Drug Testing and the Law

Patricia A. Greenfield

This article examines judicial and administrative rulings and legislation involving or related to the issue of drug testing in the workplace. It discusses the rights of employees in the public and private sector: constitutional rights; federal, state, and local statutory rights; rights of unionized employees; and common law rights. It analyzes both the current state of the law and future directions the law may take, as courts and administrative agencies decide more cases and governmental bodies continue to pass drug testing legislation.

KEY WORDS: drug testing; worker screening; testing; privacy rights; Fourth Amendment; search and seizure; employment-at-will; wrongful discharge.

INTRODUCTION

President Reagan's Executive Order 12564, signed September 15, 1986, established a policy opposing drug use by federal employees both on and off the job. The Departments of Justice and Transportation have begun mandatory testing of employees. In November 1988 the Department of Transportation ordered random testing of approximately four million nongovernment employees—including interstate bus and truck drivers; airline pilots, navigators, flight attendants, and mechanics; railway engineers, brakemen, and conductors; mass transit subway engineers and bus drivers; Coast Guard licensed seamen; and pipeline workers (Molotsky, 1988). As increasing numbers of public and private employers, many following the federal government's lead, take steps to institute drug testing programs in the workplace, employees have turned to the courts to assert protections and resolve issues raised by these programs. Some litigants seek to limit or prohibit such testing, while others seek redress of injuries alleged to have arisen from the use or misuse of test results. This paper presents an overview of legal developments in the area of drug testing in the workplace. It surveys and analyzes legal arguments, legislation, and federal and state court decisions concerning drug testing programs.

1 School of Management, University of Massachusetts, Amherst, Massachusetts 01003.
OVERVIEW OF LEGAL ISSUES: PUBLIC AND PRIVATE SECTOR

At the outset, a distinction must be drawn between the legal issues applicable to public and private employers and employees. The restrictions and protections set out in the various provisions of the United States Constitution apply only to public employers and employees. (See, e.g., cases discussed in Bible, 1986, pp. 321-323.) State constitutions, however, may deal with both public and private sector employment. Other statutes, at both the federal and state levels, may apply to public and private sector employees. Private sector employees may also take advantage of tort and contract law, and the burgeoning law of wrongful discharge, court-made law that has developed on a state-by-state basis.

UNITED STATES CONSTITUTIONAL ISSUES

Fourth Amendment

The major public employee challenge to federal, state, and local government drug testing programs has been based upon the Fourth Amendment of the United States Constitution. The Fourth Amendment states that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The courts have reached a consensus that drug testing is a form of search and seizure and, therefore, covered by the Fourth Amendment. (See, e.g., cases noted in National Treasury Employees Union v. Von Raab, 1987, Appendix at p. 182.) The crucial question in determining the constitutionality of the search has been whether the particular search is "unreasonable."

A number of courts examining drug testing of employees, including railway employees after certain accidents and fatal incidents, firefighters, police officers, teachers, bus drivers, and electrical line workers, have required or indicated that they would require a finding of some form of reasonable and/or individualized suspicion of drug use for a search to be found reasonable and, thus, not in violation of the Fourth Amendment. A number of courts have rejected tests based on the absence of such suspicion: Capua v. City of Plainfield, 1986; Lovvorn v. City of Chattanooga, 1986; Patchogue-Medford Congress of Teachers v. Board of Education, 1987; Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, 1987; Feliciano v. City of Cleveland, 1987; Smith v. City of East Point, 1987; Taylor v. O'Grady, 1987; Policeman's Benevolent Association of New Jersey, Local 318 v. Township of Washington, 1987; American Federation of Government Employees v. Weinberger, 1986. Other courts have upheld drug tests because they have determined that reasonable or sufficient individualized suspicion justified the search: Railway Executives Association v. Burnley, 1988; Allen v. City of Marietta, 1985; Division 241, Amalgamated Transit Union v. Suscy, 1976; Turner v. Fraternal Order of Police, 1985; Smith v. White, 1987. A decision requiring a showing of probable cause in order to test for drugs was recently overturned (Jones v. McKenzie, 1987).

Other courts have allowed random testing of certain specific categories of employees or of employees in a highly regulated industry without evidence of individualized suspicion. These groups of employees include: state prison guards in contact with prisoners (McDonell v. Hunter, 1987), jockeys in the horseracing industry (Shoe-