 1277 (D.C. Fla. 1975) (failure to hire black applicant because she did poorly on typing test was lawful); but see Officers for Justice v. Civil Service Comm., San Francisco, 473 F. Supp. 801, 22 FEP Cases 1704 (N.D. Cal. 1979) (City unlawfully failed to establish job-relatedness of written exam for sergeant and patrol officer which has substantial adverse impact on minority-group applicants); Stutts v. Freeman, 694 F.2d 666, 30 FEP Cases 1121 (11th Cir. 1983) (TVA violated Sec. 504 of Rehabilitation Act in using written general Aptitude Test Battery rejecting dyslexic applicant and failing to allow applicant to use oral test in order to adjust for his dyslexia).

89. Ligons v. Bechtel Power Corp., (8th Cir. 1980) (employer behaved lawfully in refusing to promote black employee who failed to pursue opportunity to upgrade his welding qualifications).

90. Guardians Assn., New York City Police Dept. v. Civil Service Comm. City of New York, 633 F.2d 232, 23 FEP Cases 677 (confidence in a particular test can be illustrated by the relationship between the abilities sought to be tested and the job tasks in question).
tude test unrelated to the job duties involved or unrelated to a potential promotional track, will be rejected by arbitrators and by the courts.\textsuperscript{91} A test of physical ability for a sedentary assignment is likewise impermissible.\textsuperscript{92} Therefore, I am persuaded that testing for drugs—where there is no probable cause or suspicion to do so, and where the jobs are not of the public safety type or inherently dangerous, will be actionable and subject to judicial rejection.

I conclude with a checklist of what I think will be litigable or arbitrable as drug testing continues and increases. Employers should be prepared for these challenges on a case by case basis:

1. The facts do not constitute “probable cause or reasonable basis” or that no special public interest or hazard or regulated industry exist for random testing.
2. Testing was carried out improperly with unqualified personnel. The chain of custody and analysis of the urine was not maintained properly.
3. The test results or the scientific methodology of the tests were faulty as to the employee involved. A false positive result was obtained.
4. That any substance abuse policy was not uniformly and consistently applied to employees similarly situated.
5. That a reasonable effort at confidentiality was not maintained.
6. That in a collective bargaining situation the plan or policy was not bilaterally bargained or at least bargained to impasse.

With that I conclude with the hope that this has been informative.


\textsuperscript{92} Cf. Harless v. Duck, 619 F. 2d 611, 22 FEP Cases (6th Cir. 1980) (police department failed to prove that physical ability test, which had significant adverse impact on females, was job-related.)