

AT WORK WHILE "UNDER THE INFLUENCE": THE EMPLOYER'S RESPONSE TO A HAZARDOUS CONDITION

I. INTRODUCTION

The magnitude of drug and alcohol abuse in society¹ has considerable implications upon both work place safety and efficiency.² The costs associated with drug and alcohol abuse in the work force³ have resulted in the widespread adoption of

1. *Statements on Drug/Alcohol Abuse in the Workplace Before House Labor Subcomm. on Health and Safety, 99th Cong., 2d Sess., reprinted in DAILY LAB. REP. (BNA) No. 234, at D-1 (Dec. 31, 1985)* (a survey conducted by the National Institute on Drug Abuse reports that "20 million Americans are currently using marijuana/hashish . . . ; 4 million Americans are using cocaine; 2 million Americans are currently using other stimulants; over 1 million Americans are using sedatives without a prescription; and 100 million Americans are using alcohol") (statement of Elaine M. Johnson, Acting Deputy Director, National Institute on Drug Abuse).

2. A 1982 Industry Week study of a dozen major American corporations has revealed that a drug impaired employee "is 3.6 times as likely to be involved in an accident; has 2.5 times as many absences lasting eight days or longer; receives 3 times the average level of sick benefits; is 5 times as likely to file a worker's compensation claim, and functions at about 67% of the work potential." *Id.* at D-3 (statement of J. Ronald Blount, Associated General Contractors of America).

3. A study conducted by the Employee Assistance Society of North America indicates that, "lost productivity due to alcohol abuse costs the United States \$30.1 billion a year, while the cost for drug abuse is \$8.3 billion." *From Baseball Diamond to Shop Floor, Employers Battling Alcohol/Drug Abuse, DAILY LAB. REP. (BNA) No. 211, at C-1 (Oct. 31, 1985).*

programs to detect substance abuse in both the public⁴ and private sectors.⁵

The first part of this Comment will address issues raised regarding the validity of the means chosen by the employer for the detection of intoxication or the use of illicit substances where challenged by constitutional and common law rights of privacy. The article will next consider the adoption and application of plant rules and programs in the context of a collectively-bargained agreement. Finally, there will be a discussion of the constraints imposed by the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act upon an employer's decision to terminate the employment of a known alcohol or drug abuser, and a brief survey of an employer's exposure to liability upon a decision to retain a substance-impaired employee.

II. DETECTION OF DRUG OR ALCOHOL IMPAIRMENT

A. Constraints

1. Public Sector

In the context of public sector employment, the administration of programs implemented for the purpose of detecting drug or alcohol abuse is subject to challenge under the fourth

4. On September 15, 1986, President Reagan signed an executive order requiring mandatory drug testing for workers in "sensitive" positions and providing for testing of employees in non-sensitive positions where: (1) there is a reasonable suspicion that the employee uses illegal drugs; (2) as part of an investigation of an accident or unsafe practice; or (3) as follow-up to counseling or rehabilitation through an Employee Assistance Program. Exec. Order No. 12564, 51 Fed. Reg. 32889 (1986); *see also* *Turner v. Fraternal Order of Police*, 120 L.R.R.M. (BNA) 3294 (D.C. Cir. 1985) (rule requiring police officers suspected of drug use to undergo drug testing found constitutional; refusal to undergo testing, or a positive test, results in discharge); *Railway Labor Executives' Ass'n v. Dole*, No. 85-2891 (9th Cir. 1986) *discussed in* DAILY LAB. REP. (BNA) No. 5, at A-7 (Jan. 8, 1986) (The implementation of a drug and alcohol testing program announced by the Department of Transportation to cover railroad employees was stayed by the United States Court of Appeals for the Ninth Circuit. The nationwide program would require pre-employment drug screening and toxicological testing of employees where there is probable cause to suspect impairment by drugs or alcohol.); *see also* *Milwaukee J.*, Mar. 6, 1986 (Metro), at 1, col. 2 (federal employees interviewed in Wisconsin unanimously agreed that they would submit to drug testing if it becomes a requirement for having a government job).

5. Marcotte, *Drugs at Work*, 72 A.B.A. J. (Mar. 1, 1986) ("As many as 25 percent of the major corporations in the United States now engage in drug screening before hiring new employees. . . .").

amendment.⁶ It has not been until recently that the question of the application of the constitutional "search and seizure" proscription has been evaluated in the employment arena; however, the constitutionality of blood and alcohol testing has been delineated with respect to the procurement of evidence in charges of driving while under the influence of an intoxicating liquor.⁷

In *Schmerber v. California*,⁸ the Supreme Court addressed, for the first time, the issue of whether the compulsory administration of blood tests violated the search and seizure provisions of the fourth amendment. The fourth amendment challenge in *Schmerber* involved a blood test, taken at the direction of a police officer, after the petitioner had been charged with the criminal offense of driving an automobile while under the influence of intoxicating liquor. The first step in the Court's analysis was to determine if the compulsory blood test involved an intrusion within the scope of the fourth amendment. Finding that "[s]uch testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,'" the Court set forth the foundation of the second tier of its analysis by stating that "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified under the circumstances, or which are made in an improper manner."¹⁰ Therefore, the Court's finding that blood testing constituted a search within the meaning of the fourth amendment was not determinative of whether the testing was violative of the fourth amendment; rather, an individual's fourth amendment protection was held to be impinged only where the search was "not justified under the circumstances."

6. The fourth amendment provides, in relevant part, for "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV.

7. See, e.g., *Schmerber v. California*, 384 U.S. 757 (1966); *Davis v. District of Columbia*, 247 A.2d 417 (D.C. Cir. 1968); *State v. Locke*, 418 A.2d 843 (R.I. 1980).

8. 384 U.S. 757. For an analysis of *Schmerber* and a discussion of evidence procured by search, see Comment, *Analyzing the Reasonableness of Bodily Intrusions*, 68 MARQ. L. REV. 130 (1984).

9. *Schmerber*, 384 U.S. at 767.

10. *Id.* at 768.

The Court's holding that the warrantless blood testing at issue was justified, and thus not violative of the petitioner's fourth amendment protection, was predicated upon the "clear indication that evidence would be found,"¹¹ that a delay in procuring a warrant could result in "the destruction of evidence,"¹² and, that the test was performed in a reasonable manner.¹³ In the case of searches of government employees, an additional exception to the warrant requirement has emerged.¹⁴

While the *Schmerber* case is arguably distinguishable from testing in the employment context since evidence obtained by an employer would not be used in a criminal investigation, the United States District Court for the District of New Jersey rejected such a distinction in *Shoemaker v. Handel*,¹⁵ stating that, "[a]ll of us are protected by the Fourth Amendment all of the time, not just when the state suspects us of criminal conduct."¹⁶ Not only was the *Schmerber* decision held to be applicable to tests administered by a public employer, but the decision which had found blood tests to constitute searches was extended in *Shoemaker* to include breathalyzer and urinalysis as well.¹⁷

In *Shoemaker*, jockeys challenged the constitutionality of a regulation promulgated by the New Jersey Racing Commission which provided for the random testing of jockeys and disciplinary action in the event of positive results. The legitimacy of warrantless testing was analyzed by means of a

11. *Id.* at 770. "[H]uman dignity and privacy which the fourth amendment protects forbid any intrusions on the mere chance that desired evidence might be obtained." *Id.*

12. *Id.* (citing *Preston v. United States*, 376 U.S. 364, 367 (1964)).

13. *Id.* at 771. The fact that the test was conducted in a hospital was held to indicate that it was conducted in a "reasonable manner." *Id.* at 771-72.

14. *Allen v. City of Marietta*, 601 F. Supp. 482, 489 (N.D. Ga. 1985).

15. 619 F. Supp. 1089 (D.N.J. 1985).

16. *Id.* at 1098 (citing *McDonell v. Hunter*, 612 F. Supp. 1122, 1126 (S.D. Iowa 1985)). *But see* *United States v. Kahan*, 350 F. Supp. 784 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 479 F.2d 290 (2d Cir. 1973), *rev'd*, 415 U.S. 239 (1974).

17. "Breathalyzer and urine searches implicate the interests in human dignity and privacy found to be at stake in *Schmerber*." *Shoemaker*, 619 F. Supp. at 1098; *see also* *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976) (urinalysis found to constitute search within the meaning of the fourth amendment).

two-prong "reasonableness test":¹⁸ (1) whether the government's interest in conducting a search outweighed a "legitimate expectation" of privacy,¹⁹ and (2) if the administration of the tests was reasonable.²⁰

With respect to the first prong of the "reasonableness test," the court found the government interest in "maintaining the integrity of the racing industry and the safety of the sport"²¹ outweighed the jockeys' legitimate expectation of privacy. The issue more critical to the development of drug and alcohol detection in the work place was the court's finding with respect to the second prong of the test involving the administration of the test on a random basis. While restating the principle that "some quantum of individualized suspicion"²² is usually requisite to a constitutional search, the court found that the random testing procedure was reasonable. The court's basis for upholding a testing procedure in which individuals tested were chosen by drawing names from an envelope was primarily in its finding of the relatively low degree of intrusiveness involved in breathalyzer tests and urinalysis²³ as compared with the state's need for conducting such tests in the absence of any individualized suspicion.²⁴

18. *Shoemaker*, 619 F. Supp. at 1098. The court in *Chenkin v. Bellevue Hosp. Center, N.Y.C. Health & Hosps. Corp.*, 479 F. Supp. 207 (S.D.N.Y. 1979) stated: "It is axiomatic that the fourth amendment forbids only those warrantless searches deemed 'unreasonable.'" *Id.* at 213.

19. The foundation for the court's analysis was the test enunciated by Justice Harlan in his concurrence in *Katz v. United States*, 389 U.S. 347 (1967), which set forth a two-prong analysis in determining whether an expectation of privacy is legitimate: (1) if there is an actual expectation of privacy; and (2) if society is prepared to recognize that interest as reasonable. *Shoemaker*, 619 F. Supp. at 1098 (quoting *Katz*, 389 U.S. at 361).

20. *Shoemaker*, 619 F. Supp. at 1100.

21. *Id.*

22. *Id.* (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)).

23. The Court compared the intrusiveness of breathalyzer and urine tests to body cavity and strip searches which are considered the most intrusive of searches. *Shoemaker*, 619 F. Supp. at 1101.

24. Three reasons were delineated as providing justification for testing absent any suspicion:

(1) The fact that the horse racing industry had been subject to "pervasive and continuous regulation"; (2) licensure requirements provided ample notice of the regulations; and (3) the vital interest of the state in ensuring that races are safely run.

Id. at 1102.

The court's decision in *Shoemaker* was issued only one year after the Court of Appeals for the Eighth Circuit in *McDonell v. Hunter*²⁵ had affirmed the decision of a district court²⁶ in enjoining strip searches, blood tests, and urinalysis unless the searching officials had a "reasonable suspicion" that the employee was smuggling drugs or under the influence of drugs or alcohol. The detection program at issue in *McDonell* provided for the testing of employees of a state correctional institution absent any suspicion to warrant the investigation and regardless of whether a consent form had been signed.²⁷ The court in *Shoemaker* noted and distinguished *McDonell* primarily on the basis of the unique nature of the racing industry which required, and historically had been subject to, pervasive regulation.²⁸ Despite the court's effort to provide a basis for the inconsistency among the circuits regarding the necessity of probable cause in conducting a search, the court's emphasis upon the particular nature of the employment as a basis to uphold testing absent a reasonable suspicion has not been reflected in other decisions.²⁹

For example, in *Turner v. Fraternal Order of Police*,³⁰ an order issued by the municipal police department of the District of Columbia, providing that any member of the department could be ordered to submit to urinalysis upon "suspicion" of drug abuse, was interpreted to require a "rea-

25. 746 F.2d 785 (8th Cir. 1984).

26. 612 F. Supp. 1122 (S.D. Iowa 1985).

27. One employee, McDonell, who had signed a consent form, had been fired because he had refused to take a urinalysis test after prison officials asked him to take the test due to information they allegedly received regarding his involvement in drug trafficking. Two other employees were told they would be compelled to submit to testing after they refused to sign consent forms. *McDonell*, 746 F.2d at 786. In *Shoemaker*, the court distinguished the inadequacy of the consent in *McDonell* from the licensure requirements of jockeys. 619 F. Supp. at 1102.

28. See *supra* note 24.

29. It is interesting to note that the policy considerations which prompted the court in *Shoemaker* to discard the requirement of a reasonable suspicion prior to testing were present in *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985), wherein the court, citing *McDonell*, found the testing of police and fire department employees unconstitutional absent a "reasonable suspicion" of usage. *Id.* at 1324. Clearly the government interest in providing a drug and alcohol free police and fire department is at least as strong as is the interest as applied to horse racing. *Id.* at 1324. Cf. *supra* note 24 and accompanying text.

30. 120 L.R.R.M. (BNA) 3294 (D.C. Cir. 1985).

sonable, objective basis to suspect that a urinalysis"³¹ would produce evidence of illegal drug use. The decision to require a reasonable suspicion was reached despite the court's recognition of the public interest in ensuring a narcotic-free police force.³² Thus, while it has been uniformly accepted that the government may impose reasonable restrictions upon employment,³³ including regulations requiring drug and alcohol testing, whether a particular testing program is "reasonable" will depend upon the court's balancing of the individual privacy claim against the government's asserted interest.³⁴

2. Private Sector

It is well established that the fourth amendment protection against unreasonable search and seizure applies only against the state.³⁵ Therefore, as contrasted with the public sector, private employers are not limited by the constitutional constraints discussed above.³⁶ Furthermore, in the absence of a showing that a private employer is "government motivated," evidence procured as a result of a search of an employee or his property is admissible as evidence in criminal proceedings.³⁷ For example, in *United States v. Bloom*,³⁸ evidence discovered

31. *Id.* at 3296-97.

32. *Id.* at 3296 ("[G]iven the nature of the [police] work and the fact that not only his life, but lives of the public rest upon his alertness, the necessity of rational action and a clear head unbefuddled by narcotics becomes self-evident.").

33. See, e.g., *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976); *Allen v. City of Marietta*, 601 F. Supp. 482 (N.D. Ga. 1985) ("[T]he government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties."). *Id.* at 491.

34. See *City of Marietta*, 601 F. Supp. at 489.

35. See, e.g., *Burdeau v. McDowell*, 256 U.S. 465 (1921). A district court in *Hoagburg v. Harrah's Marina Hotel*, 585 F. Supp. 1167 (D.N.J. 1984), rejected a first amendment free speech claim against a casino holding that, "[a]s a general principle, the federal constitutional guarantees of personal rights are enforceable as against federal or state governments only, and not as against private individuals." *Id.* at 1171 (emphasis in original); see generally *Lehr & Middlebrooks, Work-Place Privacy Issues and Employer Screening Policies*, 11 EMPLOYEE RELATIONS L.J. 407, 412 (1985).

36. See, e.g., *Heiskala v. Johnson Center Fed. Credit Union*, 474 F. Supp. 448, 450 (S.D. Tex. 1979).

37. See, e.g., *State v. Stevens*, 123 Wis. 2d 303, 367 N.W.2d 788 (1985) (evidence procured by a garbage collector entering defendant's locked garage subject to fourth amendment constraints wherein the garbage collector had become an agent of the government by previously agreeing to give defendant's garbage to a deputy sheriff).

38. 450 F. Supp. 323 (E.D. Pa. 1978).

as a result of an employer's search of former employees' desks was admissible in proceedings before the Securities Exchange Commission. Similarly, in *State v. Bembenek*,³⁹ the Wisconsin Court of Appeals held that evidence in a criminal proceeding was properly admitted where it had been discovered by a university safety officer searching a purse in the defendant's locker.⁴⁰ Although state constitutions may concurrently provide protection against unreasonable search and seizures, such provisions are generally similarly limited to protection against government agents.⁴¹

Despite the relative certainty which exists with respect to the state action requirement of a constitutional claim⁴² where there is a collective bargaining agreement providing for discharge only for cause, fourth amendment principles may be substantively recognized by the arbitrator in determining the propriety of a discharge where the "cause" was based upon evidence procured by a "search" or "seizure."⁴³

Illustrative of the uncertainty which has existed with respect to the application of the fourth amendment to searches conducted by a private employer is the arbitrator's discussion in *Smith's Food King*.⁴⁴ The grievant in *Smith's Food King*

39. 111 Wis. 2d 617, 331 N.W.2d 616 (1983).

40. The rationale of the court was set forth as follows:

It is a long-established rule that the constitutional guarantee against unlawful searches and seizures applies only to actions of government agents and not private individuals. A private search is beyond the reach of the exclusionary rule. One of the reasons for the exclusionary rule is to deter the police from illegal searches by denying them convictions based on the fruits of illegal searches. The policy behind not applying the exclusionary rule in private searches is that private individuals will not be so deterred, because they have less knowledge of criminal procedure and are not interested in getting convictions.

Id. at 631-32, 331 N.W.2d at 624 (citations omitted).

41. See *Hoagburg v. Harrah's Marina Hotel*, 585 F. Supp. 1167 (D.N.J. 1984); *State v. Jenkins*, 80 Wis. 2d 426, 259 N.W.2d 109 (1977). *But see* *Montana Human Rights Div. v. City of Billings*, 199 Mont. 434, 649 P.2d 1283 (1982) (right to privacy set forth in Montana Constitution extends to protect against private individuals).

42. *Lugar v. Edmundson Oil Co.*, 457 U.S. 922 (1982).

43. *Dow Chem. Co.*, 65 Lab. Arb. (BNA) 1295 (1976) (Lipson, Arb.) (rights of privacy and personal dignity to be given consideration by labor arbitrators with respect to employer conducted searches); *Aldens, Inc.*, 58 Lab. Arb. (BNA) 1213 (1972) (McGury, Arb.) (exclusionary rule applies to suppress evidence of goods stolen by employee from employer where evidence is the result of an improper search conducted off company premises); *see also* *Gem City Chem.*, 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.) (testing without probable cause constitutes "invasion of privacy").

44. 66 Lab. Arb. (BNA) 619 (1976) (Ross, Arb.).

contended that a bodily search conducted by the employer's security guard violated his constitutional right of protection against unreasonable search and seizure. While stating that the constitutional protection against unreasonable search and seizure did not apply in the context of private employment, the arbitrator nevertheless implied as a condition to the admission of evidence procured by a search a "reasonable protection" of an employee's right to privacy.⁴⁵

Arbitration decisions upholding the use of search techniques are typically buttressed with language indicating a recognition of fourth amendment rights against searches in the private sector by predicating the legitimacy of a search with a finding of the existence of an employer's "suspicion."⁴⁶ Recently, however, the arbitrator in *Shell Oil Company*⁴⁷ explicitly upheld the use of a "spot-check" search, stating, "[t]he ramifications of the use of drugs in the work force go far beyond economics. More importantly, they impact the safety of all employees To control such drug usage in the workplace, a search policy is patently necessary."⁴⁸ It is nevertheless important to note that the arbitrator's apparent broad-based recognition of the need and legitimacy of random employee searches was not necessary to his decision. Although the employer's search policy included the right to search packages, lunch boxes, and vehicles on company premises without a "reasonable suspicion"⁴⁹ of possession or use, the employer did have reason to suspect the possession of illicit substances with respect to the grievant.⁵⁰ Thus, it is not cer-

45. *Id.* at 625. (although the evidence obtained from the search was admitted in the proceeding, the grievant was reinstated upon the arbitrator's finding of disparate treatment).

46. See, e.g., *Prestige Stamping Co.*, 74 Lab. Arb. (BNA) 163 (1980) (Keefe, Arb.).

47. 84 Lab. Arb. (BNA) 562 (1985) (Milentz, Arb.).

48. *Id.* at 565.

49. The employer's policy was contained in the employee handbook and explained in a company newsletter as follows: "The Company continues to reserve the right to carry out reasonable searches of all individuals and their personal effects (including vehicles) on all Company property. Such searches may be conducted by the Company without prior announcement of such times and locations as deemed appropriate by the Company." *Id.* at 563 (quoting *Shell Oil Co. Newsletter* (Dec. 28, 1982)) (emphasis added).

50. A security guard employed by the company had observed "roaches" and a "roach clip" in the grievant's car prior to the search. *Id.* at 564.

tain that the arbitrator would have upheld the policy were it enforced absent a "suspicion" justifying the search.

Several months after the decision in *Shell Oil Company* was rendered, the arbitrator in *Rust Engineering Company*⁵¹ expressly rejected fourth amendment protection against private action. In *Rust Engineering Company*, the grievant's wallet was discovered to contain marijuana by a supervisor who had found the wallet and looked through its contents to identify the owner. The employee was discharged for violation of a plant rule prohibiting the possession of narcotics or alcohol on company premises. Upholding the discharge, the arbitrator recognized that some arbitrators had applied constitutional rights in the context of labor arbitration; nevertheless, the arbitrator correctly continued, stating "[t]he fact remains, however, that the Fourth Amendment to the Constitution of the United States protects against government, not private, action."⁵²

Whether the *Shell Oil* and *Rust Engineering* decisions will be recognized by arbitrators in future decisions is uncertain. However, even if arbitrators extend the fourth amendment protection to searches conducted by employers in the private sector, a broad interpretation of the "reasonable suspicion" requirement⁵³ may nevertheless result in a wide latitude of circumstances in which random searches may be justified.

B. Common Law Right to Privacy

A common law right to privacy, described generally as a "right to be let alone,"⁵⁴ is set forth in the Restatement (Second) of Torts.⁵⁵ Pertinent to this discussion of employer testing and other forms of searches to be used in the detection of drugs and alcohol use or possession is section 652B, which

51. 85 Lab. Arb. (BNA) 407 (1985) (Whyte, Arb.).

52. *Id.* at 410.

53. See, e.g., Boone Energy, 85 Lab. Arb. (BNA) 233, 236 (1985) (O'Connell, Arb.) (employer's suspicion of *entire workforce* justified where any employee is found under the influence of a controlled substance).

54. RESTATEMENT (SECOND) OF TORTS § 652A comment a (1977).

55. *Id.* at § 652A. The Restatement describes four forms of tortious invasions of another's privacy: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of other's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) publicity that unreasonably places the other in a false light before the public. *Id.* See generally W. PROSSER, LAW OF TORTS § 117, at 807-09 (1971).

describes an invasion of privacy categorized as an "intrusion upon seclusion."⁵⁶ This particular form of a tortious interference with another's privacy is described as follows:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.⁵⁷

In those states which recognize the tort of intrusion upon another's seclusion, a protection analogous to the search and seizure provision of the Constitution is provided against the acts of private individuals.⁵⁸ With respect to labor relations, the common law or statutory right to privacy clearly raises considerations upon the means adopted by employers to detect drugs or alcohol.

In Kansas, an employee challenged his employer's policy of randomly searching employee vehicles prior to their exit from company property.⁵⁹ Since the Kansas Supreme Court had previously recognized the Restatement version of the tort of intrusion upon seclusion,⁶⁰ the employee, who was terminated for refusal to comply with the policy, asserted a cause of action for "invasion of privacy and for reckless, wanton disregard of [the] right to be let alone."⁶¹ The court dismissed the privacy claim on the ground that the employee's refusal to allow the search had "successfully thwarted the commission of the alleged tort"⁶² and therefore did not resolve the issue of whether a completed search constitutes a tortious intrusion.

56. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

57. *Id.* The comments accompanying this section indicate the particular appropriateness of this section to privacy interests in an employment context. In particular, comment b states that an invasion may occur by an "investigation or examination into [the plaintiff's] private concerns, as by opening his private and personal mail, searching his safe or wallet" *Id.*

58. *Kedra v. City of Philadelphia*, 454 F. Supp. 652, 667 (E.D. Pa. 1978). The court held that the tort of intrusion was the appropriate analogy to a civil rights claim based on unlawful searches of property, but stated that false imprisonment was the appropriate tort with respect to seizures of persons. *Id.* at 667 n.12.

59. *Gretencord v. Ford Motor Co.*, 538 F. Supp. 331 (D. Kan. 1982).

60. *Froelich v. Adair*, 213 Kan. 357, 516 P.2d 993 (1973).

61. *Gretencord*, 538 F. Supp. at 333. The employee also raised claims of false imprisonment and outrageous conduct which will not be discussed in this Comment. *Id.* at 333-34.

62. *Id.*

Although there has not yet developed a clear delineation as to the scope of an employee's reasonable expectation of privacy in the context of tortious interference, liability has been imposed where a corporate officer opened and read mail addressed to another employee,⁶³ and where employees have entered the home of a fellow employee uninvited.⁶⁴ In the latter instance, the plaintiff-employee was discharged as a result of information conveyed to an employer of plaintiff's intoxication discovered when fellow employees entered the plaintiff's trailer via the aid of a locksmith. Finding that the entrance violated plaintiff's right to privacy, the Louisiana court distinguished between an "actual" uncompensable, single, uninvited entry into another's home and the "actionable" intrusion at issue.⁶⁵ The court's finding that the intrusion was "unreasonable," and therefore "actionable," was primarily based upon its finding that the entrance was motivated by a desire to "prove [the employee's] unworthiness as a supervisory employee."⁶⁶

In addition to potentially limiting the manner by which an employer may lawfully test or search employees, privacy claims have been asserted with respect to the required disclosure of information.⁶⁷ However, in the absence of publication, the required disclosure of personal information is not unreasonably intrusive where there exist valid business interests to support the disclosure.⁶⁸ For example, in *Spencer v. General Telephone Company*,⁶⁹ a federal district court, applying Pennsylvania law, recognized the state's adoption of the Restatement privacy tort, but nevertheless rejected an employee's claim that an information sheet requiring a security investigation constituted a tortious intrusion.⁷⁰ Rather, the court stated that subjective offense was insufficient and held that "[s]uch a request cannot compare to the surreptitious investi-

63. *Vernars v. Young*, 539 F.2d 966 (3d Cir. 1976).

64. *Love v. Southern Bell Tel. & Tel. Co.*, 263 So. 2d 460 (La. Ct. App. 1972).

65. *Id.* at 465-66.

66. *Id.* at 466.

67. *See, e.g., Bratt v. International Business Machs. Corp.*, 392 Mass. 508, 467 N.E.2d 126 (1984).

68. *Id.* at 135-36; *see also Cort v. Bristol-Meyers Co.*, 385 Mass. 300, 431 N.E.2d 908 (1982).

69. 551 F. Supp. 896 (M.D. Pa. 1982).

70. *Id.* at 899.

gations or activities envisioned by the Restatement.”⁷¹ While the latter case seems to indicate the necessity of an element of “surreptition” in a case where requested information is not acquired, an Alabama court rejected such an argument in *Phillips v. Smalley Maintenance Services*.⁷² Although the conduct complained of in *Phillips* was considerably more egregious than requests which would occur in the course of an employer’s questioning of substance use or possession,⁷³ it is significant to note that the court, in finding that intrusive interrogation constituted a tortious interference, held that liability could be imposed despite the absence of any physical intrusion analogous to a trespass.⁷⁴

As discussed above, an employer who employs tests, conducts searches or questions an employee in a manner which intrudes upon a “reasonable expectation of privacy” may be liable in states recognizing the tort of intrusion upon seclusion. Furthermore, such liability may not be predicated upon the intrusion occurring in a private place, nor upon the trespassory nature of an act.⁷⁵ Against the flexible elements comprising the Restatement privacy tort, Wisconsin has adopted a more restrictive recognition of the right to privacy.⁷⁶ Wisconsin Statute section 895.50 recognizes a right to privacy for which injunctive relief and compensatory damages are provided:⁷⁷ “Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.”⁷⁸

Since section 895.50(2)(a) has not yet been interpreted by Wisconsin courts,⁷⁹ it is not apparent under which circum-

71. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652B comment d).

72. 435 So. 2d 705 (Ala. 1983).

73. The claim in *Phillips* involved sexual demands which occurred prior to plaintiff’s discharge. *Id.*

74. *Id.* at 711.

75. See generally RESTATEMENT (SECOND) OF TORTS § 652B comment c.

76. WIS. STAT. § 895.50(2)(a) (1983-84).

77. WIS. STAT. § 895.50(1)(a), (b). Attorney fees are provided as well. WIS. STAT. § 895.50(2)(c). In addition the court may assess attorney fees against the plaintiff if the court finds the action to be frivolous. WIS. STAT. § 895.50(6)(a), (b).

78. WIS. STAT. § 895.50(2)(a).

79. Although WIS. STAT. § 895.50(2)(a) has not been the subject of litigation, dicta in *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis. 2d 379, 280 N.W.2d 129 (1979) indicates that a claim which was denied in *Yoeckel v. Samonig*, 272 Wis. 430, 75 N.W.2d 925

stances, if at all, a place of employment will be considered "private." If it were held that a reasonable person would in no instance consider a work environment "private," testing or search policies would not be violative under the trespassory element of the statute unless: (1) a physical intrusion actually occurred; and (2) the employee had not consented to the search.

III. "JUST CAUSE" FOR DISCHARGE?

Generally, upon discovery that an employee has possessed or used alcohol or drugs at work, private employers⁸⁰ would be free to discharge an employee at will unless: (1) rules setting forth the policy and company disciplinary procedure are found to constitute an employment contract modifying the at-will relationship;⁸¹ or (2) discharge would violate a duty imposed by statute.⁸² However, in the context of a collectively-bargained agreement which provides for discharge only for "just cause," questions will ordinarily arise in arbitration⁸³ regarding both the propriety of a plant's illicit substance rule and its enforcement.⁸⁴

(1956), involving a tavern keeper photographing a woman in a restroom while using the facilities would be actionable under the statute. *Hirsch*, 90 Wis. 2d at 396, 280 N.W.2d at 137.

80. See, e.g., WIS. STAT. § 63.43 (1983-84) (discharge of municipal employee in city of over 150,000 only for "just cause"); see also WIS. STAT. § 63.10 (1983-84) (discharge of civil service employee in county of over 500,000 only where officer believes employee has "acted in such a manner as to show him to be incompetent to perform his duties or to have merited demotion or dismissal"). Unlike an at-will employee, a public employee is entitled to due process with respect to his or her discharge. *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985).

81. See *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985) (where an employee handbook constitutes an express contract in which a promise of employment is exchanged for a promise to continue employment on express conditions, the employment-at-will relationship is modified). But see *Rouse v. People's Natural Gas Co.*, 119 L.R.R.M. (BNA) 2220 (D. Kan. 1985) (where employment manual not bargained for, the unilateral expression of a company policy is not binding on the employer).

82. See *infra* Section IV.

83. A court has discretion to determine if an employee is required to exhaust contractual grievance-arbitration procedures prior to bringing a court action under § 301 of the Labor Management Relations Act, 28 U.S.C. § 185(a). See, e.g., *Proffitt v. J.I. Case Co.*, 120 L.R.R.M. (BNA) 2250 (E.D. Wis. 1984) (exhaustion required); *Price v. United Parcel Serv., Inc.*, 601 F. Supp. 20 (D. Mass. 1984) (exhaustion required).

84. See generally T. DENENBERG, *ALCOHOL AND DRUGS, ISSUES IN THE WORK-PLACE* (1983). This Comment will not discuss the relative merits of different testing procedures. Regardless of which testing procedure is instituted, it is apparent that

In the event that a grievance is filed by an employee whose discharge is covered by a collective bargaining agreement, the burden of proof required to show "just cause" may vary with the arbitrator.⁸⁵ Where the discharge is the result of the possession or use of illicit substances, some arbitrators may require proof beyond a reasonable doubt on the theory that the extraordinary burden is justified where the discharge is the result of "criminal or moral turpitude."⁸⁶ Other arbitrators have stated that the proof beyond a reasonable doubt standard does not apply in the context of arbitration.⁸⁷

A. Implementation of Plant Rules

In the event that management is party to a collective bargaining agreement and adopts a testing or search program, additional questions arise concerning the employer's duty to bargain about the implementation of the program.⁸⁸ Whether an employer's unilateral implementation of alcohol or drug programs is violative of section 8(a)(5) of the National Labor Relations Act (NLRA),⁸⁹ which imposes a duty upon the employer to bargain over conditions of employment,⁹⁰ may ultimately depend upon the scope of management rights reserved in a collective bargaining agreement.

proof of drug impairment will require the establishment of chain-of-possession procedures and documentation. Failure to follow chain-of-possession procedures may result in an arbitrator refusing to uphold a discharge based on the laboratory results at issue. See, e.g., *Pacific Motor Trucking*, 86 Lab. Arb. (BNA) 497 (1986) (D'Spain, Arb.). For a discussion of problems associated with testing for cannabinoids, see *Georgia-Pacific Corp.*, 86 Lab. Arb. (BNA) 411 (1985) (Clarke, Arb.); see also *Alcohol & Drugs in The Workplace: Costs, Controls, and Controversies*, BNA SPECIAL REPORT 27-38 (1986) (general discussion of testing procedures).

85. Although the arbitrator will generally have flexibility in the determination of the burden of proof to be applied, where the burden is provided in the collective bargaining agreement, that provision will control. United States Gov't Printing Office, 82 Lab. Arb. (BNA) 57, 61 (1983) (Feldesman, Arb.).

86. *Associated Grocers of Colo. Inc.*, 81 Lab. Arb. (BNA) 974, 977 (1983) (Smith, Arb.); see also *Texas Util. Generating Co.*, 82 Lab. Arb. (BNA) 6, 12 (1983) (Edes, Arb.).

87. *Hussman Refrigerator Co.*, 82 Lab. Arb. 558 (1984) (Mikrut, Jr., Arb.).

88. See, e.g., *Milwaukee J.*, Mar. 11, 1986, § 3 (Business) at 3 (National Football League Commissioner, Pete Rozelle, stated that if the league players' union doesn't agree to his random drug testing program, he will unilaterally implement the program).

89. 29 U.S.C. § 158(a)(5) (1982).

90. 29 U.S.C. § 158(d) (1982).

In a dispute analogous to that which might arise under section 8(a)(5) of the NLRA, a United States district court⁹¹ recently found that a railway company's unilateral implementation of a drug surveillance and search program violated sections 2 and 6 of the Railway Labor Act (RLA).⁹² The court found that a plant rule, which prohibited the possession or use of drugs or alcohol on company property and established a practice of detecting violations by means of the sensory observations of supervisory personnel, constituted working conditions.⁹³ Thus, the railroad's implementation of a program utilizing "sniff" dogs was enjoined as a unilateral change in working conditions violative of the RLA.⁹⁴

In contrast, the company's implementation of a program utilizing urinalysis was found to be justified under a safety rule prohibiting on-duty use or possession of intoxicants.⁹⁵ The critical distinction between the two procedures was the fact that the drug surveillance was to be conducted on a random basis, whereas the testing was pursued only where there was cause to believe that the relevant plant rule had been violated.

With respect to section 8(a)(5) violations, the unilateral implementation of new disciplinary programs has been found to violate the NLRA.⁹⁶ However, where a collective bargaining agreement contains a broad management rights clause, an employer's implementation of reasonable plant rules⁹⁷ is generally upheld if notice is given to the union in accordance with the relevant provision in the collective bargaining agreement.⁹⁸

91. *Engineers v. Burlington N.R.R.*, 120 L.R.R.M. (BNA) 3047 (D. Mont. 1985).

92. 45 U.S.C. § 151-188 (1982).

93. The Railroad Labor Act, like the National Labor Relations Act, prohibits an employer from instituting unilateral changes in working conditions. 45 U.S.C. § 156 (1982).

94. A separate action was filed for declaratory and injunctive relief against Burlington Northern's urine-testing policy. *Burlington N.R.R.*, 120 L.R.R.M. (BNA) 3054 (D. Mont. 1985).

95. *Id.* at 3052.

96. *See* *Electri-Flex Co. v. NLRB*, 570 F.2d 1327 (7th Cir. 1978), *cert. denied*, 439 U.S. 911 (1978).

97. *See* *infra* notes 103-06 and accompanying text. *But see* *Faygo Beverages, Inc.*, 86 Lab. Arb. (BNA) 1174 (1986) (Ellman, Arb.).

98. Failure to comply with notice or publication requirements contained in labor agreement may result in the rule being found invalid. *Capital Area Transit Auth.*, 69 Lab. Arb. (BNA) 811 (1977) (Ellmann, Arb.).

Where management has retained the prerogative to establish "reasonable" plant rules, the issue resulting from the company's implementation of drug or alcohol testing programs will be subject to arbitration and concern the "reasonableness" of the rule.⁹⁹ In *Boone Energy*,¹⁰⁰ an employer, pursuant to a management rights clause in which the exclusive right to hire and discharge employees was reserved and a provision which provided that employees are entitled to a safe working place, instituted a search and random testing program. Rejecting the union's contention that the discharge was improper, the arbitrator not only found the employer's action reasonable, but stated that since an employee had been found under the influence of a controlled substance prior to the institution of the testing "an employer would be remiss if it did not become suspicious of the entire work force and then take steps to see if a basic common sense rule was being violated."¹⁰¹ Generally, strong public policy considerations in favor of assuring a safe working environment¹⁰² suggest that testing or search programs instituted under a managements right clause should be found reasonable.

B. *The Scope of Plant Rules*

Unless a plant rule prohibiting the use or possession of drugs or alcohol is found to be "unreasonable, arbitrary, capricious, [or] discriminatory,"¹⁰³ an arbitrator will ordinarily enforce a rule which is uniformly applied.¹⁰⁴ Furthermore, in

99. See, e.g., *Rust Eng'g Co.*, 85 Lab. Arb. (BNA) 407 (1985) (Whyte, Arb.); *Shell Oil Co.*, 84 Lab. Arb. (BNA) 562 (1985) (Milentz, Arb.); *Texas Utils. Generating Co.*, 82 Lab. Arb. (BNA) 6 (1983) (Edes, Arb.).

100. 85 Lab. Arb. (BNA) 233 (1985) (O'Connell, Arb.).

101. *Id.* at 236. But see *Gem City Chems. Inc.*, 86 Lab. Arb. (BNA) 1023 (1986) (Warns, Arb.) (implementation of plant rule requiring drug screen during physical examination not within management rights clause where drug testing conducted without probable cause).

102. "Being under the influence of drugs or alcohol renders an employee incapable of performing his work. In the industrial environment, it also renders the employee a hazard to himself and others." *Porcelain Metals Corp.*, 73 Lab. Arb. (BNA) 1133, 1139 (1979) (Roberts, Arb.).

103. *Hussmann Refrigerator Co.*, 82 Lab. Arb. (BNA) 558, 563 (1984) (Mikrut, Jr., Arb.).

104. See, e.g., *Western Paper Box*, 81 Lab. Arb. (BNA) 917, 921 (1983) (Conception, Arb.) (equal treatment in enforcing plant rules required). But see *Hussmann Refrigerator Co.*, 82 Lab. Arb. (BNA) 558 (1984) (Mikrut, Jr., Arb.).

formulating plant rules to protect against the possession or use of alcohol or drugs, "an employer is not narrowly limited to denouncing acts already made criminal by the law but may, at a minimum, adopt reasonable prophylactic measures going beyond the statutes."¹⁰⁵ In an assessment of a discharge resulting from the application of plant rules, public policy in favor of an employer's attempt to protect the safety of employees by providing a drug-free work place is a factor relevant to the propriety of reinstatement.¹⁰⁶

Where the scope of a plant rule extends to include off-duty conduct,¹⁰⁷ an employee discharged as a result of the enforcement of such a rule may be reinstated with back pay unless the employer can establish a probable impact at the plant from the nature of the employee's misconduct.¹⁰⁸ For example, the arbitrator in *Kentile Floors, Inc.*,¹⁰⁹ reinstated, with full seniority and back pay, an employee discharged pursuant to a company policy of discharge where employees had been convicted of a crime. The employee had been convicted on a misdemeanor charge of possession of a narcotic. While stating that the discharge would clearly be reasonable had the offense been committed on company property,¹¹⁰ the arbitrator found that the off-duty offense did not constitute "just cause" because the offense "had no discernible effect upon the employer's business or upon his relationship with other employees."¹¹¹

105. *Misco, Inc. v. Paperworkers*, 120 L.R.R.M. (BNA) 2119, 2122 (5th Cir. 1985).

106. *Id.*

107. Even when an employee is on company property, an employer cannot require the testing of the employee when the employee's presence is unrelated to his employment. *Texas Utils. Generating Co.*, 82 Lab. Arb. (BNA) 6, 11 (1983) (Edes, Arb.).

108. *Weyerhaeuser Co.*, 86 Lab. Arb. (BNA) 182 (1985) (Lewin, Arb.); *W.E. Caldwell Co.*, 28 Lab. Arb. (BNA) 434 (1957) (Kesselman, Arb.). *But see* *Olson v. Job Serv.* N.D., 379 N.W.2d 285 (N.D. 1985) (employee entitled to unemployment compensation where discharged for violating written agreement not to consume alcoholic beverages on or off duty.) *Cf. Gregory v. Anderson*, 19 Wis. 2d 130, 109 N.W.2d 675 (1961).

109. *Kentile Floors, Inc.*, 57 Lab. Arb. (BNA) 919 (1971) (Block, Arb.).

110. *Id.* at 921; *see also* *General Portland Cement Co.*, 58 Lab. Arb. (BNA) 1299 (1972) (Marshall, Arb.). In Wisconsin, discharge or refusal to hire because of an arrest or conviction record constitutes discrimination unless the charge relates to the job. WIS. STAT. § 111.322 (1983-84).

111. *Kentile Floors, Inc.*, 57 Lab. Arb. (BNA) at 922. (the arbitrator refused to enforce the rule on the grounds that the rule was overbroad).

However, a conviction involving the "sale," as opposed to the "use" or "possession" of drugs may justify "just cause" for dismissal.¹¹² In *Martin-Marietta Aerospace*,¹¹³ an employer's decision to discharge an employee was found proper after it discovered that the employee had been convicted for the sale of cocaine to an undercover detective off company premises. Reconciling his decision with the generally recognized rule stated above, the arbitrator distinguished the discharge of a "user" from a "pusher," finding that in the latter instance the employer's reasonable expectation that the employee might sell drugs to other employees established just cause because of the "impact on the Employer's product, its reputation, employee safety, plant security and production and discipline."¹¹⁴

C. *Refusal To Take Tests*

In order to establish just cause for discharge under a plant rule prohibiting drug or alcohol use, it is usually necessary to confirm a suspicion of use by means of a test.¹¹⁵ Therefore, where an employee is confronted by management with a suspicion that he or she has violated plant rules prohibiting use of drugs or alcohol, and the employee denies such use and refuses the opportunity to resolve the conflict by undergoing a test, a discharge would properly be sustained.¹¹⁶ Although an employer would be unable to meet its required burden of proof¹¹⁷ where an employee refuses a test, arbitrators will

112. *Martin-Marietta Aerospace*, 81 Lab. Arb. (BNA) 695 (1983) (Aronin, Arb.).

113. *Id.*

114. *Id.* at 699.

115. *Owens-Corning Fiberglass*, 86 Lab. Arb. (BNA) 1026 (Nichols, Jr., Arb.) (company failed to prove that employee had violated plant rule prohibiting use of drugs where company relied primarily upon testimony of former employee and another witness who "smelled" the grievant smoking marijuana). *General Tel. Co. of Ind., Inc.*, 85 Lab. Arb. (BNA) 251, 255-56 (1985) (Winton, Arb.) (where employee handbook prohibited work while "under the influence" of alcohol, testimony that discharged employee smelled of alcohol and appeared unsteady was insufficient to establish just cause without breathalyzer test); *see also General Tel. Co. of Cal.*, 60 Lab. Arb. (BNA) 1236 (1973) (Levanthal, Arb.) ("The employer's safest course of action under most circumstances is to obtain competent medical verification when an employee's condition is suspect.").

116. *General Tel. Co. of Cal.*, 60 Lab. Arb. (BNA) at 1239.

117. *See supra* notes 85-87 and accompanying text.

take into consideration why the requisite proof was not obtained:

To do otherwise would be to invite employees when alerted they are under suspicion of reporting to work under the influence to simply absent themselves so no definitive determination could be made, then utilize a defense that the employer cannot prove beyond a reasonable doubt they had in fact been drinking.¹¹⁸

A different result may be found in *Faygo Beverages, Inc.*¹¹⁹ The policy in dispute in *Faygo* provided that a refusal to take a test constituted proof of violation of a rule against being intoxicated on the job. The arbitrator construed this policy to be a "palpable reversal of normal just cause principles" and as such refused to enforce the policy which had neither been negotiated with the union nor circulated to employees.¹²⁰

An alternative approach to that set forth above is to find that the refusal to take a test is an act of insubordination which independently warrants discharge. The insubordination rationale was adopted by the arbitrator in *American Standard*,¹²¹ in which an employee suspected of being under the influence of drugs repeatedly refused to take a drug test. The arbitrator found that the employee's refusal to undergo the drug screen test constituted a direct act of insubordination punishable under the company rules by discharge.¹²²

118. General Tel. Co. of Cal., 60 Lab. Arb. (BNA) at 1239; see also General Portland Cement Co., 58 Lab. Arb. (BNA) 1299, 1301 (1972) (Marshall, Arb.) (arbitrator found the fact that an employee, suspected of possessing illicit substances, refused to empty pockets to constitute an indirect indication of guilt).

119. 86 Lab. Arb. (BNA) 1174 (1986) (Ellmann, Arb.).

120. *Id.* at 1177.

121. American Standard, 77 Lab. Arb. (BNA) 1085, 1087-88 (1981) (Katz, Arb.).

122. The right to require employees to submit to testing was found to be reserved in the collective bargaining agreement which provided that the company could require a medical examination at any time during employment to determine if the employee was fit for employment. *Id.* at 1087.

In *American Standard*, the discharge for insubordination was supported by the arbitrator's finding there was evidence to support the conclusion that the employee was intoxicated; however, in those instances where a collective bargaining contract directly provides that a refusal to submit to a test or search is insubordination which will justify discharge, a claim that there is insufficient proof of an employee's use is irrelevant to the distinguishable claim of insubordination. Texas Utils. Generating Co., 82 Lab. Arb. (BNA) 6, 11 (1983) (Edes, Arb.).

See also *Shell Oil Co.*, 84 Lab. Arb. (BNA) 562 (1985) (Milentz, Arb.) (as in *American Standard*, there was no insubordination clause directly applicable to refusals to

Recently, however, the arbitrator in *Signal Delivery Service, Inc.*,¹²³ refused to uphold a discharge for insubordination where an employee refused to take a blood alcohol test. Central to the arbitrator's finding was that the employer failed to establish that the employee was forewarned that his refusal to submit to the testing would result in discharge.¹²⁴

IV. HANDICAP DISCRIMINATION

Both with respect to pre-employment drug screening and appropriate action to be taken in the event that an employee is discovered to have reported to work under the influence of an intoxicant or narcotic, an employer must consider the statutory constraints regarding handicap discrimination.

A. *The Rehabilitation Act*

The Rehabilitation Act of 1973¹²⁵ applies generally to federal employees,¹²⁶ federal contractors¹²⁷ and to recipients of

comply with searches, and similarly, the broad insubordination clause was extended to cover the refusal to submit to the search request).

123. 86 Lab. Arb. (BNA) 75 (1985) (Wies, Arb.).

124. In determining whether the discharge for refusal to submit to the blood alcohol test was for just cause, the arbitrator applied the test for just cause set forth in *Grief Bros. Cooperage Corp.*, 42 Lab. Arb. (BNA) 555 (1964) (Daugherty, Arb.):

1. Did the employee have forewarning of the consequences of his conduct?
2. Was the Company's rule or order related to orderly, efficient and safe operation?
3. Before imposing discipline, did the Company make an effort to discover whether the employee violated the rule?
4. Was Management's investigation conducted fairly and objectively?
5. Did the investigation reveal substantial proof or evidence that the employee was guilty?
6. Has Management applied the rules evenhandedly and without discrimination?
7. Was the degree of discipline reasonably related to the seriousness of the offense and the employee's past record?

Signal Delivery, 86 Lab. Arb. (BNA) at 80-81.

125. 29 U.S.C. § 701-796 (1982).

126. 29 U.S.C. § 791(b) (1982).

127. 29 U.S.C. § 793 (1982) ("the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals"); see also DEPT. OF LABOR, AFFIRMATIVE ACTION FOR THE HANDICAPPED: A HANDBOOK FOR EMPLOYMENT OPPORTUNITY SPECIALISTS AT THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (1980).

federal funds.¹²⁸ The legislative history of the Rehabilitation Act indicates that it was enacted to "promote and expand employment opportunities in the public and private sectors for handicapped individuals."¹²⁹ However, for the purpose of sections 503 and 504 of the Rehabilitation Act, which pertain respectively to federal contractors and recipients of federal funds,¹³⁰ an individual is not handicapped where drug or alcohol use "prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."¹³¹ In contrast, under section 501 of the Rehabilitation Act, affirmative action required of federal employers is not so contrained.¹³² Specifically, where a federal employee's alcohol or drug abuse prevents the individual from properly performing his or her job, a federal agency has a duty to "make reasonable accommodations . . . unless the accommodation would impose an undue hardship on the operation of its program."¹³³

In *Whitlock v. Donovan*,¹³⁴ the United States District Court for the District of Columbia recently addressed the issue of the scope of a federal agency's duty "to accommodate."¹³⁵ The alcohol-related difficulties of the employee in *Whitlock* commenced with an alcoholic seizure on the job re-

128. 29 U.S.C. § 794 (1982) ("[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .").

129. S. REP. NO. 93-318, 93d Cong., 1st Sess. 49 (1973), reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2076.

130. See 29 U.S.C. § 706(7)(B) (1982).

131. *Id.* Section 706(7) was intended to "exclude alcoholics and drug abusers in need of rehabilitation from the definition of 'handicapped individual.'" H.R. REP. NO. 95-1149, 95th Cong., 2d Sess. 22-23, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 7312, 7333.

132. The definitional limitation under § 706(7)(B) applies only to Rehabilitation Act § 503, 29 U.S.C. § 793, and Rehabilitation Act § 504, 29 U.S.C. § 794. 29 U.S.C. §§ 791(b), 794(a) (1982). For a distinction of Rehabilitation Act § 501, 29 U.S.C. § 791, which applies to federal employees, from Rehabilitation Act §§ 503 and 504, 29 U.S.C. §§ 793, 794, which cover federal contractors and recipients of federal aid respectively, see *Gardner v. Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985); *Whitlock v. Donovan*, 598 F. Supp. 126, 129 (D.D.C. 1984).

133. 29 C.F.R. § 1613.704(a) (1985).

134. 598 F. Supp. 126 (D.D.C. 1984).

135. The standard of the duty to "accommodate" was based largely on publications of the United States Office of Personnel Management. *Id.* at 131-33 (quoting UNITED

quiring hospitalization and continued for the next five years with a series of unauthorized absences which finally culminated in discharge.

Since the employee's handicap was alcohol dependency,¹³⁶ in addition to the section 501 protection, the employee was covered under the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 ("Act").¹³⁷ The Act prohibits federal employers from denying or depriving employment "solely¹³⁸ on the ground of prior alcohol abuse or prior alcoholism"¹³⁹ and includes a provision that the section "shall not be construed to prohibit the dismissal from employment of a federal civilian employee who cannot properly function in his employment."¹⁴⁰ Despite the similarity of the language of the provision to section 706(7)(B),¹⁴¹ which has been construed to exclude alcohol and drug abusers whose use prevents them from performing their work, the court held that the Act indicated that "dismissal was intended only to apply to employees who refused treatment altogether or who had repeatedly failed in treatment."¹⁴² Viewing the statutes together, the court found "a firm intention to require federal employers to exert substantial affirmative efforts to assist alcoholic employees toward overcoming their handicap before firing them for *performance deficiencies related to drinking*."¹⁴³

The district court's holding that the Labor Department had failed to "reasonably accommodate" the employee was predicated upon the following analysis of the statutory and regulatory rehabilitation requirements:

STATES OFFICE OF PERSONNEL MANAGEMENT, FEDERAL PERSONNEL MANUAL SYSTEM SUPPLEMENT 792-2, ALCOHOLISM AND DRUG ABUSE PROGRAMS (1980)).

136. Alcoholism is a handicap covered under the Rehabilitation Act of 1973. 598 F. Supp. at 129 (citing 43 Op. Att'y Gen. No. 12 (1977)).

137. 42 U.S.C. § 290dd, as amended by Act of Oct. 19, 1984, Pub. L. No. 98-509.

138. For a discussion of the interpretation to be given to the word "solely," see Walker v. Weinberger, 600 F. Supp. 757 (D.D.C. 1985). The court held that an alcoholic is to be removed "solely" on the basis of unsatisfactory performance or after refusal of treatment. *Id.* at 761.

139. 42 U.S.C. § 290dd-1(c) (Supp. III 1985).

140. 42 U.S.C. § 290dd-1(d) (Supp. III 1985).

141. See *supra* note 130 and accompanying text.

142. Whitlock, 598 F. Supp. at 131.

143. *Id.* (emphasis added).

[W]hen an employee's deficiencies are suspected to be due to alcohol, the agency is first required to offer counseling. If the employee rebuffs the offer, and if his work is such that discipline would be warranted, the agency should offer a "firm choice" between treatment and discipline. An agency is required to follow through on its firm offers.¹⁴⁴

In the case at instance, the court found that "reasonable accommodation" required (1) an evaluation of all available evidence to determine if deficiencies in employment were related to alcohol,¹⁴⁵ and (2) a firm choice between serious disciplinary action and an offer of extended leave without pay for inpatient treatment.¹⁴⁶ In addition, the court recently in *Walker v. Weinberger*¹⁴⁷ further defined the scope of "reasonable accommodation" to include "forgiveness of [the employee's] past alcohol-induced misconduct in proportion to his willingness to undergo and favorable response to treatment."¹⁴⁸ Thus, where an employee has undergone rehabilitation, those acts related to the employee's pre-treatment alcohol-induced behavior may not be cumulated with non-alcohol-related misconduct in an assessment of disciplinary action.¹⁴⁹

Despite the breadth of a federal employer's duty to accommodate, the Rehabilitation Act does not require the provision of "help indefinitely to an employee who [can]not safely or adequately perform his job."¹⁵⁰ For example, in *Robinson v.*

144. *Id.* at 133-34.

145. Where there is no nexus between alcoholism and the acts or reasons justifying discharge, there is no violation under the Act for failure to accommodate. *Richardson v. United States Postal Serv.*, No. 84-3648 (D.D.C. July 29, 1985) discussed in *DAILY LAB. REP.* (BNA) No. 156, at A-10 (Aug. 13, 1985).

146. The court qualified its holding as follows:

[T]his is not to say that in every instance where an agency confronts an alcoholic employee who has failed in treatment that it must offer leave without pay or some other specific arrangement. But if there is evidence . . . that such a leave might have been beneficial, the reasonable accommodation duty requires the agency to evaluate whether such a leave, or alternative arrangement, would have imposed an undue hardship on the agency.

Whitlock, 598 F. Supp. at 137.

147. 600 F. Supp. 757 (D.D.C. 1985).

148. *Id.* at 762. *But see* *Spragg v. Campbell*, 466 F. Supp. 658 (D.S.D. 1979) (the court held 42 U.S.C. § 4561, renumbered as 42 U.S.C. § 290dd (Supp. III 1985) only to prohibit the removal of an employee *solely* because of alcohol abuse).

149. *Walker*, 600 F. Supp. at 762.

150. *Robinson v. Devine*, 37 Fair Empl. Prac. Cas. (BNA) 728, 731 (D.D.C. 1985).

Devine,¹⁵¹ a federal employee's claim of handicap discrimination was rejected where the employee refused counseling after repeated efforts to accommodate the employee's alcoholism had failed. Since the employee refused counseling after a "firm choice" of counseling prior to discharge, the employer was found to have met the duty to accommodate.¹⁵² Moreover, it should be noted that the duty to accommodate does not require an employer to reassign an employee to a job which could be performed with the handicap.¹⁵³ Therefore, in the event that an alcohol- or drug-dependent employee refuses or repeatedly fails at efforts of rehabilitation, an employer would not be required to reassign the employee to a job less hazardous or strenuous which could arguably be performed despite the addiction.

The standards set forth in *Whitlock* should apply equally in the case of accommodating drug abusers, although such individuals are not afforded the additional protection of section 290dd.¹⁵⁴ Both former addicts and employees suffering from drug addiction are considered handicapped if the addiction "substantially limits one or more of such person's major life activities. . . ." ¹⁵⁵

In *McCleod v. City of Detroit*,¹⁵⁶ applicants for firefighter jobs were rejected after a drug screening test indicated the recent use of marijuana. The applicants claimed they had been discriminated against in violation of section 794 of Title 29 of the United States Code.¹⁵⁷ Since the challenged discrimination was made with respect to a federally funded program, as

151. *Id.*

152. *Id.*

153. *Carty v. Carlin*, 39 Fair Empl. Prac. Cas. (BNA) 1217, 1222 (D. Md. 1985); see also *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-83 (accommodation does not require an employer to violate seniority provisions of a collective bargaining agreement).

154. See *supra* note 124 (the Federal Personnel Manuals which provided a basis for the Court's decision apply to both alcoholics and drug abusers).

155. 29 U.S.C. § 706(7)(B)(i) (1982); see also 29 C.F.R. § 1613.702(a) (1986). " 'Major life activities' means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1613.702(c) (1986); 42 FED. REG. 22686 (1977) (Op. Secretary, Department of Health, Education and Welfare) (drug addiction is a physical or mental impairment within the meaning of the Rehabilitation Act).

156. 39 Fair Empl. Prac. Cas. (BNA) 225 (E.D. Mich. 1985).

157. See *supra* note 128 and accompanying text.

opposed to a federal agency, the city would be justified in denying employment if it were established that the use of marijuana adversely affected a firefighter's ability to perform.¹⁵⁸ Thus, the court's dismissal of the applicants' claims was predicated upon two grounds: (1) the use of marijuana did not constitute an impairment within the meaning of the Rehabilitation Act;¹⁵⁹ and (2) even if marijuana use were a protected handicap, the criteria of denying employment for use was required by job necessity and therefore protected.¹⁶⁰ Under the second ground, the city would have met its burden even if marijuana use were deemed to be a handicap under the Act. However, it is significant to note that the marijuana use was not found to constitute a handicap on the basis of its interference with the applicants' ability to be firefighters: "[o]ne particular job for one particular employer cannot be a major life activity."¹⁶¹

While the selection criteria in *McCleod* were found to be protected,¹⁶² in *Davis v. Bucher*¹⁶³ the criteria used were held to violate the Rehabilitation Act. In *Bucher*, the city's screening procedures revealed methadone in the urine of an applicant. As a result of the test, the applicant was denied employment.¹⁶⁴ The drug usage in this case was an addiction clearly within the Rehabilitation Act;¹⁶⁵ therefore, the burden was upon the employer to establish the disqualification of former addicts as a criterion related to the applicant's ability to perform. The disqualification was found violative of the Rehabilitation Act since the sole criterion of exclusion was former drug abuse and such abuse was not shown to affect successful employment.¹⁶⁶ Thus, while a federal contractor or recipient of federal aid may discharge or refuse to hire an employee for reasons relating to drug or alcohol impairment

158. See *supra* note 130 and accompanying text.

159. *McCleod*, 39 Fair Empl. Prac. Cas. (BNA) at 227-28.

160. *Id.* at 228.

161. *Id.* (quoting *Salt Lake City Corp. v. Confer*, 674 P.2d 632, 636 (Utah 1983)). See generally M. ROTHSTEIN, *MEDICAL SCREENING OF WORKERS* 121-30 (1984).

162. See 29 C.F.R. § 1613.706 (1986).

163. 451 F. Supp. 791 (E.D. Pa. 1978).

164. Two intervening plaintiffs had similarly been denied employment on the basis of former drug usage. *Id.* at 794.

165. *Id.* at 795.

166. *Id.* at 796-97.

without violating the Rehabilitation Act, the employer must establish a relationship between the ability to perform a job efficiently or safely and the employee's substance use. However, despite the fact that alcoholism or drug addiction affects an employee's ability to perform a job efficiently or safely, a federal employer may discharge an employee only after a "firm choice" between rehabilitation and discipline is presented.

B. *Wisconsin Fair Employment Act*

In a manner similar to the Federal Act, section 111.34(2)(a) of the Wisconsin Statutes¹⁶⁷ prohibits discrimination on the basis of a handicap, but provides that "it is not employment discrimination because of handicap to refuse to hire, employ, admit or license any individual . . . if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment, membership or licensure."¹⁶⁸ In addition, the Wisconsin Fair Employment Act (WEA) provides for a duty to accommodate¹⁶⁹ which largely parallels the federal regulatory provisions discussed above.¹⁷⁰

It is undisputed that alcoholism is a handicap under the Wisconsin Act.¹⁷¹ While the Wisconsin courts have not yet determined whether drug abuse constitutes a handicap, it seems probable that a medically diagnosed¹⁷² addiction would fall within the statutory definition.¹⁷³ Although drug impaired employees are within the scope of the accommodation

167. WIS. STAT. § 111.34(2)(a) (1983-84).

168. *Id.*

169. WIS. STAT. § 111.34(1)(b) (1983-84).

170. *See supra* note 132.

171. *See Squires v. Labor & Indus. Review Comm'n*, 97 Wis. 2d 648, 294 N.W.2d 48 (1980). *See also* Comment, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act*, 1983 WIS. L. REV. 725, 732-35. Recently, the Supreme Court of Ohio cited *Squires* in its holding that drug addiction and alcoholism constitute handicaps under the state handicap discrimination law. *Hazlett v. Martin Chevrolet, Inc.*, reprinted in DAILY LAB. REP. (BNA) No. 174, at D-1 (Aug. 13, 1986).

172. *See, e.g., Connecticut Gen. Life Ins. Co. v. Department of Indus., Labor & Human Relations*, 86 Wis. 2d 393, 407-08, 273 N.W.2d 206, 213 (1979).

173. WIS. STAT. § 111.32(8) (1983-84).

provision of the Wisconsin Statutes, the precise scope of the accomodation is as yet undetermined.

Decisions rendered with respect to alcoholism were considered prior to the 1982 amendments to the Act.¹⁷⁴ Thus, for example, in *Squires v. Labor & Industry Review Commission*,¹⁷⁵ the court found that the discharge of an alcoholic did not constitute discrimination because "[n]othing . . . in sec. 111.32(5)(f), Stats., prevents an employer from discharging an employee who is an alcoholic and who because of his alcoholism is physically or otherwise unable to efficiently perform the duties required in his job."¹⁷⁶ While WEA, as amended, still provides that a decision not to hire or to discharge is not discrimination where reasonably related to the job criteria, an employer under section 111.34(1)(b)¹⁷⁷ might now be required to accommodate an alcoholic employee otherwise qualified for the particular job. Given the substantial similarity of WEA to the Rehabilitation Act and the fact that federal law has previously been used in interpreting Wisconsin discrimination law,¹⁷⁸ it is likely that rehabilitation under WEA will assume the standards set forth under the Rehabilitation Act.¹⁷⁹

Finally, sections 111.34(2)(a) and (b)¹⁸⁰ appear to have abrogated the previous "rational relationship" and "reasonable

174. See, e.g., *Squires*, 97 Wis. 2d 648, 294 N.W.2d 48; *Connecticut Gen. Life*, 86 Wis. 2d 393, 273 N.W.2d 206.

175. 97 Wis. 2d 648, 294 N.W.2d 48.

176. *Id.* at 652, 273 N.W.2d at 51.

177. WIS. STAT. § 111.32(5)(f) (1983-84) provides:

The prohibition against discrimination because of handicap does not apply to failure of an employer to employ or to retain as an employee any person who because of a handicap is physically or otherwise unable to efficiently perform, at the standards set by the employer, the duties required in that job.

Id.

WIS. STAT. § 111.34(1)(b) provides that handicap discrimination includes "[r]efusing to reasonably accommodate an employee's or prospective employee's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business."

178. See, e.g., *Samens v. Labor & Indus. Review Comm'n*, 117 Wis. 2d 646, 345 N.W.2d 432 (1984); *Bucyrus-Erie Co. v. Department of Indus., Labor & Human Relations*, 90 Wis. 2d 408, 280 N.W.2d 142 (1979).

179. See *supra* notes 125-27 and accompanying text.

180. WIS. STAT. § 111.34(2)(a) and (b) provides in relevant part:

[I]t is not employment discrimination to refuse to hire, [or] employ . . . if the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment. . . . (b) In evalu-

probability of hazard" distinctions used to determine safety-based hiring standards under WEA prior to the 1982 amendments. In *Samens v. Labor & Industry Review Commission*,¹⁸¹ the court, applying the unamended statute, found an employer's refusal to hire an epileptic as a truck driver/groundman to be legitimate under the exception of the statute. The employer had "outright" rejected the applicant after learning of his condition and prior to requesting any medical records. Despite the absence of any individual evaluation, the court nevertheless held the employer's refusal to hire legitimate by finding that the particular nature of the job justified the application of the lower standard requiring only a "rational relationship" between the criteria and its safety obligations. While the outcome under the Wisconsin Statute as amended might be the same, the WEA now clearly requires a "reasonable" relationship of an employment criterion to a decision not to hire or employ on the basis of a handicap, and the evaluation of the "reasonable" relationship must be made on an individual, case-by-case basis.

V. SOME FINAL CONSIDERATIONS

Despite contractual and statutory constraints on an employer's use and application of drug and alcohol testing, public policy mandates the adoption of means to detect chemically impaired employees.¹⁸² In addition to the inherent cost of worker's compensation associated with the employment of an alcohol or drug abusive employee,¹⁸³ failure to

ating whether a handicapped individual can adequately undertake the job-related responsibilities of a particular job, membership or licensed activity, the present and future safety of the individual, of the individual's coworkers and, if applicable, of the general public may be considered. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment or licensure of handicapped individuals in general or a particular class of handicapped individuals.

181. 117 Wis. 2d 646, 345 N.W.2d 432 (1984).

182. See, e.g., *Misco, Inc. v. Paperworkers*, 120 L.R.R.M. (BNA) 2119 (5th Cir. 1985).

183. See, e.g., WIS. STAT. § 102.58 (1983-84) (where injury results from an employee's intoxication, reduction in worker's compensation is limited to \$15,000); see also *District 141, Int'l. Ass'n of Machinists and Aerospace Workers v. Industrial Comm'n*, 79 Ill. 2d 544, 404 N.E.2d 787 (1980) (in order for employee's intoxication to bar worker's compensation claim, the intoxication must incapacitate the employee in performing his job-related duties); *Karns v. Liquid Carbonic Corp.*, 275 Md. 1, 338 A.2d

adopt programs to detect and effectively deal with alcohol- or drug-dependent employees may result in numerous other claims.¹⁸⁴

The statutorily-imposed duties to furnish a safe place of employment to employees and frequenters have not yet been the subject of employer liability in the context of the employment of drug-impaired employees. However, the potential application of such statutes was recently made apparent in a federal district court opinion.¹⁸⁵ In its decision, the court found that an employer's disclosure of an employee's mental condition was justified, in part, by the fact that the employer presented a dangerous condition in its work place within the meaning of West Virginia's safe-place statute.¹⁸⁶ It is evident that if other jurisdictions should find an employee's dangerous condition to be within an employer's duty to provide a safe place of employment, the employment of alcoholics or drug addicts could result in substantial liability.

In addition, potential liability may exist under the common law duty to control the actions of a person known to be dangerous.¹⁸⁷ A court applied the common law negligence doctrine in *Otis Engineering Corp. v. Clark*¹⁸⁸ and held an em-

251 (1975) (to bar worker's compensation claim, injury must arise "solely" from intoxication); *Driscoll v. Great Plains Mktg. Co.*, 322 N.W.2d 478 (S.D. 1982) (claim is barred where injury is proximately caused by intoxication). An employer's acquiescence may bar an employer from asserting an intoxication defense. See, e.g., *McCarty v. Workmen's Compensation Appeals Bd.*, 12 Cal. 3d 677, 527 P.2d 617, 117 Cal. Rptr. 65 (1979); *West Fla. Distribs. v. Lamarie*, 438 So. 2d 133 (Fla. Dist. Ct. App., 1983).

184. See generally *Obdyke, Employee Intoxication and Employers' Liability*, PERSONNEL ADMINISTRATOR 109 (Feb. 1986).

185. *Davis v. Monsanto Co.*, No. 84-2493 (D. W. Va. 1985) reprinted in DAILY LAB. REP. (BNA) No. 30, at D-1 (Feb. 13, 1985).

186. West Virginia's "safe-place" statute, W. VA. CODE, § 21-3-1, (1985) is identical in relevant part to WIS. STAT. § 101.11(1) (1983-84). But see *Korenak v. Curative Workshop Adult Rehabilitation Center*, 71 Wis. 2d 77, 237 N.W.2d 43 (1976); *Gross v. Denny*, 61 Wis. 2d 40, 212 N.W.2d 2 (1973) (Wis. STAT. § 101.11(1) applies only to unsafe physical conditions). Cf. *Bucyrus-Erie Co. v. Department of Indus., Labor & Human Relations*, 90 Wis. 2d 408, 421, n.5, 280 N.W.2d 142, 148 n.5 (WIS. STAT. § 101.11(1) cited with respect to a handicapped employee's ability to perform safely).

187. One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. RESTATEMENT (SECOND) OF TORTS § 319 (1977).

188. 668 S.W.2d 307 (Tex. 1983); see also *Beckendorf v. Simmons*, 539 S.W.2d 31 (Tenn. 1976) (employer liable to third person injured as a result of an intoxicated off-duty employee's collision).

ployer liable in a wrongful death action where an employee had become involved in an accident after being dismissed from work in an intoxicated state. Under an alternative negligence doctrine, the employer could potentially be held responsible for the tortious acts committed by a known drug or alcohol abuser for failing to exercise reasonable care to control the conduct of the employee while on the business premises.¹⁸⁹

VI. CONCLUSION

Where employees report to work under the influence of alcohol or narcotics, an employer's increased susceptibility to liability is apparent. As a result, increasing numbers of employers are instituting drug detection programs.¹⁹⁰ Ideally, these programs will include benefits for the coverage of treatment for chemical dependency¹⁹¹ or employee assistance programs which provide rehabilitation services.¹⁹²

Although public employers may, in most instances, be required to have a "reasonable suspicion" of use or possession prior to testing an employee for substance impairment, private employers are not subject to the fourth amendment restrictions upon random searches. If a common law right to privacy were found to exist with respect to employee searches, private employers might be restrained against the adoption of random testing programs; however, the extension of this doctrine to employment relations remains uncertain. Similarly, recent arbitration decisions recognizing the public policy inherent in an employer's efforts to provide a drug-free work place indicate that employers who are parties to collective bargaining agreements may implement and apply reasonable drug and alcohol detection programs.

Handicap discrimination laws may impose restraints upon the course of action to be taken upon discovery of intoxication

189. See *Korenak*, 71 Wis. 2d 77 at 82-83, 237 N.W.2d at 46-47 (citing RESTATEMENT (SECOND) OF TORTS § 319).

190. See *supra* note 4.

191. See, e.g., *From Baseball Diamond to Shop Floor Employers, Battling Alcohol/Drug Abuse*, DAILY LAB. REP. (BNA) No. 211, at C-1 (Oct. 31, 1985); see also Wis. STAT. § 632.89 (1983-84) (requires coverage for treatment of alcohol and drug abuse problems).

192. See, e.g., *Conference Takes Close Look at Substance Abuse in Workplace*, DAILY LAB. REP. (BNA) No. 218, at A-2 (Nov. 10, 1985).

or drug abuse. However, where affirmative action is required, the employer is nevertheless assured, by presenting to the employee a "firm choice" of discipline or rehabilitative measures, that the drug-impaired employee will be removed and will hopefully return to employment in a rehabilitated state.

JENNIFER L. ADAMS